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NOTE.

Heretofore we have published with each volume not edited by an author of established reputation a certificate as to the good judgment used in rejecting cases. As the certifiers, as well as the press and the profession, have uniformly approved the work on volumes edited by the General Editor, or by others under his immediate supervision, we think we may safely omit the certificate from this and subsequent volumes.

THE GILBERT BOOK CO.

St. Louis, June 1, 1887.

FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

~~SUPREME COURT AND DISTRICT COURTS~~

ST. LOUIS, MO.:
THE GILBERT BOOK COMPANY.
1887.

CORRECTION.

At the end of the case of *Nachtrieb v. The Harmony Settlement*, under CHURCHES, volume 5, page 788, make the following note :

Reversed. See HARMONY SOCIETY, page 868, volume 18.

The only error in arranging cases, or making the proper note of cases reversed, that we have been able to find, so far, is shown by the correction above indicated.

The law, as announced by the judge of the lower court, from his view of the facts, stands good ; but the supreme court took a different view of the facts and dismissed the bill.

THE DELAY IN ISSUING VOLUME 18

was made by press of other work on the firm doing our printing. Volume 19 is already partially in type and will issue in six or seven weeks after volume 18, with volumes 19 and 20 (now all ready in manuscript,) soon after. Volume 21, on Land, edited by Leonard A. Jones, is promised in ample time to prevent delay. Most of the work on volumes 22, 23, 24 and 26 is already done, and some work has been accomplished on all the remaining volumes, so that our friends can feel confident of the series appearing as fast as is consistent with good work and accurate editing.

THE GILBERT BOOK CO.

FEDERAL DECISIONS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME, CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

COMPRISING

THE OPINIONS OF THOSE COURTS FROM THE TIME OF THEIR ORGANIZATION TO
THE PRESENT DATE, TOGETHER WITH EXTRACTS FROM THE OPIN-
IONS OF THE COURT OF CLAIMS AND THE ATTORNEYS-
GENERAL, AND THE OPINIONS OF GENERAL
IMPORTANCE OF THE TERRI-
TORIAL COURTS.

ARRANGED BY

WILLIAM G. MYER,

*Author of an Index to the United States Supreme Court Reports;
also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri
and Tennessee, a Digest of the Texas Reports, and
local works on Pleading and Practice.*

VOL. XVIII.

FACTORS—HYPOTHECATION.

ST. LOUIS, MO.:

THE GILBERT BOOK COMPANY.

1887.

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PRINTER AND STEREOTYPED,
MADISON, WIS

EXPLANATORY.

1. The cases in this work are arranged by subjects, instead of chronologically. They are assigned to the various general heads of the law, and each subject is divided and subdivided, for convenience of arrangement and reference, with head-notes, or table of contents, at the head of each subject, the same as an ordinary digest.

2. At the head of each division of a subject will be found a digest or summary of the points of law in the cases assigned to such division. This SUMMARY is confined exclusively to the statement of the points of law applicable to the particular division under which the case is published, other points of law in the case, if any, being transferred to other subjects, or to other subdivisions of the same subject. Where points in a case are carried to another division of a subject, they are put into the foot-notes, or notes following the cases, and reference is made to the case by section numbers in parenthesis at the end of the section.

3. The cases in full are arranged, generally, according to the order of the sections of the SUMMARY. Where the court states the facts of the case, it is so indicated by the use of the words STATEMENT OF FACTS at the beginning of the opinion. Where it is necessary to state the facts apart from the opinion, the statement is made as brief as possible, and is confined to the facts necessary to enable the reader to understand the points decided. The cases are also divided into convenient paragraphs, with a brief statement at the beginning of each paragraph of the point of law discussed or decided. Reference is here had to the *italic* sections scattered through the opinion. These take the place of the syllabus usually placed at the head of the opinion, and, besides bringing out every point of law actually decided, in some instances call attention to a review of authorities, as well as various points of law which would ordinarily be classed as *dicta*.

4. At the end of a series of cases is a digest of points applicable to the particular subdivision of the subject. This digest matter is obtained from four sources: 1st. Cases assigned originally to the general head, but digested and thrown out in the final arrangement, not to appear in full in any part of the work. 2d. Points taken from cases which will appear in full under some other division of the same subject. 3d. Points taken from cases which are assigned to some other general head. 4th. A digest of cases from state reports, law periodicals, and the opinions of the Court of Claims and the Attorneys-General.

5. Cases that will not appear in full in any part of the work are denoted by a *star* following the name of the case, thus, *DOE v. ROE*.* The tables of cases will also contain a similar designation of rejected cases, so that in consulting them the reader will readily see whether he is referred to a case in full or only a digest.

6. The *italic* matter at the head of the SUMMARY takes the place of the side-heads, or catch-words, usually prefixed to the sections, and is intended as an index to the contents of the SUMMARY. At the end of each section of the SUMMARY the name of the case of which the section is a digest is given, followed by the numbers of the sections into which the case is divided, so that after the reader has read the section of the SUMMARY, and found that it is what he wants, he can at once turn to the case in full.

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ABBREVIATIONS.

Abbott's Admiralty	Abb. Adm.	Lowell	Low.
Abbott's U. S.	Abb.	McAllister.....	McAl.
Albany Law Journal.....	Alb. L. J.	McCahon.....	McCahon.
American Law Register...	Am. L. Reg.	McCrary	McC.
Baldwin	Bald.	McLean	McL.
Bee.....	Bee.	MacArthur	MacArth.
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Holmes	Holmes.	Woodbury & Minot	Woodb. & M.
Howard	How.	Woolworth	Woolw.
Hughes	Hughes.	Wyoming Territory	Wyom. Ty.
Law and Equity Reporter..	Law & Eq. Rep.	Van Ness	Van Ness.
Legal Gazette Reports	Leg. Gaz. R.		

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See JUDGMENTS; CONSTITUTION AND LAWS.

FALSE IMPRISONMENT.

See TORTS.

FALSE PRETENSES.

See CRIMES.

FALSE REPRESENTATIONS.

See FRAUD.

FALSE RETURNS.

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|---|---|

I. IN GENERAL.

SUMMARY—*Money paid over under illegal orders may be recovered back, § 1.—Navy agents; disbursements; time of service, § 2.—Defaulters; adding commissions of delinquent to balance due, § 3.*

§ 1. Money paid into the treasury by an official, under peremptory instructions from his superior, and to which he is entitled as a part of the fees and emoluments of his office, may be recovered back, if such orders were illegal. *United States v. Ellsworth*, § 4.

§ 2. Under an act allowing navy agents two per cent. on the first \$100,000 disbursed, and one per cent. on every succeeding \$100,000, *provided, however*, that the maximum compensation do not exceed \$3,000 per annum, the time of service and the amount disbursed furnish the true rule of compensation, the compensation per year being the rule of decision and not per quarter or any other legal subdivision of a year. *United States v. Wendell*, §§ 5, 6.

§ 3. The act of March 3, 1797, providing, upon neglect or refusal of one accountable for public moneys to pay over the balance reported to be due, that the comptroller in a suit to recover such balance may add to said balance the commissions of the delinquent, is applicable only to commissions pending and unsettled, not to such as have already been paid to such officer under a final adjustment of accounts. *Ibid.*

[NOTES.—See §§ 7-80.]

UNITED STATES *v.* ELLSWORTH.

(11 Otto, 170-174. 1879.)

APPEAL from the Court of Claims.

Opinion by **MR. JUSTICE CLIFFORD**.

STATEMENT OF FACTS.—Goods imported at the period mentioned in the declaration might be stored, under the warehouse acts, in the public stores legally established at the port of which the petitioner is collector. Due indemnity to the United States was given by the railroad company, at whose request the public stores, in this case, were established, against loss arising from decay, waste, or damage to the goods there deposited. Moneys to a large amount, as specified in the declaration, were paid to the petitioner, as such collector, to reimburse the treasury for the salaries of inspectors having charge of the

goods deposited in such stores. Pursuant to the act of congress, the collector rendered, under oath, a quarter-yearly account to the treasury of the sums of money collected for rent and storage beyond the rent paid for the stores to their owners. 5 Stat., 432; R. S., sec. 2647. Statutory requirement also exists elsewhere that all moneys received by collectors for the custody of goods in bonded warehouses shall be accounted for as storage, under the fifth section of the prior act. 14 Stat., 188. Such requirement is enforced by a penalty, as follows: That every officer or agent who neglects or refuses to comply with the same "shall be subject to be removed from office, and to forfeit to the United States any share or part of the moneys withheld to which he might otherwise be entitled." R. S., sec. 3619.

Yearly payments of the same, as the petitioner alleges, were made by him through mistake, and that he made application to the commissioner for leave to correct his account; but the commissioner refused the request, and declined in advance to repay the petitioner any part of the said moneys. What the petitioner alleges in that regard is that a part of the money derived from that source, not exceeding \$2,000 in any one year, belonged to him, under the act requiring accounts as to rent and storage.

Annual payments on that account were made by the petitioner, as he alleges, for the period of eight years during which he held the office, amounting in all to the sum of \$14,535.23. Maximum compensation of his office is \$4,500, as follows: Salary, fees and commissions not exceeding \$2,500. R. S., sec. 2675. Nor exceeding \$2,000 in any one year from rent and storage. Id., sec. 2647. Out of the annual receipts for rent and storage the plaintiff claims an amount not exceeding \$2,000 in any one year, to which he adds the entire receipts from all other sources of emolument, and from the aggregate of these receipts he deducts the amount of his yearly compensation, and by that mode of computation his claim is as stated in the declaration.

Two pleas were filed in behalf of the United States: 1. They deny each and every allegation of the petition. 2. They allege that the petition was not filed within six years after the claim first accrued. Charges barred by the statute of limitations were rejected, and the court below rendered judgment in favor of the petitioner for the balance, amounting to the sum of \$11,954.73, as appears by the transcript. Special findings of fact were duly filed in the record, as required by the rules of the court, to the effect following: That the petitioner was collector of the port from March 5, 1870, to January 25, 1878, and the act of congress shows that the maximum of his compensation was as stated in his petition; that two freight depots are located at that port, and that from the time the petitioner became collector, to June 15, 1877, the apartments of the depots were constantly and exclusively used for the storage of goods in bond, seized goods, and goods unclaimed.

Compliance with the treasury regulations in establishing such depots is also shown by the findings of the court, and that two inspectors were constantly kept there in charge of goods stored in those depots during that period, and that the amount of their salaries was annually reimbursed to the United States through the collector by the railroad companies at whose request the depots were established, as shown by the statement exhibited in the fifth finding of the court. All these amounts were duly entered in the quarterly accounts of the petitioner, and were paid to the treasurer of the United States in compliance with official instructions.

§ 4. *Money paid into the treasury by an officer under peremptory instructions from his superior may be recovered back in the court of claims if such orders were illegal. (a)*

Peremptory instructions were given to the officer that all moneys of every description, not received by warrant on the treasury, must be actually deposited, as they would be charged in the collector's account. His compensation, as received, was derived wholly from the other statutory sources of emolument, the findings of the court showing that he was not paid anything out of the yearly amounts collected from rent and storage. Due credit was given for the annual amounts he received from the other sources of emolument during the six years, within the statute of limitations, as exhibited in the seventh finding of the court; and the same finding also contains a statement showing the additional amounts required for each of those years to bring up the compensation of the collector to the maximum rate.

Argument to show that the aggregate received from all sources of emolument, including the receipts from rent and storage, is sufficient to justify the claim of the petitioner, is certainly unnecessary, as it is clear to a demonstration that the computations of the court below are correct. Plainly it follows from those computations that the collector is entitled to that rate of compensation, unless it be denied that the receipts from rent and storage, as explained in the opinion in *United States v. Lawson*, 11 Otto, 164, are not properly included in that aggregate.

Sums received for rent and storage, not exceeding \$2,000 in any one year, if duly included in the quarterly accounts of collectors, are as much due to such officers of the non-enumerated ports as to the incumbents of the larger offices, and their right to the same rests on the same foundation. Actual necessity has always existed, since the treasury department was established, for more storehouses for the deposit and safe keeping of imported merchandise than the United States owned, and it cannot be doubted that all such as have been placed under the statutory control of collectors and have been used for that purpose according to law are, during the period they are so controlled, used and occupied, public storehouses, within the meaning of the act of congress requiring collectors to include receipts from that source in their quarterly accounts, and allowing them to retain out of the same a sum not exceeding \$2,000 in any one year. *United States v. Macdonald*, 5 Wall., 647, 659 (§ 444, *infra*); S. C., 2 Cliff., 270, 282.

None of these matters are controverted by the solicitor-general; but he insists that the payments were voluntary, and that the accounts having been settled cannot be opened, even if it appears that the demand and payments were both made under a mistake of law. Responsive to the first suggestion, the same answer may be given to it as that given by the court to a similar suggestion in the preceding case. You will also bear in mind, said the commissioner, that all moneys of every description, not received by warrant on the treasury, must be actually deposited. Had he added, If you fail to comply, the law will be enforced, his meaning could not be misunderstood, as the act of congress provides that the gross amount of all moneys received from whatever source for the use of the United States, with an exception immaterial in this case, shall be paid by the officer or agent receiving the same into the

(a) To the same effect, *United States v. Lawson*,* 11 Otto, 164.

treasury at as early a day as practicable, without any abatement, etc. R. S., sec. 3617.

Penalties are prescribed for a non-compliance with that requirement, as follows: Every officer or agent who neglects or refuses to comply with that provision shall be subject to be removed from office and to forfeit any part or share of the moneys withheld, to which he might otherwise be entitled. 14 Stat., 187; R. S., sec. 3619. Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner.

Judgment affirmed.

UNITED STATES v. WENDELL.

(Circuit Court for New Hampshire: 2 Clifford, 340-351. 1864.)

STATEMENT OF FACTS.—Debt against a navy agent and his sureties on his official bond. The questions in the case related only to the compensation to which the navy agent was entitled under the statutes creating and regulating that office, and the facts appear sufficiently in the opinion of the court.

Opinion by CLIFFORD, J.

This controversy has arisen from a difference of opinion as to what was the measure of compensation to which the principal defendant was entitled. The condition of the respective bonds is that the incumbent in the office shall faithfully discharge all his duties as navy agent for the port where he was appointed. A doubt cannot be entertained that the officer, under that condition, was obliged to account for and pay over all public money which came to his hands, except what he was entitled to retain as compensation for his services. The question presented, therefore, cannot be satisfactorily solved, without first ascertaining what sum the incumbent was lawfully entitled to retain as compensation.

§ 5. *Construction of statutes relative to navy agents and the compensation to which they are entitled.*

Navy agents were first authorized to be appointed by the third section of the act of the 3d of March, 1809; and the same section provides that their compensation shall not in any instance exceed that allowed to the purveyor of public supplies. 2 Stat. at Large, 536; *Browne v. United States*, 1 Curt., 18 (§§ 135-37, *infra*). They are described in the section authorizing their appointment, not in terms as navy agents, but as agents appointed either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the navy of the United States. *United States v. Cutter*, 2 Curt., 626. (Bonds, §§ 405-8). Such agents receive and disburse large sums of money, and they are required by law to make monthly returns, in such form as may be prescribed by the treasury department, of the moneys received and expended during the preceding month, and of the unexpended balance in their hands. 2 Stat. at Large, 536. Their term of office is for four years, removable at pleasure; and such appointments are required to be submitted to the senate for confirmation. 3 Stat. at Large, 582; 5 Stat. at Large, 703. The provision for their compensation, as

originally enacted, remained unchanged until the 3d of March, 1855, when the act was passed which gives rise to the present controversy. 10 Stat. at Large, 676. An express provision is made by that act, that in lieu of \$2,000 per annum, the maximum compensation now allowed by law to navy agents, there shall be allowed two per centum commission on the first \$100,000, or under, disbursed by them, and one per centum on every succeeding \$100,000 disbursed by them, until the compensation reaches \$3,000 per annum, which amount shall be the maximum compensation for such agents. Certain provisos are also annexed to the section, which it is not important to notice at the present time. Statutory regulations can hardly be clearer or more explicit than is the language of the section upon the subject under consideration. The compensation of the officers named cannot exceed the sum of \$3,000 for the services of one year. Attention to the language employed will show that the maximum is in terms based on the period of one year, and in point of fact upon nothing else, because, let the amount be ever so great, the compensation of the officer cannot exceed the yearly sum of \$3,000. The amount disbursed does not determine the maximum, but only the proportion of the maximum to which the officer is entitled, as is evident from the fact that the excess of one year cannot aid the deficiency of another. The maximum compensation is fixed by law at \$3,000 per annum, and the reference undoubtedly is to the calendar year, as is obvious from the fact that the allowance of the per centum, that is, the one per centum or two per centum, as the case may be, is continued until the compensation reaches the sum of \$3,000. The compensation per annum, therefore, is the rule of decision, and not per quarter, nor for any other legal subdivision of the year. Yearly disbursements, as ascertained by the monthly accounts, furnish the means of computing the yearly compensation of the officer, and of determining what proportion of the maximum he is entitled to receive for that period of time, subject to two important limitations prescribed by law; that is to say, that the compensation cannot exceed \$3,000, and that the act prescribing the maximum shall not be so construed as to reduce the salary to which any navy agent was entitled under previous laws.

The time of service and the amount disbursed are the data for computing the amount of the compensation for any fractional portion of the year, because the maximum being based on an entire calendar year, the proportion of it due to the officer, if earned, can only be determined by ascertaining the proportion of the year which has elapsed. Where officers of the United States, entitled to a yearly compensation, are superseded within the year, the general rule is that they are entitled to a *pro rata* compensation. Reference is made by the defendants to the case of *United States v. Dickson*, 15 Pet., 141, where a different rule was applied; but, in the judgment of this court, the rule there prescribed is not applicable in this case. *Hoyt v. United States*, 10 How., 143. The contrary rule is the correct one in the settlement of accounts with collectors and all other revenue officers, and with ambassadors and ministers plenipotentiary, and, perhaps, at the present day, with all other persons holding office under the federal government. 9 Stat. at Large, 3; 11 Stat. at Large, 52. The act of the 11th of February, 1846, provides that collectors and all other officers of the customs, serving for a less period than one year, shall not be paid for the entire year, but shall be allowed in no case more than a *pro rata* of the maximum compensation of said officers respectively, for the time only which they actually serve as such collectors or other officers, whether

the same be under one or more appointments, or before or after confirmation. A special reference is also made by the defendants to the case of *United States v. Pearce*, 2 Sumn., 575; but it is a sufficient answer to that case to say that the act of congress first referred to, passed since the date of that decision, establishes a different rule.

The conclusion, therefore, upon this branch of the case is, that the accounts of the principal defendant, so far as respects the balance of \$1,123.60, reported to be due, and which on the 30th of August, 1861, he was directed to deposit to the credit of the treasury, were correctly adjusted by the accounting officers of the department, and that the plaintiffs are entitled to recover for that amount, together with interest on the same from the date of settlement.

§ 6. *The rule as to recharging the commissions where the navy agent is delinquent.*

The second proposition of the plaintiffs is that the principal defendant having refused to deposit the balance reported to be due, as directed by the proper officer of the department, they, the plaintiffs, were authorized to recharge the whole amount of the commissions previously allowed to him during the whole period of his service in that office. The claim is based upon the first section of the act of the 3d of March, 1797, which in effect provides that when a person accountable for public money shall neglect or refuse to pay into the treasury the sum or balance reported to be due, upon the adjustment of his account, it shall be the duty of the comptroller to institute suit for the recovery of the same, adding to the sum stated to be due the commissions of the delinquent; and the act declares that the same shall be forfeited in every instance where suit is commenced and judgment is obtained thereon. 1 Stat. at Large, 512. But the proposition cannot be sustained, because the whole amount recharged had been lawfully and conclusively adjusted and allowed to the defendant. The "commissions of the delinquent" are only such as are pending, and are not such as have been paid to the officer, under a final adjustment of his accounts. Where suit is commenced under the circumstances described in the provision, all unsettled and pending commissions are to be adjudged forfeited in case judgment is obtained in favor of the United States. Addition may be made to the sum reported to be due of the unsettled commissions in the hands of the delinquent, but it is not the purpose of the act to reopen accounts fairly and conclusively adjusted and settled. Instances may be found where the same person has held a particular office for forty years, and if the proposition be correct, a dispute in the settlement of his account for the last quarter of the fortieth year would open the accounts for the entire period he held the office. Such a construction of the act of congress cannot be adopted, and the proposition is accordingly overruled. Referring to the agreed statement, it will be seen that the whole amount reported to be due from the principal defendant accrued under the bond declared on in the second suit. The plaintiffs are entitled to judgment in the second suit, but in the first suit judgment must be entered for the defendants.

Costs are allowed in the second suit, but the United States are never liable to costs.

§ 7. *Power to enlarge or diminish.*— Neither the president nor a departmental head has the power to enlarge or diminish the compensation of an officer of the government or a public agent receiving a specified salary, unless the power to do so is given by authority of congress. *Goldsborough v. United States*,* Taney, 80.

§ 8. **Taxing salaries.**—Congress has no power, under the constitution of the United States, to tax the salary of a judicial officer of a state. *The Collector v. Day*, 11 Wall., 118.

§ 9. **Attachment of money due.**—Money due a United States employee cannot be attached in the hands of a government disbursing agent. *Attachment of Money in Hands of Disbursing Officer*,* 10 Op. Att'y Gen'l, 120.

§ 10. **Defaulters—Interest.**—The provisions of the act charging the receiver of public moneys with interest thereon, "if he shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his account," seems to be directed against wilful defaulters whose delinquency is clear. It is not chargeable on a sum found due by a treasury account which, upon contestation, is found to be grossly surcharged against the defendant, and is not supported by the government by evidence of any other statement of accounts. But the court in this case expressly reserved its opinion as to whether interest could be charged in a suit upon an account agreed upon by both parties as determining and presenting the rights of the parties; though an item of interest, if it had been contained in such an account agreed upon, though during the pendency of the trial, would have been allowed. *United States v. Collier*, 8 Blatch., 825 (§§ 445-56).

§ 11. **Increase of expenses.**—Where the agent of a department of the federal government was ordered to a place other than that at which he resided when he was appointed and his compensation was fixed, thereby causing his expenses, etc., to be increased, the department may allow him a greater compensation than his contract calls for. *United States v. McCall*, Gilp., 568.

§ 12. **The statute of limitations cannot be pleaded by the government against an officer's claim for compensation**, in a suit by it against such officer, the officer not being allowed to sue the government, his only right to assert his claim being by way of defense to a suit by the government. *United States v. Nourse*,* 4 Cr. C. C., 151.

§ 13. **Payment into treasury under orders.**—Payments made by an officer, of money to which he is entitled as fees, without protest, under the peremptory orders of a superior officer, are not voluntary payments, and when wrongfully exacted may be recovered back. *United States v. Lawson*,* 11 Otto, 164.

§ 14. **Out of appropriations for preceding year.**—Fees may be claimed out of an excess of appropriations from a preceding year, the unexpended balances being considered as applied to the purposes for which they are made, and this though, save this excess, there be no appropriation for the year during which the services are rendered. *United States v. Austin*,* 2 Cliff., 835.

§ 15. **Legal advice.**—The contracts of marshals, collectors and other servants of the United States, not heads of departments, for legal advice, are personal and do not bind the government to pay fees for such advice. *United States v. Ingersoll*,* Crabbe, 183.

§ 16. There is no precedent or usage to validate such contracts. *Ibid*.

§ 17. **In cases of removals by the president**, by operation of a new commission, the old commission ceases only when notice of the new commission is given to the outgoing officer; and where the new commission gives the appointee the right to compensation from the date of the appointment, the government will have to pay the salaries of two officers, in the same office, until the outgoing officer gets notice of the new commission. *Term of Judicial Salaries*,* 7 Op. Att'y Gen'l, 803.

§ 18. **Where money has been illegally paid to an officer of the United States**, on his claim for the same as compensation for official services, the government can recover it back by action. *Parker v. United States*, 1 Pet., 293.

§ 19. **Rejected claims.**—Where an item was improperly rejected by the treasury department, it was held it was entitled to draw interest from the date of its rejection. *United States v. Smith*,* 1 Woodb. & M., 184.

§ 20. **Absence.**—By regulations of the secretary of the treasury for the government of the department it is provided in reference to the absence of an employee, that, "when absence is caused by sickness, a certificate of the attending physician must be furnished, showing the nature of the disease, the daily attendance, and amount and extent of the debility or disability caused by such sickness, with the date when first called in and that when attendance ceased." An employee was absent and furnished the required certificate; his salary for the time he was absent was refused by the department, on the ground that the year before he had been absent twenty-two days, for which time he had received pay. *Held*, that he was entitled to his salary for the time that he was sick and twenty per cent. additional pay, under the joint resolution of congress of February 28, 1867. *Sleigh v. United States*,* 9 Ct. Cl., 369. Where a superseded chief justice of New Mexico left that territory for a visit to Washington before receiving notice of his suspension, and did not, in fact, learn of it until some time afterward, he came within the operation of the act of congress forbidding the payment of more than sixty days' salary to any territorial officer absenting himself from his territory. *Duration of Commissions*,* 6 Op. Att'y Gen'l, 87.

§ 21. The regulations established by the secretary of the treasury, on the 1st of June, 1869, for the government of his department, provided that the absence of any employee for more than one month in any fiscal year, "whether authorized or unauthorized, will be without pay;" that "when absence is caused by sickness, a certificate of the attending physician, showing his daily attendance from the first to the last call, must be furnished," and if no physician was employed, other satisfactory evidence would be accepted. An employee in the treasury department was absent six days in August and twelve days in September, 1869; he furnished the required certificate of sickness from a physician; the secretary of the treasury directed his pay to be docked for the absence. There was nothing offered to impeach the validity of the physician's certificate. *Held*, that the employee was entitled to his compensation during his absence on account of sickness. *Ware v. United States*,* 7 Ct. Cl., 565.

§ 22. Performing duties of a higher grade.—The object of section 12 of the act of August 26, 1846, modifying the act of March 3, 1835, is merely to require that the order (not required to be given by said act of March 3, 1835) authorizing any officer to perform the duties of a higher grade shall have been given previous to the performance of such duties, but need not be in writing. *Magruder v. United States*,* Dev., 47.

§ 23. Fees of successful party.—The act of congress of March 1, 1793, declares that there shall be allowed and taxed in the courts of the United States, in favor of successful parties, such compensation for their travel and attendance as is allowed in the supreme court of their respective states. *Held*, that where no compensation is allowed to the successful party for travel and attendance in the supreme court of the state, none can under this act be allowed. *Sebring v. Ward*, 4 Wash., 546.

§ 24. The act of congress of 20th of September, 1789, adopted the rates of fees that prevailed in the supreme court of the state. In Maine parties are entitled to costs, thirty-three cents for each day's attendance, and travel, ten miles to be counted one day. The acts of congress since 1789 regulating fees make no reference to the taxation of a party's costs for travel and attendance, and in the federal courts in Maine they are taxed in favor of the prevailing party. *Nichols v. Inhabitants of Brunswick*, 3 Cliff., 88.

§ 25. Jurors in civil cases attending the circuit court of the United States for the district of Pennsylvania were allowed one dollar and twenty-five cents *per diem* for their attendance. *Ex parte Lewis*,* 4 Cr., 433.

§ 26. The docket fee of \$30 allowed in favor of the prevailing party by section 824 of the Revised Statutes, "on a trial before a jury or on a final hearing in equity of admiralty," is taxable whenever the trial is entered upon by the swearing of a jury in a common law case, or by the introduction of testimony or the final opening of the argument in equity or admiralty, and does not depend upon a judgment or decree so as to be lost by a discontinuance entered after the trial or final hearing has begun. *The Bay City*,* 2 Flip., 703.

§ 27. Predecessor and successor.—Informations against certain vessels were filed during the term of office of a district attorney, who had the exclusive management of the informations during the time when the claims were filed, the property claimed, appraised and delivered on bail, and attended the interests of the government at a subsequent term of court, though not on the final trial of the cases. His successor, on the other hand, took up the cases in their undetermined state, and performed most of the professional labor involved in their determination. *Held*, that under these circumstances neither district attorney had an exclusive right to the taxable costs allowed in said cases, but that each was legally and equitably entitled to a portion of said fees. *Ex parte Robbins*,* 2 Gall., 319.

§ 28. A district attorney and his successor in office having both rendered services in certain informations, the court being unable to govern the apportionment of fees according to the rule of allowance giving \$17 for each claim (\$5 for the interrogatories, \$6 for the libel or answer, and \$6 for all other services), on account of the parties having by mutual agreement waived the filing of interrogatories or answers, was of the opinion that under the facts of the case full justice would be done by allowing for all services which the parties could tax as costs, to the district attorney who had the original charge of the information five-elevenths of the taxable costs allowed in the cases, and to his successor in office six-elevenths of the same sum. *Ibid*.

§ 29. Remedies.—The marshal may have an attachment, to enforce payment of his fees, against an attorney who has indorsed writs, brought by a non-resident, and which were dismissed. *Anonymous*, 2 Gall., 101.

§ 30. It is the unquestioned right of a citizen, when his claims have been disallowed by the accounting officer, to present them for the consideration of a court and jury. *United States v. Smith*, 1 Bond, 68.

§ 31. Proceedings which had been instituted by an officer of an insurance company, declaring the company a bankrupt, were set aside because they were unauthorized by the company. The marshal moved the court for an order requiring said officer to pay the marshal's fees for

executing the warrant issued in the case. *Held*, that the marshal could not recover his fees in that way; that his remedy was by action. *In re Atl. Mut. Life Ins. Co.*, 9 Ben., 837.

§ 82. On the 19th of March, 1849, Guthrie was appointed chief justice of the supreme court of the territory of Minnesota, to which office there had been annexed a salary of \$1,800 per annum. The tenure of the appointment was, both by the act of congress and the commission, four years from the date of the commission. Guthrie was removed from office 23d October, 1851. Guthrie's claim for salary from the time of his dismissal to the expiration of four years from the date of his appointment was disallowed. He applied to the circuit court for the District of Columbia for a *mandamus*, to compel the secretary of the treasury to pay his salary up to the time named in his commission as the termination of his appointment. *Held*, that *mandamus* was the proper remedy. *United States v. Guthrie*, 17 How., 284.

§ 83. Reasonable compensation.—Where the law provides for a reasonable compensation to an officer, in determining what is reasonable the court must look to what the law allows in similar cases. *Clerks' Fees*,* Taney, 453.

§ 84. The law has established no rate of fees to be allowed as compensation to auditors appointed by the federal court. A charge by the auditor of \$225 for his services in making the necessary examination and report in a matter involving over \$60,000 is not excessive. *Lombard v. Bayard*, 1 Wall. Jr., 193.

§ 85. The law of Pennsylvania allows executors commissions for taking charge of and selling the estate. *Held*, that trustees within that state should be allowed commissions for the same services. *Prevost v. Gratz*, 3 Wash., 434.

§ 86. When the court calls on an officer of the court to render services for which no fee is by law established, he is entitled to a reasonable compensation; so it was held that where a commissioner's fee of \$3 for service rendered by him in taking the testimony upon the justification of sureties, was charged, such fee being reasonable was correctly charged. *The Schooner F. Merwin*,* 10 Ben., 403.

§ 87. While defendant was marshal the census was taken; he appointed deputies and completed the work; the United States making no advances to him on that account, he paid the deputies, of which he informed the government. The government caused the deputies to be paid again, after having notice of the payment by the marshal, and brought this action for public moneys alleged to be in the hands of the marshal. *Held*, that the marshal could retain the amount paid to the deputies, the government having failed to repay him. *United States v. Eyk*, 4 McL., 119.

§ 88. The secretary of the territory of Minnesota made a trip to Washington to procure the funds appropriated by congress for the support of the territorial government. *Held*, that if the jury believed the public interests of the territory required the journey, the secretary should be allowed his actual expenses. *United States v. Smith*, 5 Am. L. Reg., 268; 1 Bond. 68.

§ 89. It seems that one who has voluntarily performed services as clerk at the seat of government, with the knowledge of the officer authorized to consent to the performance of the services, has a valid claim against the United States for compensation. *McElderry v. United States*,* Dev., 42.

§ 40. Where claimant, in May and June, 1833, rendered services in the office of the fourth auditor of the treasury, although he was not employed by the head of that department, but voluntarily tendered his services, and was merely permitted by the auditor to perform them in his office, it is not an employment in the sense of the act of August 26, 1842, section 15, and for that reason no legal liability, on the part of the United States, to make the petitioner compensation for his services can result from it. *Boyd v. United States*,* Dev., 47.

§ 41. It seems that a contract for services as extra clerk in a department, bureau or office at the seat of government, not in accordance with the provisions of the special appropriation act of congress of August 26, 1842, is in violation of such act, and void as against the United States. *McElderry v. United States*,* Dev., 43.

§ 42. The act of August 23, 1842, does not apply only to the departments of the government. The language of that act is general, and this court has no authority to limit its operation. *Holman v. United States*,* Dev., 46.

§ 43. Where voluntary services as clerk are performed, without the knowledge of an agent authorized by the government to consent thereto, there can be no claim against the United States for compensation. *McElderry v. United States*,* Dev., 43.

§ 44. No one but the head of a department, bureau or office at the seat of government, can, under any circumstances, contract for the services of an extra clerk, on account of the government; and it seems that the head of a department, bureau or office can contract for such extra services only during the session of congress, or when such services are made necessary to enable such department, bureau or office to answer some call made by either house of congress. *Ibid*.

§ 45. An agent of a department of the federal government is not entitled to compensation

under a law regulating the salaries and fees of federal officers, but to such compensation as was agreed upon between him and the department. *United States v. McCall, Gilp.*, 563.

§ 46. A navy agent was compelled to pay damages and interest on a bill drawn, in the exercise of his official duties, on the secretary of the treasury, which was dishonored by the secretary under a mistake of fact. The bill was drawn after the revocation of the agent's appointment, but before the agent had notice thereof. *Held*, that the agent must be reimbursed the amount so expended by him. *Armstrong v. United States, Gilp.*, 399.

47. The surveyor-general of the territory of Utah was driven from the territory by the Mormons, then in open rebellion. The surveyor had been paid his salary up to the time he ceased to hold the office. In accordance with instructions to deliver the public property to his successor, or, if his successor should not arrive by a certain time, to make the delivery to the governor or other responsible officer of the United States, he sent an agent to make the delivery. The agent several times offered to deliver to the governor, who for a number of times refused to accept the property, but finally did accept it. *Held*, that the surveyor-general was entitled to be reimbursed the expenses and salary of the agent and the amount paid for the rent of a room hired for the storage of the property, though these expenses had accrued since the expiration of his term of office. *Burr v. United States*,* 2 Ct. Cl., 217.

§ 48. Savage, a citizen of the United States established at Guatemala, was requested by the accredited agent of the United States at that place to take charge of and preserve the records, archives and public property of the United States, and to correspond with the secretary of state and perform the duties of diplomatic agent. At several different times he performed these services, upon similar requests, to the satisfaction of the secretaries of state, amounting altogether to about fourteen years; and in the opinion of Mr. Marcy, secretary of state, "an allowance at the rate of one thousand five hundred dollars or two thousand per annum might with entire propriety" be allowed him. *Held*, that he would be allowed fifteen hundred per annum. *Savage v. United States*,* 1 Ct. Cl., 170.

§ 49. Set-off.—In an action by the United States against a disbursing officer or other individual for the recovery of moneys claimed of him, the defendant is entitled on trial to the allowance of all equitable demands of his against the United States, if the same have been submitted to the proper accounting officers of the government and disallowed by them. *United States v. Collier*, 3 Blatch., 325 (§§ 445-56).

§ 50. An amount claimed by way of set-off to a suit upon moneys received by a collector cannot be allowed if the claim relied on as set-off has not been presented to the proper accounting officers and disallowed. *United States v. Austin*,* 2 Cliff., 325.

§ 51. The act of congress of 3d of March, 1797, provides "that in suits between the United States and individuals, no claim for a credit shall be admitted on trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination, and by them disallowed in whole or in part, unless it should be proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident." *Held*, where the claims were not presented to the accounting officers of the treasury, and no proof was exhibited which brings the claims within either of the exceptions stated in the above provision of congress, that the claims must be excluded from the consideration of the jury. *United States v. Smith*, 5 Am. L. Reg., 268; 1 Bond, 68.

§ 52. It is the right of the citizen, in a suit brought by the United States for the recovery of a balance claimed, if his credits have been disallowed by the accounting officer, to present them for the decision of a court and jury. *Ibid*.

§ 53. The rejection of a claim of an officer of the United States, by the treasury department, is no objection to the admission of it by the court, against the demand of the government, as evidence to the jury. But on the other hand it seems that, had the claim never been presented to the department for allowance, it could not be admitted as evidence on the trial. *United States v. Macdaniel*, 7 Pet., 1; *United States v. Ripley*, 7 Pet., 18.

§ 54. In a suit by the United States against an officer, for a balance claimed to be due, the defendant will be presumed to have admitted all the charges except those excepted to, and that the credits in the account are all that he is entitled to when he claimed no other. But the defendant may prove that he did not intend such an admission. *United States v. Kuhn*, 4 Cr. C. C., 401.

§ 55. Where it appears by the account current of defendant, introduced in evidence by the United States in a suit for a balance alleged to be due, that there is a balance due the defendant, the United States cannot recover without proving errors or omissions in said account which show a balance against defendant. *Ibid*.

§ 56. During the continuance of Ware's term of office as postmaster at Kenningston, the postmaster-general discontinued the postoffice at that place. *Held*, that when the postoffice

was discontinued Ware ceased to be postmaster; that his compensation, except receipts from boxes, and these were extinguished when the postoffice was discontinued, depending on postages collected, ceased when the postmaster ceased to collect postage; that his claim for damages for the discontinuance of the postoffice could not be considered, he having failed or neglected to show that it had been presented to and disallowed by the auditor of the postoffice department. *Ware v. United States*, 4 Wall., 617.

§ 57. In a suit by the United States for a balance due on an official bond, no credit shall be allowed unless the items claimed as credits have been presented to the proper accounting officer and by him disallowed in whole or in part. The only exceptions are where the officer claiming the credits was absent in a foreign country, or prevented by some unavoidable cause from their presentation. Subject to the above rules the courts hold that where an item of expenditure, or an act of official service, is fairly within the legal duties of the officer, he is entitled to a just allowance. *United States v. Corwin*, 1 Bond, 149.

§ 58. Miscellaneous.—A collector, having seized a vessel, employed counsel (who happened to be a district attorney) and agreed to divide with him his moiety allowed him by law on moneys thus realized. The owners of the vessel compromised with the attorney, but not being able to pay the money immediately the district attorney took their bond and kept it in his possession. The treasury was displeased with this action, denied the attorney's right to take and keep the bond, and directed its return to the treasury. This was done by the attorney without objection. Subsequently the bond was put by the collector into the hands of another party who collected the amount of the bond, dividing it equally between the United States and the collector, who kept his moiety, including the half thereof agreed to be paid the district attorney. *Held*, these facts constituted no claim upon the part of the district attorney against the treasury for wrongfully depriving him of the security for his share of the forfeiture money, no objection having been made at the time by him to the surrender of the bond, nor notice given to the treasury of his interest. *United States v. Ingersoll*,* *Crabbe*, 135.

§ 59. Where the law is not imperative, but confides to the secretary of war a discretion to allow or disallow a charge by a government agent against the government, the court and jury have the same discretion, when the case comes up for trial, and are not bound by the decision of the secretary of war. *United States v. Duval*, *Gilp*., 356.

§ 60. Where a head of a department directs allowances to be made to an officer or clerk in his department, for services rendered therein, the comptroller of the treasury cannot legally refuse to allow the amount. *Whiting's Case*,* 10 Op. Att'y Gen'l, 435; *White's Case*,* 10 Op. Att'y Gen'l, 442.

§ 61. In a matter of general and established practice, such as the allowance, by a district judge, of the marshal's fees, the regular taxation of costs is binding on the accounting officers. *Certified Fees of Marshals*,* 3 Op. Att'y Gen'l, 496.

§ 62. The taxation by the court (of fees to the marshal for both summoning witnesses and serving a writ of subpoena) and the allowance and certificate of the judge are conclusive upon the accounting officers, when the service is enumerated in the act of congress and the sum allowed therefor is not exceeded; nor can the allowance be considered "palpably excessive" if it is in accordance with rules of court and established modes of procedure, even though a part of the service and of the compensation might be usefully dispensed with. *Compensation of Marshals*,* 3 Op. Att'y Gen'l, 536.

§ 63. A letter of the president, embodying an opinion on past services of an officer, is not law in determining the legality of his charges. *United States v. Ingersoll*,* *Crabbe*, 135.

§ 64. Army registers and general orders of the commanding officer are not evidence from which the jury may draw an inference to establish the pay and emoluments of officers. *Wetmore v. United States*,* 10 Pet., 647.

§ 65. Upon the question of the confirmation of the report of a master to whom the accounts of a shipping commissioner had been referred, the district attorney objected that the master should have reported that the salaries paid to certain deputies were too large for the work performed. *Held*, that as he had not raised the point before the master, nor introduced evidence to prove the fact alleged before him, the court would not interfere with the report now. *In re the Accounts of the Shipping Commissioner of the Port of New York*,* 16 Blatch., 92.

§ 66. The use of the word "employed," in a certificate from a head of department stating that he had "employed" one holding an office under him in the department to perform certain duties claimed by the person employed to be beyond the requirements of his office, goes to show that said duties were in fact of the nature claimed and not such as could be "required, ordered, directed or appointed." *United States v. Nourse*,* 4 Cr. C. C., 151.

§ 67. The act of congress for the organization of the territory of Minnesota provided for certain appropriations by congress to be made upon the estimate of the secretary of the treasury, and to be expended by the secretary of the territory. *Held*, that while it was obligatory on the secretary of the treasury to make the necessary estimates, yet if he fails to do so, or if the esti-

mates prove insufficient, it affords no reason why the claims of the secretary of the territory coming within the scope and intention of the act should not be allowed. *United States v. Smith*, 5 Am. L. Reg., 268; 1 Bond, 68.

§ 68. The act of congress of April 20, 1818, fixes the compensation of clerks to be employed by the navy commissioners, and provides that "no higher or other allowance shall be made to any clerk in the said departments and offices than is authorized by this act." *Held*, that the clerks who had been overpaid, and those who had received a salary but had never been employed in the office, had no right to retain the sums so received; and that the sanction of navy commissioners or head of a department, erroneously given, could not give the parties the right to retain the said sums. *Pay of Clerks of the Navy Commissioners*,* 2 Op. Att'y Gen'l, 582.

§ 69. An officer, who receives his commission with a back date, is not entitled to pay from that date. *Compensation of Officers of the Navy*,* 4 Op. Att'y Gen'l, 348.

§ 70. An action for money had and received, being a suit for additional fees by a custom-house gauger, will not lie against an ex-collector of customs, by virtue of the act of March 2, 1799, chapter 129, as amended by the act of 1816, chapter 95. *Champney v. Bancroft*,* 1 Story, 423.

§ 71. An advance of money having been made by the government to an officer, to be expended, it was held that a debt was created that could only be extinguished by showing a proper expenditure and repaying the balance remaining, and that the government could recover the latter. *United States v. Freeman*,* 1 Woodb. & M., 45.

§ 72. The time at which payment should be made for services rendered or to be rendered in preparing abstracts of title for the use of the government depends on contract; the head of a department or other competent officer of the United States may pay for such service in whole or in part before the completion of the work. *Payment of Counsel by the United States*,* 7 Op. Att'y Gen'l, 686.

§ 73. Travel is not included in the word "services," in that portion of the fee bill of 1853 which requires certain officers to make oath that the services charged in their bills have been actually and necessarily performed. *Mileage of District Attorneys*,* 9 Op. Att'y Gen'l, 417.

§ 74. In an action by the owner of cotton against an agent of the treasury department for unlawfully seizing said cotton, it was held the defendant was liable for the depreciation in the value of the cotton during the time the cotton was unlawfully held by defendant; that he was liable for insurance premiums and storage paid by the plaintiff; and for clerks' and marshals' fees, paid by plaintiff in suits to recover the cotton, but not for attorneys' fees. *Flanders v. Tweed*, 15 Wall., 450.

§ 75. The government cannot make itself a creditor of one of its officers, without his consent, and retain his salary in discharge of the debt thus acquired. *Purchasing Debts against Public Officer*,* 1 Op. Att'y Gen'l, 676.

§ 76. Congress, on 18th of August, 1856, passed a private act for the benefit of Col. Daniel Randall, directing that there be paid to him "a commission of one per cent. upon such amounts of money collected," "and by him disbursed or paid into the treasury of the United States, in virtue of authorities specially vested, . . . and arising from duties on imports, taxes, or other assessments in Mexico." The collector at Vera Cruz determined the amount of duties on certain importations and sent to Col. Randall, in Mexico, drafts for the collection thereof. He collected the amount of the drafts and disbursed and paid the same into the treasury. *Held*, that he was entitled to the commission. *Randall v. United States*,* 8 Ct. Cl., 539.

§ 77. In 1836 an act was passed (5 Stat. at Large, 111, 112, sec. 10) authorizing the commissioner of the general land office to employ sixteen clerks at a salary of \$1,300 each. Claimant, a clerk in that office, who had been receiving a salary of \$1,200, received a letter on the 13th of January, 1845, from said commissioner, stating that "one hundred dollars have been added to your salary, to take effect from this date." It appeared from the pay-rolls, made up December 1, 1844, and January 1, 1845, that on each of those dates there were in the general land office sixteen clerks with \$1,300 salary, exclusive of claimant, who never demanded his salary at the rate of \$1,300, but at the expiration of each month, for more than eight years, signed a receipt at \$100 per month in full payment of his salary. *Held*, that the receipts given by claimant show that he continued to be a clerk at the annual salary of \$1,200; that the court must presume that he received all he was entitled to. *Wagaman v. United States*,* Dev., 129.

§ 78. Congress ratified the proceedings of the convention of California which continued General Riley as acting executive, at a salary of \$10,000 per annum, and provided for the payment of the expenses of the convention. *Held*, that the United States became liable for the salary of General Riley from the date of recognition of him as executive by the convention, at the rate of \$10,000 per annum. *Riley v. United States*,* 1 Ct. Cl., 299.

§ 79. The act of congress of February 5, 1853, provided for the payment by the United States of certain expenditures of General Riley, upon the production by him of proper vouch-

ers to the accounting officers, and for the payment of certain other expenditures, provided they appear to the president to be proper and necessary. *Held*, that as to the first class of expenditures the accounting officers had no power to exercise a discretion as to their propriety, but that upon the production of vouchers General Riley was entitled to the allowance; that as to the second class the approval of the president of the propriety and necessity of the expenditures was a condition precedent to their allowance. *Ibid*.

§ 80. King was appointed superintendent of certain works for the construction of a harbor, for which service he was to receive \$3 per day. He was paid up to the 25th of September, but continued in the employment up to the 22d of November, when the appropriation was exhausted and the work suspended. He was then employed as custodian of the works at \$1.50 per day, both he and his employer, Colonel Turnbull of the engineers, supposing that the work would be resumed in the spring. King also furnished two scows to be used about the work, for which he claims \$5 per day. He also claims \$100 for use of an acre of land by the government, upon which lumber was piled; and a claim is also set out based upon a litigation between claimant and another in reference to timber, taken by claimant for the use of the harbor, which he supposed to belong to the government. King claims a salary of \$1.50 as custodian of the works for a period of nearly eight years. *Held*, that he would be allowed \$3 a day from the 25th of September to the 22d of November, \$1.50 per day as custodian up to June following his appointment to that position, that being the time at which it was understood his appointment should cease; \$5 per day for the use of his scows, \$100 for the use of the land and that part of the claim arising out of the litigation, which is included in the judgment and costs recovered before the justice of the peace, but that part embraced in the appeal would be disallowed, he having exceeded his authority in taking the appeal. *King v. United States*,* 1 Ct. Cl., 88.

II. DEATH OR SUSPENSION FROM OFFICE.

SUMMARY — *Not entitled to salary during suspension*, § 81. — *Reinstatement; delay in yielding possession of office*, § 82. — *Deputy acting as collector*, § 83. — *Removal without notice; clerk hire and other expenses*, §§ 84-86. — *Death of collector; rights to emoluments of office*, § 87.

§ 81. An officer suspended by order of the president, under authority of the act empowering the president to suspend officers during the recess of the senate, till the end of the next session, and who was restored to office by the omission of the senate, at its next session, to advise or consent to the appointment of a successor, is not thereby entitled to his salary for the term of his suspension. *Embry v. United States*, §§ 88, 89.

§ 82. An officer who, after a term of suspension from office, has been reinstated, cannot claim his salary for an unavoidable, though not unreasonable, delay of ten days from the time of his reinstatement in office to the yielding possession to him of the same, during which the person appointed to fill his place during his suspension holds over. *Ibid*.

§ 83. A deputy collector appointed by the secretary of the treasury to perform the duties of the collector, suspended for fraud, until the appointment of a successor, is entitled to the salary of a collector during the suspended collector's term of suspension, and in case of death of the suspended collector during such term of suspension, till the appointment of his successor. *United States v. Farden*, §§ 90, 91.

§ 84. An officer of the government who employs a clerk for the term of one year, but is removed from office without notice, and compromises the clerk's claim by the payment of the proportionate salary of one quarter, can charge the same against the government if the employment of the clerk was necessary, entered into in good faith, and the character and terms of the hiring were such as could be considered prudent and business like. *United States v. Jarvis*, §§ 92-96.

§ 85. An officer of the government who was suspended without notice, and having rented an office became liable, under the law of Massachusetts, for the rent of such office for the quarter after his retirement, because of his omission to give notice, can charge the amount so incurred against the government. *Ibid*.

§ 86. The general rule in such cases is that whenever the agent of the government, in the ordinary course of his agency, enters into contracts proper to the business of the agency and incurs liabilities thereunder, before notice of the revocation of his agency, the government is bound to indemnify the agent for such liabilities, unless the revocation of his agency without notice is due to his own faults. *Ibid*.

§ 87. If, under section 22 of the act of March 2, 1799 (1 U. S. Stat. at Large, 644), providing that "in case of the disability or death of a collector, the duties and authorities vested in him shall devolve on his deputy, . . . for whose conduct the estate of such disabled or deceased collector shall be liable," a deputy collector enters upon the duties of collector, he does

so as the agent of the government, not of the deceased collector, and is not accountable to the deceased collector's estate for the emoluments received as collector. The statute investing him with the authority of the collector includes the authority to receive the emoluments to that office appertaining, and the liability of the deceased collector's estate for the deputy's acts is a special liability attached by law, and does not draw with it the right to require the deputy to account to it for the emoluments received as collector. *Merriam v. Clinch*, §§ 97-100.

[NOTES.—See §§ 101-111.]

EMBRY v. UNITED STATES.

(10 Otto, 680-685. 1879.)

APPEAL from the Court of Claims.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—By the tenure-of-office act, passed March 2, 1867 (14 Stat., 430), it was enacted that every person appointed to a civil office by and with the advice and consent of the senate should hold his office until his successor should be in like manner appointed and duly qualified, except as therein otherwise provided; but the president was authorized during the recess of the senate to suspend an officer for misconduct, crime or incapacity. In case of suspension, the president could designate some suitable person to perform temporarily the duties of the office until the matter should be acted on by the senate when in session. If the senate concurred in the suspension, and advised and consented to the removal, the president might remove and by and with the advice and consent of the senate appoint another person to the office. If, however, the senate refused to concur, the officer suspended might resume the functions of his office, but his salary and emoluments during the suspension went to the person who performed his duties, and not to him.

On the 20th of April, 1867, while this law was in force, Embry, the appellant, was, by and with the advice and consent of the senate, appointed and commissioned postmaster at Nashville, Tenn., the salary being at the rate of \$4,000 a year. By his commission he was to hold his office for four years, "subject to the conditions prescribed by law." On the 5th of April, 1869, the original tenure-of-office act was amended, so as to authorize the president in the recess of the senate to suspend an officer at his discretion until the end of the then next session of the senate, and to designate some person to perform the duties of the office in the meantime, who should be entitled to the salary and emoluments while he served, instead of the officer suspended. 16 Stat., 6.

Under the authority of this act, Embry was suspended from office on the 5th of May, 1869, during a recess of the senate, and Enos Hopkins designated to perform his duties. Embry, however, remained in the office until May 27. The senate did not advise or consent to the appointment of any one to fill the place of Embry during its next session, which terminated July 15, 1870, and he was, on the 21st of July, notified to resume the charge of his office, which he did on the 25th of that month. The salary from May 27, 1869, to July 25, 1870, was paid to Hopkins. This suit was brought by Embry to recover for the same time. The court of claims decided against him, and he appealed.

§ 88. *A deputy postmaster suspended from office by the president under the act of April 5, 1869, is not entitled to the payment of his salary during the time of his suspension.*

We have had no difficulty in reaching the conclusion that the appellant is not entitled to recover. The important constitutional question which has

at times occupied the attention of the political department of the government ever since its organization, and which was brought to our attention in the argument, is not, as we think, involved. The question here presented is not one of office, but of salary. Wherever the power of removal from office may rest, all agree that congress has full control of salaries, except those of the president and the judges of the courts of the United States. The amount fixed at any one time may be added to or taken from at will. No officer except the president or a judge of a court of the United States can claim a contract right to any particular amount of unearned compensation. If an officer is not satisfied with what the law gives him for his services, he may resign.

When Embry was appointed, the president had power to suspend him for cause. The law also provided that if suspended he should draw no salary so long as another person was performing his duties. While he was in office, further power of suspension was given the president, with a like provision as to pay. He was suspended. The senate did not see fit to advise or consent to the appointment of another person in his place, and consequently, on the 15th of July, 1870, when the next session of the senate ended, he became entitled to enter again on the performance of the duties which pertained to his office. This he did on the 27th of July, but not before. His present claim rests not on any contract with the government, either express or implied, but upon the acts of congress which provide for his salary. We so held in *United States v. McLean*, 95 U. S., 750 (§§ 378-79, *infra*). To adjudge in his favor would be to make a new law, not to enforce an old one. Although he was lawfully in office, he was not entitled to pay or emolument while not performing its duties because of his suspension.

§ 89. *Actual incumbent of office entitled to salary.*

It is true his lawful suspension ended on the 15th of July, but he did not resume possession until ten days afterwards. In the meantime, the person designated for that purpose performed his duties. Under these circumstances, the law gave the salary to the actual incumbent and not to him. The delay was an incident to the suspension, and does not seem to have been unreasonable. No more time elapsed than was necessary to give the proper notices and transfer the possession.

Judgment affirmed.

UNITED STATES v. FARDEN.

(9 Otto, 10-20. 1878.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—The collector of internal revenue for the second district of Alabama was suspended from office, and Farden, a deputy, was appointed acting collector until some other person should be duly appointed and qualified. He brought this action to recover pay for his services.

Opinion by R. JUSTICE CLIFFORD.

Compensation of the collector of internal revenue for the district, as fixed by the secretary of the treasury in lieu of the salary and commissions prescribed by law, is the annual sum of \$3,000. 15 Stat., 231. Such collectors may appoint as many deputies as they may think proper, to be by them compensated for their services. R. S., sec. 3148. Deputy collectors who, under the authority of law, perform the duties of a collector, in consequence of a vacancy in the office of collector, are entitled to receive the salary and commissions al-

lowed by law to such collector, or the allowance fixed by the secretary of the treasury, as compensation to the collector, in lieu of the salary and commissions prescribed by congress. *Id.*, sec. 3150; 15 Stat., 252.

Charges of fraud were made against the collector of internal revenue for the district, and he was suspended from his office by the supervisor, who made due report of his action in the premises to the commissioner. Pursuant to the act of congress, the secretary of the treasury, on the 26th of September, 1873, gave the plaintiff, who was the deputy collector of the district, the following instructions: "You are hereby directed to perform the duties of the office of internal revenue collector for the district, *vice* Francis Widner, suspended;" which was accompanied with the statement that the order should take effect from the 23d inst., and that it would continue in force until some person should be designated or appointed to the office and duly qualified according to law.

By the finding of the court it also appears that the plaintiff as such acting collector performed the duties of collector of the district from the 23d of September, 1873, to and including nine days in the month of December following. From the 23d of September to the 15th of October he was only paid the compensation allowed to him as deputy collector, and from that time to the 30th of the succeeding month he was paid the full compensation allowed to the collector, and for the remainder of the time of his service as collector he was paid nothing. Appended to the findings of the court is their conclusion of law, which is that the claimant is entitled to recover \$163.05, in conformity with the opinion of the court as published in the transcript. Judgment was rendered in favor of the claimant for that amount, and the United States appealed to this court.

Appellants do not deny that the claimant performed the services alleged in the petition, but they allege that he is only entitled to compensation as internal revenue collector for the period from October 15 to December 1, and that he has been fully paid for his services as such collector during that whole period, which proposition is sustained by the finding of the court below; but they assign for error that there was no vacancy in the office of collector for any other portion of the time during which the claimant performed the duties of collector.

Attempt is made in argument to support that theory by the third finding of the court, from which it appears that the suspended collector died on the 16th of October next after he was suspended from office, and that his successor was appointed on the first day of the succeeding December, which is conceded; but the same finding of the court shows that the new collector did not take possession of the office until ten days later, from which it appears that the finding of the court in respect to the first nine days of that month is correct to a demonstration.

Suppose that is so, still it is insisted in behalf of the appellants that there was no vacancy in the office of collector during the life-time the suspended collector, and that the judgment of the court below in allowing the claimant compensation as collector during the period from the suspension of the collector to his death is erroneous, which is the principal question in the case presented for decision. He was paid for his services during that period as deputy collector, but the court below held that he was entitled to the compensation allowed by law to a collector, and gave judgment in his favor for the difference, adding thereto a collector's compensation for the nine days which

elapsed after the new collector was appointed before he took possession of the office.

§ 90. *When a deputy may perform the duties of a collector.*

Two contingencies arise when the deputy collector may perform the duties of such collector: 1. When the collector is sick, or is temporarily unable to discharge the duties of the office, the provision is that he may devolve the same upon one of his deputies, but the collector and his sureties in that case remain responsible for the official acts and defaults of the deputy. 2. In case of a vacancy in the office of the collector, when the senior deputy shall discharge all the duties of the collector, unless the secretary of the treasury shall direct that his duties shall be performed by some other one of the deputies, the enactment being that the deputy who performs the duty of the collector in consequence of a vacancy shall be entitled to receive the salary and commissions allowed by law to such collector. R. S., secs. 3149, 3150.

Supervisors at that period were empowered by notice in writing to suspend any collector of internal revenue from duty for fraud, or gross neglect of duty, or abuse of power, and it was made his duty immediately to report his action to the commissioner, with his reasons therefor, in writing. *Id.*, sec. 3163. Fraud was the accusation against the collector in this case, and it was for fraud that he was suspended from the office of collector, and it appears that the supervisor made due report in writing of his action to the commissioner.

Difficulties would attend the effort to define with precision the relation which the suspended individual bore to the office of collector of internal revenue after the order of suspension went into practical effect, nor is it necessary, in the judgment of the court, to make any such attempt in the present case. Whatever the legal relation of the individual may have been in the strict technical sense, it is clear, we think, that for all practical purposes, during the continuance of the order of suspension, the office was vacant, and without any incumbent to discharge the duties which the law requires to be performed by the collector of the internal revenue. Plainly it was not a case of sickness or temporary disability, and consequently the duties were not devolved upon the deputy as in that case made and provided.

Prompt report in writing was made by the supervisors to the commissioner; and the finding of the court below shows that he immediately dispatched a telegram to the agent of the treasury department to designate the claimant as acting collector from that date, and to put him in possession of the office. Exactly the same view of the subject was taken by the secretary of the treasury, as appears by his communication to the claimant, in which he said, "You are hereby directed to perform the duties of the office of collector of internal revenue, *vice* Francis Widner, suspended, and to continue in office until some person shall have been designated or appointed to the office and duly qualified according to law."

Nothing can be plainer in legal decision than the proposition that, unless the secretary of the treasury assumed that a vacancy existed in the office, he could not and would not have given the directions which are contained in that communication. Under the tenure-of-office act the president had the power at that time, which was during the recess of the senate, to suspend the collector until the next session of the senate, and the act of the secretary, the head of the treasury department, is presumed to be the act of the president. *Wilcox v. Jackson*, 13 Pet., 498.

§ 91. *A deputy performing the duties of a collector of internal revenue is entitled to receive the same compensation as the collector would have received had he not been suspended.*

Some support to the opposite theory, it is supposed, may be derived from the last clause of the first section of the original act regulating the compensation to deputy collectors in such cases, but the court here is entirely of a different opinion. By that clause it is provided that no such payment shall in any case be made where the collector has received or is entitled to receive compensation for services rendered during the same period of time. 13 Stat., 282.

Grave doubts are entertained whether this provision can be construed to give any support to the theory of the defendants, that the collector is entitled to compensation during the same period of time, as he rendered no services; and inasmuch as he was suspended for fraud, it is difficult to see what claim he can have for the salary attached to the office during the period of his suspension, when the duties were performed by the deputy collector. Even if the original provision could be interpreted as supposed, still the better opinion is that it is not in force. It was left out of the act of congress passed the next year to define the true intent and meaning of the provision, and is not contained in the Revised Statutes. 16 id., 174; R. S., sec. 3150.

Suffice it to say that the court, in view of the whole case, is of the opinion that the claimant is entitled to receive the salary and commissions allowed by law to the collector of internal revenue during the period that he performed those duties under the direction of the secretary of the treasury, as found by the court below, and that the suspension by the supervisor of internal revenue, and the action of the secretary of the treasury directing him to continue in the office until a successor to the suspended officer was appointed and qualified, created such a vacancy, within the meaning of the act of congress, for all practical purposes in the administration of the duties of the office, as entitles the claimant to that compensation. Assume that to be so, and it follows that there is no error in the record.

Judgment affirmed.

UNITED STATES *v.* JARVIS.

(District Court for Maine: DAVIS, 274-290. 1846.)

STATEMENT OF FACTS.—This is an action on the official bond of a navy agent. Jarvis was appointed in 1838 and removed in 1841. On a final settlement of his accounts he was found to owe the United States \$715.97. He claimed a commission of one per cent. on \$45,218.59, paid for certain lands bought by the secretary of the navy, as being an extra service. He claimed several other small items and \$200 for one quarter's additional clerk hire.

§ 92. *Extra compensation to officers whose pay is fixed by law forbidden. (Act of March 2, 1839.)*

Charge by WARE, J.

The most considerable item claimed by the defendant in offset is \$452.18 charged as commissions on the disbursement of \$45,218.59, paid to the heirs of John Harris for lands purchased for the navy yard in Charlestown. The owner of the land not having left children, the money was to be paid to his collateral heirs, and, as the secretary could not himself conveniently ascertain who they were, he employed the defendant to do the business. In his

letter to him he says: "The money is sent to you that no mistake may occur as to paying it to the party entitled to receive it; and to guard against any such mistake, you are requested to consult the United States district attorney, Mr. Mills, and to pay over the amount and to take the proper receipts and acquittances for the same under his advice and direction." It is apparent that the service to be performed was one not only of considerable responsibility but of some delicacy, for if the defendant had paid the money to a wrong person he might have rendered himself responsible, and if he is entitled to any compensation it is not contended that the sum charged is too much. But it is argued by the district attorney that he is not entitled to any, but that he was bound to perform this service for the compensation which he received as navy agent. That salary was established as a compensation for performing the ordinary service attached to the agency. Now this does not appear to fall within the range of his ordinary duties as navy agent, and it appears to me to be so treated by the secretary in his letter. It was an extra service, and attended with additional responsibility. But then it is argued by the attorney, that, admitting this, he is barred from receiving any additional compensation by the third section of the act of congress of March 2, 1839. That section, so far as it applies to this case, is in these words: "No officer in any branch of the public service, or any other person whose salary and emoluments are fixed by law and regulation, shall receive any extra allowance or compensation in any form whatever for the disbursements of public money, or the performance of any other extra service, unless the said extra allowance or compensation be authorized by law." The defendant was an officer whose pay and emoluments were fixed. It must then be admitted that the case comes within the words of the law, and must be governed by it, if the law is applicable to the case. But this is the very point which the defendant's counsel deny.

§ 93. *In the construction of temporary statutes the presumption is that restrictions of a general character are not intended to be permanent regulations.*

The act in which this section is found is one of the annual appropriation act. Its title is, "An act making appropriations for the civil and diplomatic expenses of the government for the year eighteen hundred and thirty-nine." The first section contains more than two hundred clauses, making as many distinct appropriations for the various branches of the public service, and embracing all the civil and diplomatic expenses for the current year. The second section contains a special provision to which I shall presently refer, and the third has the clause which has been read, and which it is contended governs this case.

The argument of the defendant is, that this section is intended to apply to the subject-matter of the act only, and is to be confined to the disbursements of the appropriations contained in the act. This is, perhaps, the construction that would at first most naturally suggest itself. The act itself is one of those annual acts which spend their power in the course of the year, to which we are not accustomed to look for permanent regulations. If the legislature annex to such an act any special provision which has a proper application to the subject-matter of the act, and use no words indicating an intention to give it a more extensive operation, the just conclusion would seem to be, that the special regulation was intended to be confined to the matters embraced by the act. It is remarked by Mr. Justice Story in delivering the opinion of the court in *Minis v. United States*, 15 Pet., 445, that "it would be somewhat un-

usual to find engrafted, on an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and when the language admits of no other reasonable interpretation."

This is emphatic language, and places this, as a rule of interpretation, on strong ground. The second section of this act also contains a special regulation applying to collectors of the customs, which is clearly intended to be permanent. It requires them to place money received on unascertained duties, or duties paid under protest, at once to the credit of the treasurer. The first words of the section are: "From and after the passage of this act all moneys paid to any collector," etc., words the meaning of which cannot be mistaken. But there are no words of the like import in the third section, and the omission of them undoubtedly favors the interpretation put upon it by the defendant's counsel. But then, though these are the formal words most usually employed to exclude a doubt whether the regulation was intended to be permanent or not, they may be supplied by other language clearly indicating the intention of the legislature. Now it is quite certain that this section must extend to matters beyond the appropriations contained in the act. It provides that no officer in any branch of the public service, or any other person whose salary and emoluments are fixed by law or legislation, shall receive any extra allowance or compensation in any form, unless it is authorized by law. Now this act embraces but part of the appropriations for the year, so that we are necessarily carried beyond the subject-matter of this act. It must extend itself over all the appropriations of the year at least; and though it may be said that this clause of the law does not necessarily look beyond the current year, yet the second clause of the section evidently does. That provides that no executive officer, other than heads of departments, shall apply, from the contingent fund of which they have the control, more than thirty dollars annually, to pay for newspapers and pamphlets. The word *annually* here is necessarily prospective, and extends the operation of this clause to future years. There are, in the first clause, no restrictive words confining it to the current year. If part of the section was intended to be permanent, it is quite natural to suppose the whole was. It would be very unusual to unite, in a single section of a law, one provision intended to be permanent, with another intended to be temporary, without clearly distinguishing the permanent from the temporary part. My opinion is that this section is a conclusive bar to the allowance of the commissions claimed on the disbursements in question; and whatever we may think of the equity of the claim, it is not for the court or the jury to be wiser or more indulgent than the law.

This disposes of but part of the case. The other allowances claimed involve questions of much more delicacy and difficulty. The defendant claims an allowance of \$26.29, for office rent for the three remaining days of the quarter ending October 1, and also for rent for the quarter following. These two claims stand on the same ground, and may be considered together. An office or place of business was necessary for the discharge of the duties of the agency, and the rent had been charged and allowed, at the same rate, in previous quarters. It is admitted that it was hired and used by the defendant for the purpose of the agency and for no other, he not being engaged in any other business that required his having an office. It was hired on a parol lease; and, not having given reasonable notice of his intention to

quit before the termination of the quarter, by the law of Massachusetts he became bound for another quarter's rent. Mass. Rev. Stat., part 2, tit. 1, c. 60, § 26. The ground of the claim is this: that, having been dismissed from office when it was too late to give the notice required by law, and having himself no previous notice that he was to be suspended, this is a loss which he incurred without fault on his part, in the business of the plaintiffs, for which they were bound to indemnify him. The answer is that he held his appointment at the mere will of the president, and, being liable to be removed at any time without notice, he might have provided for the contingency in his contract.

If this was a question between two individuals, and not between an individual and the government, I cannot say that I should feel much difficulty in arriving at a conclusion satisfactory to my own mind. It was necessary, in the transaction of the affairs of the agency, that the defendant should have a place of business where he might be found in business hours. It was engaged on a parol lease, and by law he was bound to give reasonable notice of his intention to quit, or he became bound for another quarter's rent. He had held the agency for *three* years and a half, and the term for which he was appointed would not expire by its own limitation for six months. No complaint had been made against him, and he had no reason to suppose that he would be superseded before the expiration of that time. If he had engaged his office in the usual course of business, and there was nothing unreasonable in the terms on which it was engaged, considering the tenure on which he held the appointment, the principal would be liable for the loss. The question for the jury would be, whether an agent holding an appointment of so much importance, though the agency was revocable at will, should be expected to engage his office rooms on a tenancy from day to day, or week to week. If the jury should think that he acted prudently and in good faith, with a just regard to the interest of his principal, then I should say that in law he was justly entitled to look to his principal for an indemnity for a liability fairly incurred in the prudent prosecution of his proper business.

§ 94. *Revocation of power of an agent. Under what circumstances the principal is bound to indemnify him against loss on contracts entered into during his agency.*

It is true that, when a man appoints an agent or mandatary without limitation of time, he may always revoke the appointment at will. A person may enter into many other engagements liable to be dissolved at will, but which, where other persons have fairly and in the usual course of business acquired an interest under them, the law will prevent him from dissolving them at an unreasonable time; or if it does not absolutely prevent the act, will hold him to indemnify those who may suffer an injury from it. This is a general rule of justice and equity, which is found in every system of refined and cultivated jurisprudence. The engagements may be terminated at will, but then this will must be exercised reasonably, and not in mere wantonness or malice. An illustration of the principle may be drawn from the contract of partnership. When entered into without any limitation of time, it may always be dissolved at the will of any of the parties. In that highly cultivated system of jurisprudence which forms the basis of the law of the whole continent of Europe, the Roman law, the renunciation of the partnership by one of the parties, to be valid, must be made in good faith, and not at an unreasonable time, to the injury of the common interest; for it is not, says the law, the private interest of the

individual partner, but the common interest of the partnership, that is regarded. This principle, so conformable to natural equity, to good faith and fair dealing, was adopted from the Roman law by the ancient jurisprudence, and is confirmed by the new civil code of France. Pothier, *Contrat de Societ *, No. 150, 151; *Code Civil Francais*, No. 1869, 70. And though no such restriction is perhaps established in the common law, yet it seems that a court of equity will interpose and restrain a partner from wantonly and maliciously putting an end to the engagement, to the injury of the common interest. Story on Partnership, § 275, note.

But the case of a parol lease at will, which arises in the present case, is one which perhaps still more clearly shows that, when it is said that an engagement is liable to be terminated by either party, it is, in the sense of the law, a will under the control of reason and justice. Though it is said to be a contract merely at will, yet, independent of every statute regulation at the common law, the lessor cannot, without notice, eject the tenant and turn him into the street, nor can the tenant discharge himself from the liability to pay rent without giving the landlord reasonable notice, to enable him to find another tenant. 4 Kent's Com., 111. These restrictions on the capricious and wanton exercise of the will, where the interests of other persons are affected, have their foundation in a rule of universal equity and justice, arising from the social nature of men, that a man shall so use his own rights as not to injure another. *Sic utere tuo ut alienum non l das*.

This reasonable and equitable principle has also its application in the law of agency. There is no doubt, as a general rule, that the appointment of an agent may at any time be revoked by the principal without giving a reason for it, because it is the right of every man to employ such agents as he sees fit. The agent also has the same general right to renounce the agency at his own will; for it is an engagement at the will of both parties. But the contract of agency, or mandate, involves mutual obligations between the parties; and these commence, if not as soon as the appointment is made, at least as soon as the agent or mandatary commences the execution of the agency. If he has entered on the business, even if he does not accomplish prosperously what he has undertaken, he will be entitled, from his principal, to an indemnity for his expenses and services, if the failure does not arise from his own fault. Domat, *Lois Civiles*, liv. 1, tit. 15, § 2, No. 1, 2. After he has engaged in the business of the agency, the principal may at any time revoke his powers and dismiss him from his service. But if his power is thus revoked, the principal will be responsible to him for any engagements he may have entered into, and any liabilities he may have incurred in good faith, in the proper business of the agency, before he had notice of the revocation. Domat, *Lois Civiles*, liv. 1, tit. 15, § 4, No. 1.

§ 95. *Liability of agent, who renounces his agency without proper notice, for losses resulting therefrom.*

And so the agent, after entering on the business, may renounce the agency. But then this must be done in good faith, and be preceded by reasonable notice, or the agent will be liable to the principal for any loss that may result to him from this cause. The agent cannot withdraw himself from his engagement wantonly and without reasonable cause, without rendering himself responsible for the consequences. Domat, No. 3, 4; Pothier, *Mandat*, No. 44; Dig., 17, 1, 22, § 11; Dig., 17, 1, 27, § 2. And when a man has undertaken an agency, he will not merely render himself liable for damages to his principal,

if he renounces the agency without notice and without just cause, but a court of equity will go further. If an agent is employed to make a purchase, and, finding the speculation likely to prove profitable, he renounces the agency and purchases for himself, equity will hold him a trustee for the principal, and give him the benefit of the purchase directly, without putting him to an action for damages. 1 Story's Equity, § 316.

It may be true that in our jurisprudence a precise authority may not be found for all these propositions among the adjudged cases. But they rest on such clear grounds of justice and good faith, that they may be well taken for granted without the authority of a direct decision (Story's Agency, § 467), and they all stand approved by the authorities of the Roman law. They all flow from a great principle of social justice. A man cannot, wantonly and without reasonable cause, retract or annul his own acts and change his purpose, when others, in the ordinary course of business and in good faith, have acquired an interest in them, to the injury of such persons, without rendering himself liable to repair such injury. The greatest of the Roman juriconsults reduced the rule to a short and pithy maxim: No man can change his will to the injury of another. Dig., 50, 17, 75. *Nemo potest mutari consilium suum in alterius injuriam*. It is applied in some cases where no previous engagements exist between the parties, but its application is peculiarly stringent when mutual obligations by contract do exist. If I agree with a mechanic, says Pothier, to build me a house, and after the agreement I change my purpose and determine not to build, I may dissolve the engagement by giving him notice of the change of my will; but if before the notice he has purchased materials for the work and engaged workmen, I shall be bound to indemnify him for the loss he sustains by the change of my purpose. Contrat de Louage, No. 440; Duvergier, Droit Civil Francais, vol. 19, § 370. If this was a case between two private persons, the case put by Pothier would differ in no essential particulars from the present. Both are contracts of hiring; for the contract with a salaried agent or mandatary is essentially a contract of hiring, though in some respects distinguishable from the common contract for the hire of labor. Duvergier, Droit Civil, vol. 19, tit. 8, ch. 3. The defendant was a salaried agent, and he had, for the sole purpose of the agency and for the sole benefit of his principal, hired an office. He held, as all agents do, the appointment at the will of the principal, and he is dismissed without notice, while under this liability for rent. If the engagement of his office was, as to the terms, reasonable and proper and in good faith, under the circumstances, the justice of the case appears to me so clear, that the very statement of the facts carries with it the answer, and that conforms to the well established principles of law.

The other charge, for clerk hire, does not appear to me to be distinguishable in principle from the rent. It is admitted that in the business of the agency a clerk was indispensable, and he had been allowed, as all officers of this description are, a reasonable sum for clerk hire. The amount claimed is the same as had been allowed and paid in previous quarters. The clerk was engaged for a year, terminating with the expiration of the term of the defendant's appointment; and, in strict law, he might perhaps have recovered his salary for the whole of the unexpired year. 2 Smith's Lead. Cas., Am. ed., p. 25. The defendant compromised the claim by paying one quarter's salary. Is the defendant, who has been compelled to pay this sum for a liability incurred in the business of the plaintiffs, entitled to be indemnified by his principal? If

the contract with the clerk were a reasonable and proper one under the circumstances of the case, the decision referred to, from Pothier, shows how it would be decided in a controversy between individuals. And whether the contract was, as to the period for which he was engaged, reasonable and proper, would be a question for the jury. If the duties of the clerk were such as might be safely intrusted to any ordinary person, it might be questionable whether the defendant, knowing the tenure of his own office, would be justified in contracting with him for a year. But it is to be remembered that the agency of the defendant involved great responsibilities, he having contracts and disbursements to make to the amount of several hundred thousand dollars a year, and in the transaction he required a clerk in whom he could place the most unreserved confidence. It is hardly to be expected that a person of such qualifications would be willing to engage his services on the same terms as a common day laborer. One who is fit to be trusted can usually engage on terms of more permanency; and one who would be willing to engage on such precarious conditions, as to be dismissed at any time without notice, the defendant might not be willing to trust to such an extent, that, if he proved unfaithful, he might himself be involved in ruin. Both his own safety and the interest of his principal would require him to act with more circumspection. When the defendant engaged his clerk, a year of the term for which he was appointed remained, and he had no reason to expect that he would be dismissed before that term expired. If in your opinion the contract with the clerk was, under the circumstances, reasonable and proper, and was a liability incurred in good faith, in the prudent transaction of the business of the agency, on the principles of law and equity he is entitled to an indemnity.

§ 96. *The principles of natural justice controlling the relation of principal and agent between private persons also regulate those of the government and its officers.*

It will be observed that I have treated this case thus far as though it was a controversy between two private individuals; and have stated what appear to me to be the just conclusions of law. Are there any reasons of general justice or public policy, why the same principles should not be applied to these contracts between the government and an individual? After having reflected considerably on the subject, I feel bound to say that none have occurred to me. I know that it appears to be the fixed policy of the country, to hold the tenure of all appointments of this description to be at the will of the president. So also appointments of the same character between private individuals are liable to be revoked at will, and there are very satisfactory reasons why they should be so. But between individuals we have seen that, to a certain extent, this will is regulated and controlled by the principles of equity, good faith and fair dealing. If any just cause for the revocation of an agency arises out of the conduct of the agent, his powers may be revoked by the principal without subjecting himself to any of the responsibilities which have been mentioned. The agent must bear the consequences of his own misconduct or imprudence. But while he is, in good faith, prudently engaged in the business of the agency, if his authority is revoked suddenly and without notice, and he thereby suffers loss, the principles both of law and justice require the principal to indemnify him. Why should not the same measures of justice apply between the government and an individual?

If there are no grounds of justice to vary the decision, then I think there are reasons of public policy for holding that the same principles of law apply

to one case as to the other. If the tenure of the appointment is merely at will, it is to be remembered that it is equally at the will of both parties. If the principal may revoke the agency without notice, and leave the agent to meet all the liabilities which he has incurred in the prosecution of the business of the agency, then the agent may renounce the agency without notice, and leave all the inconvenience to fall on the principal. I may have taken a very incorrect view of this subject, and, if so, I am happy that my error may be so easily corrected, but it appears to me that one can hardly overstate the public mischiefs that might arise from the establishment of such a doctrine. All the most important officers of the government hold their employments by this tenure. If they may, at any time, renounce and abandon the public business intrusted to them, with impunity, without first giving reasonable notice to the appointing power of their intention, so as to enable the government to supply their places, it is easy to see that inconveniences of the gravest nature might arise. Take a single branch of the public service, the collection of the revenue. Every officer, from the highest to the lowest, holds his office at will. Suppose the principal revenue officers of one of our large ports should at once come to the determination of abandoning their offices, and send by the mail notices of their resignation when there were cargoes in port, duties on which, to a large amount, would be due. In some ports it is not uncommon for duties to accrue to the amount of half a million, by the arrivals of a single day. There would be nothing to prevent all the goods from being smuggled ashore before the president could replace the officers by new appointments. If it be said that this is putting an improbable case, it at least fairly tries the principle, and it must be allowed to be a possible case. If the law be as I suppose it to be, and the same measure of justice and the rules of good faith and fair dealing hold between the government and an individual in public agencies, as do between individuals in private agencies, then the officer, before renouncing his trust, is bound to give reasonable notice to the government, that the appointing power may have time to put another in his place; and if he abandons it without giving such notice, whether it is done corruptly and in bad faith, or in mere wantonness and caprice, he is legally bound to indemnify the government for all the loss that may be thereby sustained.

On the whole, the view that I have of the law is this: The principal may at any time revoke and withdraw the power of an agent at his pleasure, and without notice. This is a right that is fully reserved to him by the law. But if the agent has entered on the business of the agency, and has fairly, in the ordinary course of business, and in good faith, entered into any engagements, or come under any liabilities, in the prosecution of the proper business of the principal, before notice of the revocation of agency, the principal will be bound to indemnify him, unless the agent had given just cause for such revocation. In the same manner the agent may at any time renounce the agency, but then he is bound to give the principal reasonable notice of his intention beforehand, to enable him to procure another agent; and if he does not, he will be bound to indemnify the principal for any loss he may sustain. And the same principles hold whether the government and an individual are parties, or both parties are private persons.

If the law be as it has been stated, the determination of this cause depends on a question of fact, which properly belongs to the jury to decide. If the jury are of the opinion that the defendant, in engaging his office and his clerk

on the terms he did, acted in good faith according to the usual course of business, and that the conditions, as to the time on which they were made, were reasonable and proper, and such as a faithful and prudent agent would make, acting for the benefit and interest of his principal, the jury ought to find for the defendant. They were liabilities incurred solely in the business of the plaintiffs and for their benefit, from which the defendant himself derived no advantage, and for which the plaintiffs are bound to indemnify him. The defendant having actually paid these sums, under the statute of the United States of March 3, 1797, chapter 74, they constitute an equitable set-off against the plaintiffs' demand. But if, under the circumstances of this case, the defendant having been appointed to his agency for four years, of which six months remained, but liable to be removed at any time at will before the expiration of the four years, the jury are of opinion that he ought, as a prudent agent, to have engaged his office, and also his clerk, from day to day, or from week to week, or what would come to the same thing, merely at will, with the liberty of surrendering the office and of discharging his clerk at any time, without notice, and consequently liable at any time to be turned out of his office, and to be left by his clerk, without notice, then you will find your verdict for the United States for the amount of these items, with interest from the time when they should have been paid.

MERRIAM v. CLINCH.

(Circuit Court for New York: 6 Blatchford, 5-14. 1867.)

STATEMENT OF FACTS.—King was collector of the port of New York, and appointed Clinch his special deputy, under section 22 of the act of March 2, 1799. King died in November, 1865, and until May, 1866, Clinch acted as collector. This suit was brought by the administrator of King to recover of Clinch the emoluments accruing to the collector during the period that Clinch acted as collector.

§ 97. *Under the act of 1799, section 22, a collector of customs receives the emoluments accruing from duties performed by his special deputy during the principal's occasional sickness or absence. If the principal dies or is disabled, neither he nor his estate is entitled to those emoluments.*

Opinion by BLATCHFORD, J.

The question involved in this case arises under the twenty-second section of the act of March 2, 1799 (1 U. S. Stat. at Large, 644). That section provides that "every collector, . . . in cases of occasional and necessary absence and of sickness, and not otherwise, may . . . exercise and perform" his "functions, powers and duties by deputy, duly constituted" under his hand and seal, "for whom, in the execution of his trust," he "shall be answerable;" and "that, in case of the disability or death of a collector, the duties and authorities vested in him shall devolve on his deputy, if any there be, at the time of such disability or death, for whose conduct the estate of such disabled or deceased collector shall be liable." The section provides for two classes of cases in which the collector is unable to discharge himself the duties of his office. The first class is where the collector is necessarily occasionally absent, or is sick. The second class is where the collector is disabled or dead. In the first class of cases the collector does not cease to exercise or perform the functions, powers or duties of his office. On the contrary, by the express language of the section, he continues to exercise and perform such functions;

powers and duties, but he exercises and performs them by his deputy. Such deputy must be duly constituted such deputy under the hand and seal of the collector, and the collector is made answerable for the execution by such deputy of his trust. In the second class of cases, that is, the disability or death of the collector, the duties and authorities vested in him devolve on his deputy, if there be one at the time of such disability or death, that is, on the deputy whom the section thus authorizes him to constitute; and the estate of such disabled or deceased collector is made liable for the conduct of such deputy. In the second class of cases, if there be a deputy, the collector does not continue to exercise and perform the functions, powers and duties of the office by the deputy, but the duties and authorities before vested in the collector devolve on the deputy; and in such second class of cases, if there be no deputy, then, by a provision in the same section, the duties and authorities before vested in the collector devolve on the naval officer of the same district, if any there be, and, if there be no naval officer, then on the surveyor of the port, if any there be, and if there be none, then on the surveyor of the nearest port in the district. The section also provides that the authorities of the person empowered to act in the stead of a disabled or dead collector shall continue until a successor to such collector shall be duly appointed and ready to enter upon the execution of his office. If, under this section, there is no person empowered to act in the stead of the disabled or dead collector, then the duties and authorities before vested in the collector do not devolve on any one.

Now, where a deputy constituted under this law acts for the collector in cases of occasional and necessary absence and of sickness, the collector still acts, but acts by the deputy, and is entitled to all the perquisites and emoluments of the office, as fully, while so acting by deputy, as if he did not so act by deputy. But, when the collector is disabled or dies, then the duties and authorities vested in him devolve on the deputy thus constituted. The collector in such case, whether he be disabled or dead, does not exercise or perform his functions, powers and duties by such deputy, nor does he act by such deputy, nor is he entitled to the perquisites and emoluments of the office, which he would have been entitled to, if he had not become disabled or had not died. The duties and authorities of the office devolve on such deputy, if there be one, and, if there be none, then on the other officers successively who are designated in the section. The word "authorities" is broad enough to include the emoluments of the office. The "duties" of the office include the obligations which the officer owes to superior authority and to the public. The "authorities" of the office are the powers and prerogatives with which the office is clothed, connected with the discharge of his duties, including not only such powers as are necessary to enable him to discharge his duties properly, but the right and the power to demand and receive the emoluments attached by law to the office.

§ 98. *Analogy of the offices of president and vice-president to those of collector and special deputy.*

These views accord with settled principles. The constitution of the United States (art. 2, sec. 6) provides that "in case of the removal of the president from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president." The provision, in this section of the constitution, that the powers and duties of the office of president shall devolve on the vice-president, is identical, in legal effect, with the provision, in the twenty-second section of the act of 1799, that the authorities and duties vested in the collector shall devolve on his deputy.

Three times, since the adoption of the constitution, the president has died, and under the provision referred to, the powers and duties of the office of president have devolved upon the vice-president. All branches of the government have, under such circumstances, recognized the vice-president as holding the office of president, as authorized to assume its title, and as entitled to its emoluments. The vice-president holds the office of president until a successor to the deceased president comes to assume the office, at the expiration of the term for which the deceased president and the vice-president were elected. The deputy, under section 2 of the act of 1799, holds the office of collector until a successor to the disabled or deceased collector is duly appointed and ready to enter upon the execution of his office. It has never been supposed that, under the provision of the constitution, the vice-president, in acting as president, acted as the servant or agent or *locum tenens* of the deceased president, or in any other capacity than as holding the office of president fully, for the time being, by virtue of express authority emanating from the United States. So, in the case of the collector, the deputy, in acting as collector after the death of the collector who constituted him such deputy, does not act as the servant or agent of the deceased collector, but holds the office of collector fully, for the time being, by virtue of express authority emanating from the United States. The fact that, in the one case, the constitution itself designates the person on whom the powers and duties of the office shall devolve, and that, in the other case, the collector is authorized, before his decease, to designate such person, makes no difference in the principle. The person so legally designated becomes, when he assumes the powers and duties so devolved upon him, the direct agent of the government, and not the agent or servant of any individual who may have designated him.

§ 99. *No person is entitled to the emoluments of an office after he has ceased to hold it.*

It is also a well established principle that no officer is entitled to the emoluments of an office for any longer period than the period during which he holds the office. And the legislation of congress is to this effect. The purport of the statutory provisions on the subject of the compensation of public officers (act of March 3, 1839, § 3, 5 U. S. Stat. at Large, 349; act of August 23, 1843, § 2, id., 510; act of August 26, 1842, § 12, id., 525; act of September 30, 1850, § 1, 9 id., 542, 543) is, that no person is entitled to receive the emoluments of an office which he does not hold. Opinion of Attorney-General Crittenden, 5 Op. Att'y Gen'l, 768.

In the present case, Mr. King, by his death, ceased to hold the office of collector; and not only so, but the duties and authorities before that time vested in him, then devolved on the defendant, because the defendant had, during the life-time of Mr. King, been duly constituted by him his deputy, in accordance with the provisions of the twenty-second section of the act of 1799. The designation of the defendant as deputy, made by Mr. King, was made strictly in accordance with those provisions. The instrument refers to the section, and then states that Mr. King constitutes and appoints the defendant special deputy collector of the customs, within the district of the city of New York, to act for him during his absence or sickness, and then adds, "and, in case of my disability or death, the duties and authorities vested in me as collector will, by law, devolve on you, my special deputy."

I am unable to see any ground upon which the right of Mr. King to the emoluments of the office of collector, after his death, can rest. It is urged

that the provision of the section in question, which declares that the estate of the deceased collector shall be liable for the conduct of the deputy, gives to the estate of the deceased collector a title to the emoluments of the office during its administration by the deputy. Indeed, the claim of the plaintiff seems to be put wholly on that provision; and the idea that the defendant, in administering the office, under his appointment as such deputy, acted as the servant or agent of Mr. King, and not as a direct agent of the government, can rest on nothing but that provision. But that provision cannot have the effect claimed for it. Under that clause of the twenty-second section which relates to the absence and sickness of the collector, he is entitled to the emoluments of his office while he is so absent or sick, and yet he is expressly, by the section, made answerable for the execution of the trust of his deputy during such absence or sickness. But he is entitled to such emoluments in that case, not because he is answerable for the acts of his deputy during such absence or sickness, but because he himself, by the very terms of the act, still exercises and performs the functions, powers and duties of the office, although he does so by deputy. Under that clause of the same section which relates to the disability and death of the collector, he is not entitled to the emoluments of the office, after he dies, although his estate is, by the section, expressly made liable for the conduct of the deputy whom he designates. The reason why he is not entitled to such emoluments in that case is because he ceases, by his death, to hold the office, and to exercise or perform its functions, powers and duties. The liability of his estate for the conduct of the deputy, after his death, is a special liability, attached by law, as a condition. No person is bound to accept the office of collector, but, if he does, he takes it subject to the burdens which the law imposes on the holding of it. Nor, after he takes it, is he compelled to appoint a deputy, under section 22 of the act of 1799. The provision is permissive only. But, if he avails himself of it, and appoints a deputy, with the incidental advantage to himself of being able, under the section, to perform, by deputy, while occasionally and necessarily absent or sick, the duties of the office, and thus enjoy, while so absent or sick, its emoluments, he makes such appointment of a deputy subject to the condition imposed by the statute, that, on his own death, the duties and authorities of the office devolve on such deputy, and his own estate becomes liable, after his death, for the conduct of such deputy, while administering the office. Under the section but one appointment of a deputy, for any purpose, can be in force at any one time. The same person, when designated, is to act in the cases of absence, sickness, disability and death; and the collector, in availing himself of the privilege of performing the duties of his office, during his life-time, while absent or sick, by such deputy, must take on himself all the liabilities which the designation of such deputy imposes. And there is nothing unreasonable in making the estate of the deceased collector liable for the conduct of the deputy, or in withholding from it, notwithstanding such liability, the emoluments of the office during the term of such liability. The liability is imposed because the collector has the sole and unrestricted designation of the deputy. No superior officer of the government has any voice in approving or disapproving, confirming or rejecting, such appointment. Hence, the manifest propriety of holding the estate of the deceased collector liable for the conduct of the deputy after the death of the collector, so long as such deputy continues to act as the agent of the government under a designation made by the deceased collector.

§ 100. *The right to the salary of an office grows out of the duties of that office; no person is entitled to the salary who does not discharge the duties.*

But there would be no propriety in giving to the estate of the deceased collector the emoluments of the office during such period. The right to the compensation attached to an office grows out of the discharge of the duties of such office, and its emoluments do not belong to a person who does not discharge its duties. *Conner v. The Mayor, etc., of New York*, 1 Seld., 296.

I do not think that the fact that the defendant has, with or without the assent of the government, continued to receive, during the period in question, the salary appertaining to the office of assistant collector of the customs at the port of New York, has any bearing upon the question of the right of Mr. King's estate to the emoluments of the office of collector during that period.

In passing on the question involved, I only decide that Mr. King's estate is not entitled to those emoluments. I do not mean to decide that the defendant is entitled to retain them. Whether there is anything in the fact that the defendant accepted the salary of assistant collector, that precludes him from claiming the emoluments of the office of collector during the same period; or whether there was such an incompatibility between his acting as collector and his being assistant collector, as to make it impossible for him to hold both offices, and to authorize the government to call upon him to elect which office he would hold, and whether he has, in fact, made such election in favor of the assistant collectorship; or whether, under the general rule and practice, that, where an officer holding one office is authorized to perform the duties of another, he may receive the emoluments of the office which he is thus temporarily filling, but cannot receive his own at the same time, the defendant may have the emoluments of the collectorship on relinquishing those of the assistant collectorship; or whether, if he would be otherwise entitled to the emoluments of the office of collector, he is not entitled to them because of his not having taken, on the death of Mr. King, the oath required by the fourth section of the act of June 1, 1789 (1 U. S. Stat. at Large, 23), or the oath required by the twentieth section of the act of March 2, 1799 (*id.*, 641); or whether, as to so much of such emoluments as consists of fines, penalties, and forfeitures, the naval officer of the district and the surveyor of the port are, under section 91 of the same act (*id.*, 697), entitled to what would have been Mr. King's share of the same if he had lived, on the ground that, within the meaning of that section, there was no collector in the district, until such a successor to Mr. King as the twenty-second section of that act speaks of, was duly appointed,—are questions not involved in this case, and in regard to which I neither express nor intimate any opinion.

The bill must be dismissed, with costs.

§ 101. *In general.*—A navy agent appointed to a position abroad cannot charge the government for his board and compensation for his time after notice of the revocation of his appointment, nor for his passage home, nor for his trip to Washington to settle his accounts. *Armstrong v. United States*, Gilp., 399.

§ 102. The president removed the secretary of the territory of Minnesota in October, but he continued to perform the duties of the office till the 14th of November following. *Held*, that the secretary was entitled to his salary up to the 14th of November. *United States v. Smith*, 1 Bond, 68; 5 Am. L. Reg., 268.

§ 103. An officer of the United States, who is removed before the time for which he was appointed has expired, and who receives his salary quarterly, cannot claim his salary to the end of the quarter when he was removed before that time, but only to the time of his actual continuance of the duties of the office. *Ibid.*

§ 104. By act of congress a receiver of public moneys was given a commission of one per cent. on moneys received, but not to exceed the sum of \$2,500 a year. *Held*, in a case in which a receiver resigned six months before the close of his four years' term of office, having received an amount which at the per cent. allowed gave him the sum of \$2,500, that he was entitled to the entire sum of \$2,500, and that the decision of the secretary of the treasury, allowing him but one-half that sum upon the theory of quarterly apportionment of the percentage, was erroneous. *United States v. McCarty*,* 1 McL., 306.

§ 105. A purser in the navy tendered his resignation, and was informed that it was to be considered accepted when his accounts should be settled. He performed no service, and was not called on to perform any, since his resignation was tendered. He never came forward to settle his accounts for about fourteen years. *Held*, that he was not entitled to pay as purser from the time his resignation was thus tendered and accepted. *Pay of a Purser*,* 1 Op. Att'y Gen'l, 846.

§ 106. The eighth section of the act of 1856 provides that a consul shall not be allowed compensation for the time occupied in coming home, "if he shall have resigned, or have been recalled therefrom for any malfeasance in his office." *Held*, that the words "malfeasance in his office" qualified the word "resigned" as well as "recalled;" and that if a consul resigned for any other reason than for "malfeasance in office," he was entitled to compensation for the time spent in coming home. *Compensation of Diplomatic and Consular Officers*,* 9 Op. Att'y Gen'l, 89.

§ 106a. Claimant, a lieutenant in the marine corps, was dismissed the service. Subsequently the order of dismissal was revoked and his resignation was accepted, but not until after the appointment of his successor by and with the consent of the senate. He immediately applied for his pay during the interval between his dismissal and reinstatement, and received, under his protest, half pay. He brought action for the balance. *Held*, that he was not entitled to recover; the order revoking his dismissal could not have the effect of restoring him to the service after the appointment of his successor, because such appointment filled the complement of such officers in the service; that he could only be restored to the service by appointment to fill a vacancy; that he had never been restored to the service, and that the payment to him of half pay was under a mistake of law, and the United States were entitled to recover it back. *McElrath v. United States*,* 12 Ct. Cl., 201.

§ 107. Pay during suspension.—An assistant quartermaster in the volunteer army was dismissed, by direction of the president, for being absent without proper leave. The order of dismissal was afterwards revoked, as made without cause and by mistake, and therefrom the assistant quartermaster served in the army till he resigned on account of disability incurred in the Red River campaign. *Held*, that he was entitled to his pay from the time of his dismissal till the revocation of the order, as well as for the time that he actually served in the army. *Smith v. United States*,* 2 Ct. Cl., 206.

§ 108. In the absence of established naval practice to the contrary, the appointment, by the government, of a passed midshipman, while under sentence of suspension on half pay, to the rank of lieutenant, is a pardon of the sentence, and he is entitled to the pay of a lieutenant from the date of his commission. *Effect of Promotion of a Passed Midshipman*,* 4 Op. Att'y Gen'l, 8.

§ 109. An officer, put out of the service, and subsequently restored to the rank he would have had if he had not been suspended, is entitled to pay from the time he was restored in fact, at the rate which he would have been entitled to had he not been suspended; but he is entitled to no pay during the time he was out of the service. *Salaries of Officers*,* 4 Op. Att'y Gen'l, 123.

§ 110. The reinstatement, by the president and senate, of an officer in the army who had been stricken from the rolls, is to be considered as an original appointment; and the pay of the officer commences from his acceptance of the office. *Commencement of Pay of a Reinstated Captain*,* 3 Op. Att'y Gen'l, 105.

§ 111. From the time of the dismissal from the service of a midshipman to the time of his new appointment, with rank from his former appointment, the person so dismissed and re-appointed has no connection with the public service, and is not entitled to compensation. *Compensation of a Reappointed Midshipman*,* 4 Op. Att'y Gen'l, 818.

III. EXTRA COMPENSATION.

SUMMARY—Officer employed by a department, § 112.—Disbursements, §§ 113, 115, 121, 123.—No extra allowance for performing duties of office, § 114.—Authority vested in secretary of treasury not subject to review, § 116.—Powers of heads of departments, § 117.—Additional compensation to certain employees, §§ 118-120.—Navy pension agent, §§ 121, 122.

§ 112. Where an officer is employed by a department of the government to perform extra service, he may be suitably compensated therefor, unless there is some law positively prohibiting the same. *Gratiot v. United States*, §§ 123-28.

§ 113. Where a claim was made by an officer under the sixty-seventh article of the regulations of 1821 and 1825, for an allowance at the rate of \$2 *per diem* for certain disbursements made in the construction of fortifications, it was held that the *per diem* allowance is cumulative, i. e., a distinct allowance for every fortification for which there is a distinct and independent appropriation, of which separate accounts are required to be kept, and the disbursements are confided to one and the same engineer. *Ibid.*

§ 114. No allowance can be made for services which an officer was bound to perform as a part of his official duty. *Ibid.*

§ 115. Section 18 of the act of May 7, 1822, provides that "no collector . . . shall ever receive more than \$400, annually, exclusive of his compensation, . . . for any services he may perform for the United States in any other office or capacity;" hence, when A., a collector, claimed two and a half per cent. on some disbursements he had made in another capacity than collector, he was held not to be entitled to the same. *United States v. Shoemaker*. § 129.

§ 116. The authority vested by law (13 Stat., 232) in the secretary of the treasury to make further allowances as may seem reasonable to him, to certain officers, is entirely discretionary with him as to time and amount, and no appeal lies from his decision, either to the accounting officers of the treasury or to the courts. *Hall v. United States*, §§ 130-32.

§ 117. Compensation for extra services, where no certain sum is fixed by law, cannot be allowed by the head of a department to any officer who has by law a fixed or certain compensation for his services in the office he holds, unless such head of department is thereto authorized by congress, or unless it appears that such head of department was authorized by congress to appoint an agent to perform such extra services, that the compensation therefor was fixed by law, and the money for its payment for such purpose appropriated by congress, and that the said services related to matters wholly outside of said agent's office. *Ibid.*

§ 118. The deputy clerk of the clerk of the supreme court of the District of Columbia, who is appointed by said clerk of said court and serves in accordance with a contract made with said clerk, is said clerk's employee, not the government's, and cannot claim the benefit of a statute allowing additional compensation to certain employees of the government. *United States v. Meigs*, § 133.

§ 119. The clerks of courts belong to the judicial department and cannot claim the benefit of an act allowing extra pay to certain employees of the executive departments. *Ibid.*

§ 120. The government printing office is not a bureau of any executive department, and its employees are not entitled to the additional pay provided for by the act of February 28, 1867. *United States v. Allison*, § 134.

§ 121. The office of navy pension agent, held by one appointed to perform its duties by the secretary of the navy, under authority of the act of June 26, 1812, creating a fund for the payment of pensions to certain seamen, and the support of their widows and orphans, and constituting the treasurer trustee thereof, is not an office so separate and distinct from the office of navy agent as to justify a claim for extra official services legally imposed, by one who filled the offices of navy agent and navy pension agent; and such a claim falls within the prohibition of the acts of March 3, 1839, and August 23, 1842. *Browne v. United States*, §§ 135-37.

§ 122. A navy agent is not entitled to extra compensation for disbursing moneys in the character of navy pension agent, it not being shown that the office of navy pension agent, even if distinct and separate, had a compensation attached to its duties by law, nor that all the duties of the office had been performed by the claimant to entitle him to the compensation. *Ibid.*

[NOTES.—See §§ 138-243.]

GRATIOT v. UNITED STATES.

(15 Peters, 336-376. 1841.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is the case of a writ of error to the circuit court of the district of Missouri. The original action was *assumpsit*, brought by the

United States against General Gratiot, the plaintiff in error, as chief engineer, for \$50,000, alleged in the declaration to be money had and received by him as chief engineer, to the use of the United States. At the trial, the controversy turned mainly as to the merits of three items of set-off, or credit, which were claimed by the defendant in the reduction or extinguishment of the supposed debt due to the United States.

These items were as follows:

1. For disbursing \$808,727.42, on account of Fort Calhoun, from the 18th of November, 1821, to the 30th of September, 1829, being two thousand eight hundred and seventy-nine days, at \$2 per day, being less than two and a half per cent. on the amount disbursed, as allowed by the regulations of the army to an officer disbursing at a fortification..... \$5,758 00
2. For disbursing \$33,447.36, on account of contingencies of fortifications, at two and a half per cent., as authorized by the regulations above referred to..... 816 18
3. For extra services in conducting the affairs connected with the civil works of internal improvement carried on by the United States, and referred to the engineer department for execution, and which did not constitute any part of his duties as a military officer, from the 1st day of August, 1828, to the 6th day of December, 1838, inclusive, ten years and one hundred and twenty-eight days, at \$3,000 per annum..... 87,262 46

These items had all been disallowed by the treasury department for reasons stated by the proper accounting officers, and spread upon the record, and were insisted upon as just and proper allowances by the defendant.

The jury at the trial found a verdict for the United States, upon which judgment was entered; and from that judgment the present writ of error has been brought to this court. Four several bills of exceptions were taken at the trial on behalf of the defendant. The first was taken to the refusal of the court to allow any evidence to be given in support of either of these items of claim. The third was to a like refusal of the court to allow certain depositions and documents, offered by the defendant, to be given in evidence to prove that he had rendered services to the United States, over and above the ordinary and regular duties of his office, and the value of such services; and the established usage and practice of the government in allowing to engineers and other officers their claims for extra compensation for like services. The second and fourth exceptions proceeded upon minor points in the case. The second asked the instruction of the court that the United States were not entitled to recover for any public money received by the defendant in any other capacity or office than that of chief engineer; and that certain requisitions, stated in the exception, on account of Fort Grand Terre, and Fort Columbus, and Castle Williams, and the Fort at Throg's Neck, were not evidence of money had and received by the defendant to the use of the United States. The court refused these instructions, because there was no subject-matter growing out of the evidence for the United States to which the instructions could apply, if given, inasmuch as it appeared from the treasury transcript given in evidence, that the balance sued for was of sums placed in the hands of the defendant, as chief engineer, in 1835, to be expended on the works at Grand Terre; and, therefore, in effect, the money sued for was received by him in his capacity of engineer. We are of opinion that these instructions were rightly refused by the court, for the reasons given by the circuit court; and for the additional reason that the first was afterwards virtually given upon the prayer of the defendant on the fourth exception, so far as it was applicable to the case; and the second asked the opinion of the court upon a matter of fact proper for the cognizance of the jury.

§ 123. *The whole transcript of an account from the treasury department is competent evidence to charge a debtor to the government.*

The fourth exception, so far as it has not been already disposed of, asked the court to instruct the jury that the items charged against the defendant, as chief engineer, in the treasury transcript, marked A, which was given in evidence, consisting of certain balances charged in gross without the items going to show the said balances, were not competent evidence to charge the defendant in the action. This instruction the court refused to give, and, in our judgment, rightly; for, taking the whole transcript together, and examining its details as a mere matter of account, it is plain that all the items on which these balances are struck are there to be found regularly entered and brought forward. The supposed objection, then, which was stated by this court in the case of *The United States v. Jones*, 8 Pet., 375, 383, as to mere naked balances on the transcript, did not apply.

§ 124. *The United States have a right to set off a balance due by an officer against his pay and emoluments.*

There is another instruction asked under this exception, in a complicated form, but which mainly turns upon the consideration whether the treasury department had a right to deduct the pay and emoluments of the defendant, as a general of the army, and while he was chief engineer, by setting them off against the balance reported against him, on account of his superintendency of Forts Monroe and Calhoun. In our judgment, the point involves no serious difficulty. The United States possess the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.

§ 125. *An officer employed by a department of the government upon extra service may be suitably compensated, unless it is forbidden by positive law.*

Having disposed of these minor points, we now come to those arising under the first and third exceptions, and which constitute the only real difficulty in the case. The first exception under which the court excluded all evidence in support of the three terms of credit disallowed by the treasury department is certainly well founded, unless it is clear in point of law that neither of these items constituted a legal or equitable claim against the United States. It is wholly immaterial whether the claim be a legal or an equitable claim, as, in either view, under the act of 1797, chapter 74, as was decided by this court in the case of *The United States v. Wilkins*, 6 Wheat., 135, it constitutes a good ground of set-off or deduction. It is not sufficient to establish that these items ought to be rejected, that there is no positive law which expressly provides for or fixes such allowances. There are many authorities conferred on the different departments of the government, which, for their due execution, require services and duties to be performed which are not strictly appertaining to or devolved upon any particular officers, or which require agencies of a special discretionary nature. In such cases, the department charged with the execution of the particular authority, business, or duty, has always been deemed, incidentally, to possess the right to employ the proper persons to perform the same, as the appropriate means to carry into effect the required end; and also the right, when the service or duty is an extra service of duty, to allow

the persons so employed a suitable compensation. This doctrine is not new in this court, but it was fully expounded in the cases of *The United States v. M'Daniel*, 7 Pet., 1; *The United States v. Ripley*, 7 Pet., 18; and *The United States v. Fillebrown*, 7 Pet., 28.

To sustain the refusal of the court in the present case, it is therefore indispensable to show that there is some law which positively prohibits, or by just implication denies, any allowance of the disputed items, or of any part thereof. We know of no law which has such an effect, or which contains any such prohibition or denial. It is true that the act of the 16th of March, 1802, chapter 9, which provided for the organization and establishment of the corps of engineers, in one of its sections (§ 27, 2 Stats. at Large, 137), declares: "That the said corps, when so organized, shall be stationed at West Point, in the state of New York, and shall constitute a military academy; and the engineers, assistant engineers, and cadets, of the said corps, shall be subject at all times to do duty in such places and on such service as the president of the United States shall direct." But, however broad this enactment is in its language, it never has been supposed to authorize the president to employ the corps of engineers upon any other duty except such as belongs either to military engineering or to civil engineering. It is apparent, also, from the whole history of the legislation of congress on this subject, that, for many years after the enactment, works of internal improvement and mere civil engineering were not, ordinarily, devolved upon the corps of engineers.

§ 126. *The president can detach officers for special service and allow extra pay therefor.*

But, assuming the president possessed the fullest power, under this enactment, from time to time to employ any officers of the corps in the business of civil engineering, still, it must be obvious that, as their pay and emoluments were or would be regulated with reference to their ordinary military and other duties, the power of the president to detach them upon other civil services would not preclude him from contracting to allow such detached officers a proper compensation for any extra services. Such a contract may not only be established by proof of some positive regulation, but may also be inferred from the known practice and usage of the war department in similar cases, acting in obedience to the presumed orders of the president. Now it is perfectly consistent with the record in this case, that the defendant might have offered direct or presumptive evidence of such a contract, either express or implied, from the practice and usage of the war department, applicable to the very services stated in some, at least, of the disallowed items. We do not say that he could, in point of fact, have established any such contract, or any legal or equitable right to such allowances. That is a point on which we have no right to pass judgment, since he was stopped from offering any proof whatsoever at the very threshold of the inquiry. In short, unless some law could be shown establishing clearly and unequivocally the illegality of each of these items, which, as we have said, has not been shown, the refusal of the court to admit the evidence cannot be supported; and we are, therefore, of opinion that this exception was well taken, and that there was error in the refusal of the circuit court.

The third exception opens this matter still more fully and exactly, for there the defendant offered certain depositions and documents as proofs to establish that he had rendered services over and above the regular duties of his office, and the value of such extra services, and the established usage and prac-

tice of the government in allowing to engineers and other officers their claims for extra compensation for the like services. This evidence the court also rejected, as the record asserts, as incompetent and irrelevant; but, undoubtedly, upon the more broad ground on which the evidence offered under the first exception was rejected, that the claims had no just foundation in law. That the evidence so offered would, in point of fact, have maintained the asserted statements we have no right, absolutely, to affirm. That it was competent and relevant for the purpose for which it was offered, and proper for the consideration of the jury, as conducing to the establishment of the facts, has not been denied at the argument, and, indeed, seems not to admit of any well-founded doubt. A very elaborate examination and analysis of this evidence, and of its supposed bearing and agency on the merits of each of the claims, has been gone into at the bar; but in the view which we take of the case it is matter of fact belonging, in a great measure, if not altogether, to the consideration of the jury, and with which, as a court of error, we are not at liberty to intermeddle. Without, therefore, taking up more time upon this point, it is only necessary for us to say that, for the reasons already stated, we are of opinion there was error also in the circuit court in excluding the depositions and documents so offered, from the jury.

But as the merits of these claims have been fully argued before us, upon several points of law, as well as upon certain admitted conclusions of fact, as if the evidence had been admitted, and both parties desire our opinion in respect to the matters of law connected with these facts, we have deemed it right, for the purpose of bringing this protracted controversy within narrower limits, upon the new trial in the circuit court, to state some of the views now entertained by the court upon these points.

I. As to the first item. It purports to be founded on certain regulations of the army, which are spread upon the record, and which received the sanction of the president in 1821 and 1825. The sixty-seventh article of the regulations of 1821 provides as follows:

1. "The chief of the corps of engineers shall be stationed at the seat of government, and shall be charged with the superintendence of the corps of engineers to which that of the topographical engineers is attached; he shall also be inspector of the military academy, and be charged with its correspondence.

2. "The duties of the engineer department will comprise the construction and repairs of fortifications, and a general superintendence and inspection of the same, military reconnoitings, embracing general surveys and examinations of particular sites for fortifications, and the formation of plans and estimates in detail for fortifications for the defense of the same, with such descriptive and military memoirs as may be necessary to establish the importance and capabilities of the position intended to be occupied; the general direction of the disbursements on fortifications, including purchases of sites and materials, hiring workmen, purchases of books, maps and instruments, and contracts for the supplies of materials, and for workmanship.

14. "Where there is no agent for fortifications, the superintending officer shall perform the duties of agent, and while performing such duties, the rules and regulations for the government of the agents shall be applicable to him; and as a compensation for the performance of that extra duty, he will be allowed, for moneys expended by him in the construction of fortifications, at the rate of \$2 per diem, during the continuance of such disbursements; provided

the whole amount of emoluments shall not exceed two and a half per cent. on the sum expended."

The sixty-seventh article of the regulations of 1825 provides as follows:

888. "The duties of the engineer department comprise reconnoitring and surveying for military purposes, and for internal improvements, together with the collection and preservation of topographical and geographical memoirs, and drawings referring to those objects; the selection of sites, the formation of plans and estimates, the construction, repair and inspection of fortifications, and the disbursements of the sums appropriated for the fulfillment of those objects severally, comprising those of the military academy; also the superintendence of the execution of the acts of congress, in relation to internal improvement, by roads, canals, the navigation of rivers, and the repairs and improvements connected with the harbors of the United States, or the entrance into the same, which may be authorized by acts of congress, with the execution of which the war department may be charged."

893. "The engineer superintending the construction of a fortification will disburse the moneys applied to the same, and as compensation for the performance of that extra duty will be allowed at the rate of \$2 per diem during the continuance of such disbursements, provided the whole amount of emolument shall not exceed two and a half per cent. on the sum disbursed."

So far as the present item is concerned, these regulations do not differ in substance. They both raise the question as to the proper interpretation of them, whether the allowance of \$2 per diem, not exceeding two and a half per cent., is intended to be limited to a single per diem allowance; notwithstanding the engineer superintending the construction, and disbursing the moneys, as agent for fortifications, is employed at the time upon several fortifications, each requiring separate accounts of the disbursements to be kept, on account of there being distinct and independent appropriations therefor; or whether the per diem allowance is cumulative, that is to say, \$2 a day for every fortification for which there is a distinct and independent appropriation, of which separate accounts are required to be kept, and the disbursements are confided to one and the same engineer, as superintendent and agent of disbursements. The court are of opinion that the latter is the true construction of the regulations, upon the ground that it would be unreasonable to suppose that these regulations intended to give the same exact amount of compensation to a person disbursing moneys upon two or more distinct fortifications, that he would be entitled to if he were disbursing agent for one only, although his duties might be thus doubled, and even trebled; and that the natural import of the language is, that the compensation is to be given to each agent of a separate fortification, for his disbursements about that particular fortification, without any reference to the consideration whether his agency was limited to that, or extended to other fortifications. Under such circumstances, as the defendant was the disbursing agent, both at Fort Monroe and Fort Calhoun, under distinct and independent appropriations, there does not seem to be any reason why he may not be entitled to the per diem allowance which he claims for each of those forts.

§ 127. *Reasonable compensation for making disbursements.*

2. As to the second item. The right to the commissions charged for disbursing \$33,447.26, on account of contingencies on fortifications, must essentially depend upon the evidence which may be adduced in support of the claim. There is nothing in the character of the item which precludes the de-

fendant from showing that he is entitled to the commissions of two and a half per cent., or of a less amount, if he can prove that the disbursements were other than those on Forts Monroe and Calhoun; and that it has been the usage of the department to make the like compensation for disbursements under the like circumstances, or that the allowance is just and equitable in itself. The court are of opinion that evidence ought to have been admitted to establish it.

§ 128. *No allowance can be made for services which an officer was bound to perform as part of his official duty.*

3. As to the third item, constituting a charge of \$37,262.46, for extra services in conducting the affairs connected with the civil works of internal improvements, very different considerations may apply. The court are of opinion that, upon its face, this item has no just foundation in law; and, therefore, that the evidence which was offered in support of it, if admitted, would not have maintained it. The ground of this opinion is, that upon a review of the laws and regulations of the government, applicable to the subject, it is apparent that the services therein alleged to be performed were the ordinary special duties appertaining to the office of chief engineer; and such as the defendant was bound to perform, as chief engineer, without any extra compensation over and above his salary and emoluments as brigadier-general of the army of the United States, on account of such services. In this view of the matter, the circuit court acted correctly in rejecting the evidence applicable to this item.

Upon the whole, upon the other grounds already stated, the judgment of the circuit court must be reversed, and the cause remanded with directions to that court to award a *venire facias de novo*.

UNITED STATES v. SHOEMAKER.

(7 Wallace, 388-342. 1868.)

ERROR to U. S. Circuit Court, Eastern District of Michigan.

STATEMENT OF FACTS.—Shoemaker was collector of customs at the port of Detroit, and gave a bond conditioned that as disbursing agent for the new marine hospital and custom-house he would well and truly disburse all moneys coming into his hands, etc. This was a suit on the bond. It appeared that he disbursed about \$200,000, under instructions from the secretary of the treasury, part of the amount prior to June 12, 1858, and part subsequent to that date. It was proved that he had received his general maximum compensation, the \$400 allowed by the act of May 7, 1822, exclusive of his salary, and one-quarter of one per cent. on disbursements made after June 12, 1858, at which date an act was passed allowing such compensation, and making it the duty of collectors to act as disbursing agents in such cases. The defendant claimed two and one-half per cent. on his disbursements, and the court directed the jury to allow the commission if they deemed it reasonable.

Opinion by MR. JUSTICE NELSON.

The question is, whether or not there is any law affording compensation for the service performed by the collector in this case.

The argument in support of it is, that before the act of 1858, which imposed this duty and prescribed a compensation, the secretary of the treasury had no right to require any such duty of the collector, and might as well have appointed some other person to perform it; and hence, having appointed the

collector, who accepted the appointment, and has performed the service, he is entitled to the same compensation as any other agent.

§ 129. *Compensation will not be allowed a collector of the United States unless the service is rendered in pursuance of existing law.*

It may be that the collector might have refused the duty and compelled the secretary to appoint another person. But this does not advance the argument, unless there can be shown some law providing for a compensation to be allowed such agent. No such provision is made in this act, nor are we aware of any authority in any other.

The question here, however, is — the collector having accepted the appointment and performed the service — is there any authority of law entitling him to retain out of the moneys received the two and one-half per cent. as compensation for the disbursements? It is admitted that there is no act of congress authorizing it. The claim must rest, therefore, in a *quantum meruit*. This might, under some circumstances, present a strong case against the government for the allowance of a reasonable compensation. But the difficulty here is that there is not only no law providing for compensation, but the collector is forbidden to receive it. The act of May 7, 1822, section 18, provides that “no collector, etc., shall ever receive more than \$400, annually, exclusive of his compensation as collector, etc., for any services he may perform for the United States in any other office or capacity.” And the act of 3d March, 1839, section 3 (5 Stat. at Large, 349), that “no officer in any branch of the public service, or any other person, whose salaries or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money or the performance of any other service, unless the said extra allowance or compensation be authorized by law.” This act was substantially re-enacted 23d August, 1842, section 2 (5 Stat. at Large, 510), with this addition: “And the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance or compensation.” This act was noticed and commented on in *Hoyt v. United States*, 10 How., 141. The court there observe that it cuts up by the roots these claims of public officers for extra compensation on the ground of extra services; that there is no discretion left in any officer or tribunal to make allowance unless it is authorized by some law of congress. This construction of the acts of 1822 and 1839 was affirmed in the case of *Converse v. United States*, 21 How., 478. In that case a compensation was allowed for an extra service rendered by the collector, but it was allowed for the reason that the service was rendered in pursuance of existing laws, and the appropriation for a compensation was made by law. The principle settled in that case is decisive against the allowance in the present one.

Judgment reversed.

HALL v. UNITED STATES.

(1 Otto, 559-565. 1875.)

ERROR to U. S. Circuit Court, District of Minnesota.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Fifteen hundred dollars per annum are allowed to collectors of internal revenue as salary for their services and that of their deputies, to be paid quarterly. Commissions, in addition to salary, are also allowed to such officers, to be computed upon the amounts by them respectively collected,

paid over, and accounted for, under the instructions of the treasury department, as follows: Three per cent. upon the first \$100,000; one per centum upon all sums above \$100,000, and not exceeding \$400,000; and one-half of one per centum on all sums above \$400,000. Such an officer may also keep and render to the proper officers of the treasury an account of his necessary and reasonable charges for stationery and blank-books used in the performance of his official duties, and for postage actually paid on letters and documents received or sent, and exclusively relating to official business; and if the account is approved by the proper accounting officers, the collector is entitled to be paid for the same; but the provision is that no such account shall be approved unless it shall state the date and the particular items of every such expenditure, and shall be verified by the oath or affirmation of the collector.

Two provisos are annexed to those enactments: (1) That the salary and commission of no collector, exclusive of stationery, blank-books and postage, shall exceed \$10,000 in the aggregate, nor more than \$5,000, exclusive of the expenses for rent, stationery, blank-books and postage, and pay of deputies and clerks, to which such collector is actually and necessarily subjected in the administration of his office. (2) That the secretary of the treasury be authorized to make such further allowances, from time to time, as may be reasonable, in cases in which, from the territorial extent of the district, or from the amount of internal duties collected, or from other circumstances, it may seem just to make such allowances. 13 Stat., 231.

Sufficient appears to show that the principal defendant was duly appointed a collector of internal revenue under the act of congress in that case made and provided, and that the foundation of the suit is the official bond given by the appointee for the faithful discharge of the duties of the office. Breaches of the conditions of the bond having been committed as alleged, the United States commenced an action of debt in the district court against the principal and his sureties, claiming the penalties of the bond. Service was made; and the defendants appeared and pleaded (1) *non est factum*; (2) performance; (3) set-off in the sum of \$8,203.06 for money before that time advanced, paid, laid out and expended by the defendant to and for the use of the plaintiffs, and at their instance, for the work and labor of the defendant and his servants and deputies, done and performed by him as such collector for the plaintiffs, and at their instance and request.

Claim is also made for the same sum in the same plea, upon the ground that it was due and owing to the defendant from the plaintiffs for commissions, expenses and charges for extra services of himself and his servants, done and performed at the special instance and request of the plaintiffs.

Issue was joined by the plaintiffs upon the first plea; and to the second the plaintiffs reply, and deny that the defendant has well and truly performed the conditions of the writing obligatory, and assign the following breaches: (1) That he has not accounted for and paid over to the United States all the public moneys which came into his hands, in compliance with the orders and regulations of the secretary of the treasury. (2) That he did not faithfully execute and perform all the duties of his office, as more fully set forth in the replication.

Both parties, having waived a trial by jury, went to trial before the court without a jury; and the finding and judgment were for the plaintiffs, in the sum of \$11,517.63. Exceptions were filed by the defendants; and they sued out a writ of error, and removed the case into the circuit court.

Due settlement of the collector's accounts had been made by the accounting officers of the treasury; and the plaintiffs, to support the issues on their part, introduced the certified transcript of the same, to which the defendants objected; but the court overruled the objection, and admitted the evidence, and the defendants excepted. Said transcript included the statement of differences, and showed that the sum of \$20,120 was the balance due from the collector.

Collections, it seems, had been made by the officer, for the preceding year, amounting to \$77,702.08; and it did not appear that he had been paid during that period any extra allowance above his salary and commissions, nor that any of the charges claimed as set-off had been credited in the settlement of his accounts. Apart from that, it was admitted by the plaintiffs that the defendants had paid into court the sum of \$11,435.17, which is to be deducted from the balance found due from the defendants by the accounting officers of the treasury.

Set-offs were claimed by the defendants, as follows: (1) \$5,010 paid by the collector during the summer and fall of 1866, to sixteen deputy collectors employed by him during that period in his district. (2) \$648 paid for the hire of clerks in his office during the quarter ending September 30th of the same year. (3) \$1,100 paid for hire of clerks in making out his accounts and returns during that and the succeeding year.

Nothing being alleged to the contrary, it will be assumed that those several claims had been duly presented to the proper officers of the treasury, and that they had been finally disallowed. They were separately offered in evidence at the trial; and the ruling of the court in each instance was, that the same was properly rejected by the accounting officers of the treasury. Seasonable exception to the ruling of the court was taken by the defendants. Appearance was entered by each party in the circuit court, and they were both there heard; and the circuit court affirmed the judgment of the district court, and the defendants sued out the present writ of error.

Errors have not been assigned, as required by the rules of the court; but the course of the argument, as exhibited in the printed brief, warrants the conclusion that the only errors relied on are the rulings of the district court that the accounts filed in set-off were properly rejected by the accounting officers of the treasury.

§ 130. *Rules as to set-off where the United States is a plaintiff.*

Defendant litigants had no right to file accounts in set-off at common law; nor did they ever have that right until the passage of the statute of 2 Geo. II., ch. 24, sec. 4, which enacted, in substance and effect, that, where there were mutual debts between the plaintiff and the defendant, one debt may be set against the other, and that such matter may be given in evidence under the general issue, or may be pleaded in bar, so that notice shall be given of the sum or debt intended to be offered in evidence. Chit. on Contr., 948.

Questions of the kind, where the United States are plaintiffs, must be determined wholly by the acts of congress, as the local laws have no application in such cases. *United States v. Eckford*, 6 Wall., 490; *United States v. Robeson*, 9 Pet., 324; *Conklin, Treat.*, 127. Judgment in such suits is required to be rendered at the return term, unless the defendant shall, in open court, make oath or affirmation that he is equitably entitled to credits which had not been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury and rejected, and specifying each partic-

ular claim so rejected, in the affidavit. 1 Stat., 515; *United States v. Giles*, 9 Cranch, 236; 5 Stat., 83.

Section 4 of the same act provides that, in suits between the United States and individuals, no claim for a credit shall be admitted at the trial, except such as shall appear to have been submitted to the accounting officers of the treasury for their examination, and to have been by them disallowed, unless it shall appear that the defendant, at the time of the trial, is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident.

§ 131. *No allowance can be made by the accounting officers of the treasury, in settling the accounts of a collector of internal revenue, for his extra services and expenses, unless the same had been previously approved by the secretary of the treasury, under the second proviso of section 25 of the act of June 30, 1864 (13 Stats., 232).*

Claims for credit in suits against persons indebted to the United States, if it appears that the claim had previously been presented to the accounting officers of the treasury for their examination, and had been by them disallowed in whole or in part, may be admitted upon the trial of the suit; but it can only be admitted as a claim for credit, and must be proved to be just and legal before it can be allowed. Equitable claims for credit, if falling within the latter clause of the fourth section of that act, may be admitted at the trial of such a suit, though never presented to and disallowed at the treasury; but the presentation of such a claim will amount to nothing, unless it is proved that the same is justly due to the claimant.

Due returns, it seems, were made by the collector. It is not questioned that his accounts were regularly settled by the accounting officers of the treasury; nor is it suggested that due credit was not given to him for everything which he could properly claim, except for the extra services and expenses charged in the accounts filed in set-off; and it appears that those accounts were duly presented to the accounting officers of the treasury, and were by them rejected before the suit was instituted. When the claims were offered, the court admitted the evidence; and the only complaint is, that the court ruled that the claims were properly rejected by the accounting officers of the treasury, which is the only question presented for decision.

Independent of the second proviso to the section defining the compensation to be allowed to such collectors, it would be clear beyond every doubt that no claim of the kind could be allowed by any court, as appears from the acts of congress upon the subject and the decisions of this court. Legislation upon the subject commenced with respect to collectors of the customs, but was ultimately extended to all executive officers with fixed salaries, or whose compensation was prescribed by law. Section 18 of the act of the 7th of May, 1822, provided that no collector, surveyor or naval officer shall ever receive more than \$400 annually, exclusive of his compensation as such officer, and the fines and forfeitures allowed by law for any service he may render in any other office or capacity. 3 Stat., 696.

Prior to that, the settled practice and usage were to require collectors to superintend lights and light-houses in their districts, and to disburse money for the revenue-cutter service. Services of the kind were charged as extra services, and extra compensation was in many cases allowed for such service, until congress interfered, and by that act gave such officers a fixed compensation,

subject to the provision that they should never receive more than \$400, exclusive of the fixed compensation, and their due proportion of fines, penalties and forfeitures. Officers not named in that act also received fixed salaries; and they, whenever they performed extra service under the direction of the head of a department, claimed extra compensation. Claims of the kind were in some instances disallowed; and in certain cases, where litigation ensued, it was decided by this court that such claims were a proper set-off to the money demands of the United States. *Miner v. United States*, 15 Pet., 423; *Gratiot v. United States*, id., 336 (§§ 123-28, *supra*); *United States v. Ripley*, 7 id., 18.

Litigations of the kind became frequent; and congress again interfered, and provided that no officer in any branch of the public service, or any other person whose salary or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money or the performance of any other service, unless the said extra allowance or compensation be authorized by law. 5 Stat., 349.

Since then many other acts of congress have been passed upon the subject, of which one more only will be reproduced. Like the preceding act, it provides that no officer in any branch of the public service, or any other person whose salary, pay or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same shall be authorized by law; and the appropriation therefor is explicitly set forth that it is for such additional pay, extra allowance, or compensation. 5 Stat., 510; 9 id., 297, 365, 367, 504, 542, 543, 629; 10 id., 97-100, 119, 120.

Compensation for extra services, where no certain sum is fixed by law, cannot be allowed by the head of a department to any officer who has by law a fixed or certain compensation for his services in the office he holds, unless such head of a department is thereto authorized by an act of congress; nor can any compensation for extra services be allowed by the court or jury as a set-off, in a suit brought by the United States against any officer for public money in his hands, unless it appears that the head of the department was authorized by an act of congress to appoint an agent to perform the extra service, that the compensation to be paid for the service was fixed by law, that the service to be performed had respect to matters wholly outside of the duties appertaining to the office held by the agent, and that the money to pay for the extra services had been appropriated by congress. *Converse v. United States*, 21 How., 470.

None of the conditions precedent suggested existed in the case before the court; and it follows that no such allowance could have been made by the accounting officers of the treasury in settling the accounts of the principal defendant, unless the same had been previously approved by the secretary of the treasury, under the second proviso in the twenty-fifth section of the act prescribing the compensation to be allowed to the collectors of internal revenue. 13 Stat., 232.

§ 132. — *and such allowance is entirely discretionary with the secretary of the treasury.*

Authority is there given to the secretary of the treasury to make such further allowances to such collectors, from time to time, as may be reasonable; but the power to be exercised in that behalf is one vested in his discretion,

both as to time and amount. He may make an allowance one year and refuse it the next, or he may never make it at all, as to him may seem just and reasonable. No appeal lies from his decision in that regard, either to the accounting officers of the treasury or to the courts. Instead of that his decision is final, unless reversed by congress.

Judgment affirmed. (a)

UNITED STATES v. MEIGS.

(5 Otto, 748-750. 1877.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—Of the appellees one was a deputy clerk of the supreme court of the District of Columbia, another was the crier of that court, and two others were messengers. They each sued in the court of claims to recover the additional compensation allowed to certain employees of the government by the joint resolution of congress of February 28, 1867. 14 Stat., 569. The court of claims finds the above facts, and while it says, in what purports to be an opinion, that it believes that the resolution refers to clerks and employees of the executive branches of the government alone, and does not extend to those of the judiciary, it nevertheless renders a judgment for the claimants.

§ 133. *The deputy clerk, crier and messenger of the supreme court of the District of Columbia are not entitled to the increase of salary authorized by the joint resolution of February 28, 1867.*

We concur with the court of claims in the opinion that the resolution does not extend to the officers and employees of the judicial department of the government, and though in some instances it may not be easy to say to which department a claimant may belong, we have no difficulty in holding that each of the present claimants belongs to that department.

The deputy clerk, Meigs, whose case is the principal one, was appointed by the clerk of the court, and the latter was appointed by the court. The deputy served at a salary fixed by contract between him and the clerk. He was also paid by the clerk, and worked for the clerk, and performed services which it was the duty of the clerk to perform, and for which the clerk received compensation by fees paid by the litigants for whom those services were rendered. It is very difficult to see how this deputy clerk can be called an employee of the government at all. The government was never liable to him for any salary at any time, and, if the principal clerk had failed to pay him the \$2,000, the government clearly would not have been liable for it. How, then, can it be liable for the additional twenty per cent.?

Mulloy, the crier, and Taylor and Grimes, the messengers, were employees of the court,—the first appointed by the court and the others by the marshal, to perform services immediately in connection with the court and its judges; and, if employees of the government at all, they certainly belong to the judicial department, and not to the executive. The case of Manning, 13 Wall., 578, is relied on as covering the case of the present claimants. Manning was a guard in the jail of the penitentiary of the District of Columbia. He was appointed by the warden of the jail, and his compensation fixed by the secretary of the interior. Whether the warden of the jail, since the office has been dis-

(a) Affirming *United States v. Hall*,* 2 Dill., 426. *Hall v. United States*,* 1 Otto, 566, follows the above case.

connected from the marshal's office, can be held to belong to the judicial branch of the government, it is not necessary to decide; but a decision which would recognize all the county jails, penitentiaries, and other prisons of the United States as belonging to the judicial, as distinguished from the executive, department of government, would, we imagine, excite surprise. It is very clear that Manning was not an employee under the court, and that the crier and the messengers are; and, if the deputy clerk can be said to be in the employment of any but his principal, he also performs duties under the immediate control of the court.

The circumstance that in the emolument account of the clerk the auditor allows him to deduct, from the fees which he would otherwise pay into the treasury, the deputy's compensation, does not make him an employee of the department. All claims paid out of the treasury of the United States must be audited by one of its officers, and approved by one of the comptrollers; but their action in allowing or refusing to allow a claim proves nothing as to which of these great constitutional divisions, executive, legislative, or judicial, the claimant belongs. Judgment reversed, with directions to dismiss the petitions.

UNITED STATES *v.* ALLISON.

(1 Otto, 303-308. 1875.)

APPEAL from the Court of Claims.

Opinion by WAITE, C. J.

STATEMENT OF FACTS.—Allison was an employee in the government printing office from June 30, 1866, to June 30, 1867, and in this suit claims additional compensation for his services in consequence of the joint resolution of February 28, 1867. 14 Stat., 569. He contends that the government printing office was, during the fiscal year commencing July 1, 1866, a bureau in the department of the interior. If it was not, he substantially concedes that he is not entitled to the benefit of the resolution. The department of the interior is one of the executive departments of the government. R. S., sec. 437. It was made so March 30, 1849. 9 Stat., 395. It is specially charged with the supervision of certain executive bureaus. Its present jurisdiction is defined in section 441, Revised Statutes. The government printing office has never been placed under its jurisdiction by any express statute.

On the 26th August, 1852, congress passed an act entitled "An act to provide for executing the public printing and establishing the prices thereof, and for other purposes." 10 Stat., 30. It is only necessary to say of this act, that it provided for the appointment of a superintendent of public printing, and that he was to give an official bond to be approved by the secretary of the interior. His duties were carefully defined, and he was made in fact what his name implies, the superintendent of the public printing by the public printers. These public printers were, at that time, appointed by the two houses of congress, each house appointing its own.

On the 23d of June, 1860, a joint resolution was passed by congress "in relation to the public printing." 12 Stat., 117. This resolution dispensed with the public printers appointed by the two houses of congress, and placed the whole subject of public printing in charge of the superintendent. In the language of the resolution (sec. 2), he was "to superintend all the printing and binding, the purchase of paper, . . . the purchase of other necessary materials and machinery, and the employment of proof-readers, compositors, pressmen, labor-

ers, and other hands necessary to execute the orders of congress and of the executive and judicial departments at the city of Washington." To enable him more effectually to perform his duties, he was to appoint a foreman of printing and a foreman of binding. These foremen were required to report to him, and to furnish him their estimates of the amount and kind of material required. He furnished them their supplies, for which they accounted to him. He was also to report to congress at the beginning of each session the number of hands employed, and the length of time each had been employed; and by section 9 it was made his duty to report to congress "the exact condition of the public printing, binding, and engraving; the amount and cost of all such printing, binding, and engraving; the amount and cost of all paper purchased for the same; a statement of the several bids for materials; and such further information as may be within his knowledge in regard to all matters connected therewith." By section 3 he was required to render to the secretary of the treasury, quarterly, a full account of all purchases made by him, and of all printing and binding done in his office for each of the houses of congress and for each of the executive and judicial departments. The secretary of the treasury was also authorized to advance money to him on account, and he was to settle his accounts of receipts and disbursements in the manner then required of other disbursing officers. By section 9 it was made the duty of the superintendent, annually, to prepare and submit to the register of the treasury, in time to have the same embraced in the general estimates from that department, detailed estimates of salaries and other necessary expenses of the printing establishment for the second year. By section 7 the joint committee on printing for the two houses of congress was directed to fix upon a standard of paper for the printing of congressional documents. The superintendent was to advertise for proposals to furnish the government all paper necessary for the execution of the public printing, and to furnish samples of the standard paper to applicants therefor. The bids were to be opened by him in the presence of the secretary of the senate and the clerk of the house of representatives and he was required to award the contract to the lowest bidder. All differences in opinion between the superintendent and the contractors were to be settled by the joint committee on printing of the two houses. Whenever engraving was required to be done to illustrate any document ordered to be printed by either house of congress, the superintendent was to procure it to be done under the supervision of the committee on printing of the house making the order. Sec. 8. By section 7 it was provided that, if the contractor for furnishing paper failed to make his deliveries, the superintendent might purchase for temporary supply in the open market, "by and with the approval of the secretary of the interior." He was also, by the same section, to render to the secretary of the interior, at the end of each fiscal year, an account of all paper received from contractors, and of all paper used for the purposes of the government under that act; and also the amount of each class consumed in the printing establishment, and in what works the same were used. Defaults by contractors in furnishing paper under their contracts were to be reported by the superintendent, with a full statement of all the facts, to the solicitor of the treasury for prosecution.

The commissions of all officers under the direction or control of the secretary of the interior must be made out and recorded in the department of the interior, and the seal of the department must be affixed thereto. 10 Stat., 297, sec. 3. The court below has found as a fact, that "in 1867 the commission of

the superintendent of public printing was made out and recorded in the department of the interior, and the seal of the department affixed thereto, pursuant to the provisions of "this act. It nowhere appears that any act of congress expressly required this to be done; neither does it appear at what time in the year 1867 this commission was issued or recorded.

On the 22d February, 1867, congress passed an act entitled "An act providing for the election of the congressional printer." By this act, the senate was to elect some competent person "to take charge of and manage the government printing office." He was given the same powers as the superintendent of public printing. From and after the election of the congressional printer, the office of superintendent of public printing was abolished. 14 Stat., 397. The senate elected a congressional printer in pursuance of this act, February 26; but he did not take possession of his office until March 1, and the superintendent continued to act until that time. The superintendent was acting on the 28th February, when the resolution under which Allison claims was passed.

In Manning's Case, 13 Wall., 578, it appeared that the guards of the jail in the District of Columbia were selected by the warden, but that their compensation was fixed and paid by the secretary of the interior. It also appeared that the whole subject of the jail was under the supervision of the secretary, to whom the warden was required to report. Under these circumstances, we held that the office of the warden of the jail was a bureau or division of the department of the interior.

§ 134. *The government printing office is not a bureau of any of the executive departments, and the employees thereof are not included in the resolution of February 28, 1867, and are therefore not entitled to the additional pay provided for by that resolution.*

This is as far as any case has yet gone. The secretary of the interior has no control whatever over the employment of men by the superintendent of public printing. He cannot fix their wages or supervise the action of the superintendent in that particular. He does not pay them, and has no control whatever of the funds out of which they are paid. He may pay the superintendent for printing done upon the order of his department; but the superintendent disburses without any accountability to him. In short, the superintendent seems to have a department of his own, in which he is in a sense supreme. Certainly he is not under the control of any one of the executive departments. Apparently he is more responsible to congress than to any other authority. The secretary of the interior keeps and approves his bond. The same secretary must, under some circumstances, approve his purchases of paper in open market. He sends to that department, also, his accounts of the receipts and disbursements of paper. The joint committee on printing in the two houses of congress settle all disputes between him and his contractors for the delivery of paper. He reports to congress in respect to his employees, and to the secretary of the treasury in respect to his receipts and disbursements. From that department also he draws his money upon proper requisitions. He is under the direction of the committees of each house of congress in respect to engraving, and he goes to the secretary of the treasury with his estimates.

In our opinion, his employees, as they are not specially enumerated, are not included in the resolution of February 28, 1867; and, on that account, this claim cannot be maintained. The view we have taken of this case makes it

unnecessary to consider the effect of the election of a congressional printer on the 26th February, 1867. The judgment of the court of claims is reversed, and the cause remanded with instructions to dismiss the petition.

BROWNE v. UNITED STATES.

(Circuit Court for Massachusetts: 1 Curtis, 15-21. 1851.)

STATEMENT OF FACTS.—The defendant, a navy agent, claimed the right to retain a commission of two and a half per cent., for disbursing a sum of money as navy pension agent. He received his full pay as navy agent while making the disbursements, but claimed the compensation as a reasonable compensation.

§ 135. *Acts of 1839 and 1842 construed.*

Opinion by CURTIS, J.

The act of March 3, 1839, section 3 (5 Stats. at Large, 349), provides that no officer in any branch of the public service, or any other person, whose salary or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be authorized by law.

The act of August 23, 1842 (5 Stats. at Large, 510), passed about ten months after Mr. Browne's appointment, substantially re-enacts this law, with some changes of phraseology, apparently designed to render the same more clear, and superadds the requirement that the appropriation for such additional pay, extra allowance or compensation, must explicitly set forth that it is made for such object. This latter clause does not seem to be material in this case, for it is not pretended that there is any law of congress authorizing compensation for the services in question; nor is it denied that, if this case be within either of these acts, the compensation claimed by the plaintiff in error cannot be allowed. So that the question is, whether the case stated by the bill of exceptions is within either of these acts of congress. It is clear that Mr. Browne, as navy agent, comes within the very broad language of these laws; the words "no officer in any branch of the public service, or any other person, whose salary, pay or emoluments is or are fixed by law or regulations," certainly include a navy agent. He was a person in a branch of the public service, and his emoluments were fixed by law; for the act of March 3, 1809, section 3 (2 Stats. at Large, 536), which authorized the president to appoint such agents, provides that their compensation shall not, in any instance, exceed that allowed by law to the purveyor of public supplies, which, by the act of February 23, 1795, section 1 (1 Stats. at Large, 419), was fixed at \$2,000 per annum. Not denying that this is so, the counsel for the plaintiff in error argue that this case is not within the prohibitory acts either of 1839 or 1842, because those acts are not applicable to a case where the same person holds two distinct offices, and discharges the appropriate duties of each; and because Mr. Browne did thus hold and discharge the duties of two distinct offices, viz., navy agent and navy pension agent.

Both these positions require examination. The office of navy agent, though not designated by that name, is authorized by the act of 1809, above referred to. The president, with the advice and consent of the senate, is therein empowered to appoint agents, either for the purpose of making contracts, or for the purchase of supplies, or for the disbursement, in any other manner, of moneys for the use of the military establishment or of the navy of the United

States. No other than this very general description of the duties of this officer is known to me to exist in any law. Upon such appointment a commission issues, which empowers and requires the officer therein denominated a navy agent, to perform such duties as shall from time to time be required of him by the president or the secretary of the navy.

§ 136. *There is no such officer as a navy pension agent.*

To ascertain whether the payment of navy pensions, under the orders of the secretary of the navy, constitutes a separate office, it is necessary to refer to the acts of congress on that subject. By the act of March 3, 1799, sections 9, 10 (1 Stats. at Large, 716), the money accruing from the sale of prizes was declared to be a fund for the half-pay of such officers and seamen as might be entitled thereto, and for making provision for disabled and meritorious officers and seamen, and it was put under the management of the secretaries of the navy, war, and the treasury.

By the act of June 26, 1812, section 17 (2 Stats. at Large, 763), two per centum of the net amount of prize money arising from captures, or salvage for recaptures, by the private armed vessels of the United States, are directed to be paid to the United States, to be held as a fund for the support and maintenance of persons wounded, and of the widows and orphans of persons slain on board such private armed vessels. And by the act of July 10, 1832 (4 Stats. at Large, 572), the former board of trustees are directed to close their accounts, and pay these funds to the treasurer of the United States, for the use of the secretary of the navy, for the payment of navy and privateer pensions; and the secretary of the navy is constituted the trustee of such funds, and is authorized to grant and pay the pensions according to the acts of congress in that behalf, and to keep accounts of receipts and expenditures.

It is under this authority that the secretary of the navy required Mr. Browne to receive certain of these funds, and disburse the same in part execution of the trust which, by the last-mentioned law, is incumbent on the secretary as the trustee of these funds.

It is impossible to maintain that this order of the secretary is such an appointment to an office as takes the case out of the acts of 1839 and 1842. In the first place, if such an office as navy pension agent existed by law, the head of a department could not appoint to such office, there not being any act of congress vesting in him that power. Constitution, art. 2, sec. 2; *United States v. Maurice*, 2 Brock., 108. In the next place, there is no such office created by law. It must be admitted that congress, by making the secretary of the navy a trustee, and requiring him to take care of and disburse these funds, did, by implication, enable him to employ the necessary instrumentalities to execute the trust; and that, until July 4, 1840 (5 Stats. at Large, 385, sec. 6), when the receivers-general were required by congress to pay pensions under the direction of the secretary, he might use a reasonable discretion in the selection and employment of these instrumentalities. But this falls far short of the creation of an office under the United States. It amounts only to the employment of some person to execute, for the time being, some portion of this trust; but where, or how long, or to what extent, or whether at all, such temporary and occasional agency should exist, is left to the discretion of the head of the department. Now to allow that this not only constitutes an office, but that a navy agent, doing such service, is to be deemed thereby to hold a second and distinct office, and so not to come within the prohibition of these acts of 1839 and 1842, would simply annul those acts. Because, in

every case where extra compensation could be claimed before the act of 1839, by an officer having a fixed compensation, it must have been claimed for services not within the scope of the official duties of the claimant. *Andrews v. United States*, 2 Story, 208. And if it were enough, under these acts, that the claimant had done duty, out of the scope of his office, under a requisition by the head of the department, no cases would be left for these acts, restraining increased compensation, to operate upon. I cannot agree, therefore, to the position that Mr. Browne, as navy pension agent, did hold a separate office under the constitution and laws of the United States, so as to take his case out of the prohibitions of these laws.

§ 137. *Extra compensation is to be allowed public officers only when they discharge the duties of another and distinct office which has a compensation attached to it by law.*

But if he did hold a separate office created by law, to which he was duly appointed, I should still be unable to come to the conclusion that he is legally entitled to the compensation claimed. Before 1839, the supreme court, by a series of decisions, had established the rule that an officer who rendered services to the government not within the scope of his official duties was entitled to set off his equitable claims for compensation in an action by the United States, although they were of such a character that the head of a department could not by law allow them. *United States v. Wilkins*, 6 Wheat., 135; *United States v. McDaniel*, 7 Pet., 1; *United States v. Ripley*, 7 Pet., 18; *United States v. Fillebrown*, 7 Pet., 23. And this principle had been applied to very many cases in the circuits. To the abstract justice of this principle, it would seem there could be no objection; but, apparently, congress became dissatisfied with its practical application to that class of cases where the officer's compensation is fixed by law or regulations, and therefore enacted these laws of 1839 and 1842. Of the first of these acts, the supreme court, in the case of *Hoyt v. The United States*, 10 How., 141, says: "It is impossible to misunderstand this language, or the purpose and intent of the enactment. It cuts up by the roots these claims by public officers for extra compensation on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of congress. This prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation."

Now, looking at the intention of these acts, and the language employed in them, I am unable to come to the conclusion that extra compensation can be allowed to an officer because he has disbursed public money which his office did not require him to disburse. This is all that needs to be decided in this case. The argument at the bar was, that the extra allowance could not mean a compensation fixed by law for discharging all the duties of another and distinct office, and so entitling him *by law* to such compensation. This may be so. But to bring this case within the argument, it must be shown that there is *another* office which has a compensation attached to it by law, and that the claimant has become entitled to that compensation by performing all its duties, which in this case is not true.

The *United States v. Morse*, 3 Story, 87, was much relied on; but that was decided under another statute, and was the case of a distinct office, having a compensation attached to it by law, and the claimant had discharged its duties. The general observations of Mr. Justice Story concerning the policy of congress are in entire accordance with the settled doctrines of the supreme court,

before the act of 1839 was brought under its notice; and as he makes no allusion to that act, which, being only one section of an appropriation bill, might well escape his attention, I cannot consider that he had it in view, or intended to embrace it in his general reasoning.

The decision of the learned district judge, for the Maine district, in *United States v. Jarvis* (§§ 92-96, *supra*), is also relied on by the plaintiff in error. But the learned district judge for this district decided this case the other way. I have not the advantage of knowing the reasons for either of these decisions; and though I have great respect for the opinions of both those learned judges, their decisions as matter of authority can have no binding force in this appellate court.

I have avoided all discussion of one of the questions suggested at the bar, whether the disbursement of these moneys really came within the scope of the official duties of the navy agent, and so whether his bond would cover the faithful performance of this duty. It is a question not necessary to be decided in this case, and I give no opinion upon it. My conclusion is, that there was no error in the ruling of the district judge.

Affirmed.

§ 138. In general.—A federal officer having a fixed compensation is not entitled to extra pay for rendering services which are properly within the line of his official duties. *Gratiot v. United States*, 4 How., 80.

§ 139. Where a federal officer claims extra compensation for services alleged to be beyond the line of his official duty, unless he shows what had been his personal as well as official agency in those matters, the extra compensation cannot be allowed. *Ibid.*

§ 140. A usage of the government as to the amount paid to officers for doing extra services is admissible where the fact of the rendering of the extra services and right to receive pay therefor are shown. *United States v. Fillebrown*, 7 Pet., 28.

§ 141. Section 3 of the act of March 3, 1839, goes no further than section 2 of the act of March 3, 1835. It provides that no person, whose salary as an officer of the government is fixed by law, shall receive any extra compensation for the performance of any service, unless such compensation be allowed by law. *Chase v. United States*, * Dev., 151.

§ 142. Though, by the second section of the act of August 23, 1842, it is provided that "no officer in any branch of the public service, or any other person whose salary or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation, . . . for the disbursement of public money, or for any other service, . . . unless the same shall be authorized by law, and the appropriation therefor explicitly sets forth that it is for such extra allowance, additional pay, or compensation," yet this section has been held not to prevent such extra pay or allowance, in cases where the duties imposed and services rendered were foreign to the office held, were imposed in pursuance of legal requirements and the compensation therefor fixed by law. This rule applied so as to allow a claim, by way of set-off, put in issue by a collector for disbursements made and services rendered for light-house purposes, and for purposes outside his district unconnected with the duties of the office held. *United States v. Austin*, * 2 Cliff., 325.

§ 143. The third section of the act of March 2, 1839, providing that "no officer in any branch of the public service . . . shall receive any extra allowance or compensation in any form for the disbursements of public money or the performance of any extra public service, unless the said extra allowance or compensation be authorized by law," is not restricted in its application to the year of its enactment; its prospective force and intention to apply to the future is shown by the incorporation in the same section of a clause prohibiting officers from applying more than \$30 annually to the purchase of newspapers. *United States v. Jarvis*, Dav., 274 (§§ 92-96).

§ 144. An officer whose claim for compensation for extra services was not presented to the treasury at the time when the same was presented to congress does not thereby waive or forfeit his right to compensation for such services. *United States v. Nourse*, * 4 Cr. C. C., 151.

§ 145. An equitable allowance should be made for extra services performed by an officer under the sanction of the government, or under circumstances of peculiar emergency; and the compensation should be graduated by the amount paid for like services under similar circumstances. *United States v. Ripley*, 7 Pet., 18. The head of a department may allow a special

officer employed for certain service under a special contract, a compensation in excess of the amount agreed upon. *United States v. Cadwallader*, Gilp., 563.

§ 146. Disbursements.—A navy agent for the port of Boston and Charlestown claimed two and one-half per cent. commissions on moneys disbursed for the erection of a navy hospital at Chelsea; one per cent. on disbursements of naval supplies for a dry dock at Gosport and for other stations; two and one half per cent. for indorsing treasury notes. *Held*, that the disbursements for hospital at Chelsea and the dock at Gosport were extra services, for which he was entitled to extra compensation; that the disbursement of supplies of a naval character, not for the erection of anything permanent, and the indorsement of treasury notes, were a part of his official duty, for which he was entitled to no extra compensation. *United States v. Brodhead*,* 3 Law Rep., 95.

§ 147. If a purser in the navy, at the request of the United States, makes disbursements of money outside of the line of his official duty, he is entitled to a reasonable compensation therefor. *United States v. Fitzgerald*, 4 Cr. C. C., 203.

§ 148. A purser in the navy is bound by the regulations of the navy, and, if the regulations require him to make disbursements of money without providing a compensation, he cannot charge for such services, unless, when the disbursements were made, there was an agreement with an authorized officer that he should receive pay therefor. *Ibid*.

§ 149. A clerk in the navy department, receiving a salary as such, acted as agent for navy disbursements for a number of years under different secretaries, and received one per cent. on the sums disbursed, until a new head of the department transferred the duty of disbursements to another officer. While there was no law authorizing the appointment of the clerk to the office of navy agent, there was no law prohibiting it. The clerk discharged these duties during office hours. *Held*, that the clerk was entitled to the agreed compensation for the extra services actually rendered up to the time when these duties were performed by another officer. *United States v. Macdaniel*, 7 Pet., 1.

150. By the act of congress of 1813, as well as by prior and subsequent acts on the same subject, it is made a part of the ordinary duties of the collector of the customs to ascertain and pay bounties to fishermen. *Held*, that, in the absence of a law authorizing additional pay to the collector for paying bounties, he is entitled to no extra compensation for said services. *Andrews v. United States*, 2 Story, 202.

§ 151. A navy agent, whose pay and emoluments were fixed by law, claimed a commission on the disbursements of money for the purchase of land for the navy yard in Charlestown. The disbursements were extra services, and made under the direction of the secretary of the navy. *Held*, that the third section of the appropriation act of congress of March 2, 1839, declaring that no officer in any branch of the public service, or any person whose salary and emoluments are fixed by law and regulation, shall receive any extra compensation for the performance of extra service unless the extra compensation be authorized by law, was a bar to the allowance of the commissions claimed. *United States v. Jarvis*, Dav., 274 (§§ 92-96).

§ 152. Buchanan, a purser in the navy, claimed commissions on drawing bills of exchange at times, from May, 1827, to February, 1830; also commissions on the payment to mechanics and laborers at the navy yard, from 1835 to 1837. *Held*, that neither any act of congress nor any regulation of the department justified the allowance; that the services performed were a part of his official duties, for which extra compensation was not allowable; that where a rule of law is well settled a custom to the contrary cannot be shown to control the decision, and that, where there were only one or two instances, and those under peculiar circumstances, where extra compensation was allowed, such instances did not constitute a custom. *United States v. Buchanan*, 8 How., 83.

§ 153. The regulations of a department of the government, not in conflict with law, are binding on those under the authority of that department. So it was held that a lieutenant in the army, who had received his pay as such, could not be allowed a commission on money disbursed as assistant quartermaster, the regulations of the army, May 18, 1833, providing that no allowance should be made to any officer of the army for making disbursements by direction of the war department. *United States v. Webster*, Dav., 88.

§ 154. Disbursing clerks in the state department are not entitled to commissions on the disbursements of moneys, where the disbursements are a part of their official duty, and for which they are paid by salary. But even if the services performed were "extra," there being no law authorizing compensation therefor, the act of August 26, 1842, expressly forbids the allowance thereof. *Stubbs' Case*,* 10 Op. Att'y Gen'l, 31.

§ 155. The commissioners of naval hospitals appointed a secretary at a salary of \$250 per annum. The board employed the secretary to perform extra services and agreed to pay a stipulated sum therefor; it also employed him in disbursing money, agreeing to pay him a commission on the money disbursed. *Held*, that the board had authority to make the said

appointments, and that the secretary was entitled to the compensation and commissions promised by the board for extra services. *United States v. Fillebrown*, 7 Pet., 28.

§ 156. The rules and regulations for the government of the postoffice department adopted 4th March, 1833, provided that the division of finance shall be under the superintendence of the chief clerk and prescribed his duties with respect to receipts, deposits of money, payments and disbursements. The chief clerk received a stated salary for his services. He also claimed commissions for the disbursement of sundry sums and for loans negotiated by him, and cited instances of such allowances by the department. *Held*, that the services for which he claimed extra compensation were a part of his official duty, for which he was entitled to no extra compensation; and that a usage of the department to pay extra therefor did not affect the question. *United States v. Brown*, 9 How., 487.

§ 157. One who held the office of register of the treasury was "employed" by the proper authorities to act as agent for receiving and disbursing public moneys, such duties being in no way connected with the office of register of the treasury. *Held*, (1) that he was entitled to compensation for his services, and (2) that if no special contract was made he was entitled to the *quantum meruit* of two and a half per cent. established by usage in such cases. *United States v. Nourse*, *4 Cr. C. C., 151.

§ 158. The act of March 3, 1853, provided no compensation for the services of a disbursing agent of moneys connected with the marine hospital. By act of June 12, 1858, the duties of disbursing agent were devolved on a collector, and compensation of percentage on moneys received, provided. *Held*, that the collector might charge his percentage on moneys received after June 12, 1858, but not on moneys received before. *United States v. Austin*, *2 Cliff., 325.

§ 159. Money was remitted to the superintending engineer of fortifications, who turned it over to the agent of fortifications, under the sixty-seventh article of the general regulations of the army published in July, 1831, which described the duties of the agent, and also provided that the superintending engineer could be required to perform the duties of an agent when there was no agent of fortifications, for which service a particular compensation is allowed. The superintending engineer charged a commission of two and a half per cent. upon the amount for safe-keeping and responsibility incurred in receiving and turning it over to the agent when he, the engineer, "was not a disbursing agent." *Held*, that the charge could not be allowed; that a usage allowing the charge could not be shown. *Gratiot v. United States*, 4 How., 80.

§ 160. The act of congress of 3d March, 1809, providing that the compensation to navy agents appointed under its provisions shall not exceed one per cent. of the moneys disbursed, does not prohibit the agent from recovering compensation for distributing stores sent out by the government and which were not purchased by him. The court, in this case, in the exercise of its discretion, allowed the agent one per cent. for distributing such stores and disallowed his charge for delivering over stores to his successor. *Armstrong v. United States*, Gilp., 399.

§ 161. The question arose whether an acting purser in the navy, holding no other naval office at the time, was entitled to two and a half per cent. on the sums disbursed by him for the government; and it was decided that as the compensation of the purser was fixed by act of congress, and as no distinction exists in regard to emoluments between a purser and any acting purser, the claim was not a valid one. *Goldsborough v. United States*, *Taney, 80.

§ 162. Under the acts of March 3, 1839, and of August 16, 1842, an officer with a fixed salary is not entitled to any additional compensation for extra services, unless it is provided for by law, or by the regulation of an officer of the government authorized by law to make it. *Held*, that a navy agent is not entitled to compensation, beyond his salary, for any extra services, although such services may be out of the district for which he is appointed and may more properly appertain to the duties of another navy agent, or even an officer of the government filling an office of a different character. *United States v. White*, *Taney, 153.

§ 163. A navy agent was held not entitled to extra compensation for disbursements, under orders of the navy department, outside of his district, the same not having been provided for by law, as required by the acts of 1839 and 1842. *Ibid*.

§ 164. Compensation for the payment of pensions without authority of law is forbidden by the act of April, 1836. A navy agent, having rendered services as a pension agent, was held not entitled to any fee for the same. *Ibid*.

§ 165. Collector—Extra services.—The act of congress of 1799 requires the collector of the customs to perform the duties of surveyor when there is no surveyor assigned by law for the port. *Held*, that the collector was not entitled to compensation for performing the duties of surveyor under such circumstances. *Andrews v. United States*, 2 Story, 202.

§ 166. A collector cannot charge commissions upon articles purchased for light-house purposes within his own district, but when he is required to take charge of the purchases for the whole light-house service of the United States, he may charge his commissions, the secretary of the treasury being authorized to appoint a single agent for such purpose and not being re-

stricted as to his choice, and the compensation for such services being fixed by law. *Converse v. United States*,* 21 How., 463.

§ 167. Under the act of June 30, 1864, section 25, fixing the compensation of collectors, and declaring that the amount shall be "in full compensation for their services and that of their deputies," the secretary of the treasury is given sole discretion as to whether any further allowances, which he may deem reasonable, shall be made; so where a collector made a claim for \$5,010 for the pay of deputies, which claim was rejected by the secretary of the treasury, it was held that the decision of the secretary could not be judicially revised. *United States v. Hall*,* 2 Dill., 426.

§ 167a. Neither surveyors not discharging the duties of collectors, nor naval officers, are entitled to extra compensation under the act of March, 1841, to be computed upon fees, emoluments, or storage not actually received and accounted for by them, as provided for under said act, and to which fees, emoluments and storage they are not entitled legally. *Claim of Ezra Carter*,* 12 Op. Att'y Gen'l, 386.

§ 168. The collector of the port of New York charged a commission of \$201,500 for accepting and paying drafts of the treasury during his term of office, on the ground that the services were extra, not belonging to the official duties of a collector. By act of March 2, 1799, it is provided that the collector shall at all times pay to the order of the officers, who shall be authorized to direct the payment thereof, the whole of the moneys received by virtue of this act, and, as often as required, account to the treasury department. The secretary of the treasury, by a circular dated 9th of June, 1837, required that the moneys received by the collectors should be placed to the credit of the treasurer of the United States, and that the same would be drawn for by the treasurer's drafts. The act of 1838 provided that no collector should ever receive more than \$400, exclusive of his compensation as collector, and the fines and forfeitures allowed by law, for any services he might perform for the United States in any other office or capacity. By the act of 3d March, 1839, it is provided "that no officer in any branch of the public service, or any other person whose salaries, or whose pay or emoluments, is or are fixed by law and regulations, shall receive any extra allowance, or compensation in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be authorized by law." The court disallowed the charge, holding: 1st, that the services were a part of the collector's duties under the direction of the secretary of the treasury; 2d, that even if the services were extra, a greater charge than \$400 could not be made; 3d, that the act of 3d of March, 1839, was a complete bar to the charge. *Hoyt v. United States*, 10 How., 109.

§ 169. Sale of stamps.—Claimant was the assistant treasurer at New York, and claims a commission on sales of internal revenue stamps made by him while assistant treasurer in the years 1869 and 1870. The act of congress of 30th June, 1864, section 161, provides for the absolute sale of stamps to certain officers, not including the assistant treasurer, and provides a commission to the purchasers; section 170 provides that the commissioner of internal revenue may "furnish, supply, and deliver" to any assistant treasurer stamps "without prepayment therefor, and shall allow the highest rate of commission allowed by law to any other persons purchasing the same." *Held*, that the act of 1864 constituted the assistant treasurer an agent to sell the stamps; that he was not a purchaser of the stamps and not entitled to commission under the act; that he was prevented by the acts of congress of August 6, 1846, and August 23, 1842, from claiming any other compensation than his salary as assistant treasurer. *Folger v. United States*,* 13 Ct. Cl., 86.

§ 170. The act of congress of August 6, 1846, declares that the salary of the assistant treasurer shall be in full for all his services, and that he shall not receive any other compensation for any official service of any description whatever; and that he is required to do all acts and duties required by law or by direction of any of the executive departments of the government. The act of June 30, 1864, authorized the commissioner of internal revenue to furnish stamps to, among other officers, the assistant treasurer, and provided that the officers to whom stamps were furnished "shall be allowed five per centum commissions" on the face value of the stamps. The assistant treasurer, after action commenced against him by the United States, presented his claim for the five per centum commissions to the proper department and it was not allowed; *held*, that so far as the act of 1846 was in conflict with the act of 1864 the latter must prevail, and that the assistant treasurer must be allowed the commission of five per centum. *United States v. Butterfield*, 7 Ben., 412.

§ 171. In regard to the distribution of stamps by assistant treasurers under section 170 of the act of June, 1864, it was held they could not receive any compensation whatever for services of that character. *Folger v. United States*,* 13 Otto, 30.

§ 172. Performing duties of higher grade.—Officers performing, by virtue of an authorized appointment, the duties belonging to those of a higher grade, shall receive the compensation allowed to such higher grade while actually so employed (4 Stat. at Large, 756). But the

mere discharge of such duties will not entitle him to the benefit of the statute, unless he is so authorized. *McIntosh v. United States*,* 20 Law Rep., 633. When, in the case of a vacancy in an office, the duties appertaining to it are performed by the incumbent of an inferior office under the act of July, 1863 (15 U. S. Stats. at Large, 168), such officer is not entitled to the allowance of any salary which involves an increase of compensation, other than that attached to the office which he holds. *Compensation for Performing Duties of Vacant Office*,* 13 Op. Att'y Gen'l, 5.

§ 173. A vice-consul, with the sanction of the department, in charge of a consulate during the temporary absence of the consul, or placed in charge of the office by an authorized agent of the government, on the death, resignation or removal of the consul, is entitled to the statute salary, subject to the regulations of the department. *Compensation of Provisional Consuls*,* 7 Op. Att'y Gen'l, 714.

§ 174. Though the duty of a register of the treasury may require him to enter and register the accounts of a disbursing agent in his books, yet that will not blend the duties of the two positions in such a manner as to deprive him of his claim for compensation for extra-official services, if he is employed to perform the duties of disbursing agent. *United States v. Nourse*,* 4 Cr. C. C., 151.

§ 175. For services rendered by an officer of the United States, legally pertaining to the office, the officer is not entitled to compensation beyond the salary given him by law. So it was held that the secretary of the territory of Minnesota was not entitled to pay as acting governor of the territory during the absence of the governor, nor to a commission on funds disbursed by him as secretary. *United States v. Smith*, 1 Bond, 68; 5 Am. L. Reg., 268.

§ 176. Fees paid to deputies.—It seems that a collector of the customs, when sued by the United States for a balance alleged to be due, cannot be allowed such sums of money as he had paid to his deputies, who are entitled only to such fees as are by law allowed for such service; and the collector, not having at any time, in his accounts, rendered during his continuance in office, made any charge for such service, cannot be allowed anything for the same in this suit. *Andrews v. United States*, 2 Story, 202.

§ 177. Special service of enlisted men.—The act of congress of March 3, 1863, for enrolling and calling out the national forces, provides "That hereafter details to special service shall only be made with the consent of the commanding officer of forces in the field; and enlisted men now or hereafter detailed to special service shall not receive any extra pay for such services beyond that allowed to other enlisted men." *Held*, that said act does not forbid extra pay to enlisted men who were, at the date of the act, or who may be at any time afterwards, detailed for special service as clerks of the staff officers of the war department, but they are entitled to the extra pay allowed to "other enlisted men." *Extra Pay for Special Services of Enlisted Men in the Army*,* 10 Op. Att'y Gen'l, 472.

§ 178. Exploring expedition.—Since the passage of the acts of 1835 and 1839, officers detailed for an exploring expedition are not entitled to extra pay, in the absence of a law authorizing the same; and the executive has no authority to order such extra compensation. *Compensation of Officers of Exploring Expedition*,* 4 Op. Att'y Gen'l, 128.

§ 179. Acting secretary of the navy.—The chief clerk of the navy department while acting, by appointment by the president, as secretary of the navy *ad interim*, received his salary as clerk. *Held*, that the act regulating the pay of clerks in the public offices does not prohibit a clerk from receiving compensation for services performed by him in another capacity; that the claimant was entitled to compensation, at the rate paid the secretary of the navy, for the time he acted as such. *Boyle v. United States*,* 19 Law Rep., 622.

§ 180. Acting secretary of war.—Claimant was duly appointed and served as acting secretary of war, at divers times, amounting in all to one hundred and seventy-five days, between June, 1832, and October, 1833. *Held*, that he was entitled to salary for one hundred and seventy-five days at the rate of the salary of the secretary of war. *Robb v. United States*,* 19 Law Rep., 89.

§ 181. Performing duties of two offices.—Where an officer claims compensation for performing the duties of two offices, if the language of the statute on the subject is loose or obscure, the construction ought to be in favor of the officer. *United States v. Morse*,* 3 Story, 87.

§ 182. A clerk in the treasury department, at the same time that he performed the duties of clerk, acted in 1829 and 1833, by authority of the president of the United States, as secretary of the treasury in the absence of the secretary. *Held*, that the clerk was entitled to the compensation of both offices for the time that he performed the duties of both. *Dickens v. United States*,* Dev., 42.

§ 183. Claimant, while chief clerk in the state department, at periods between August 10, 1833, and November 9, 1836, acted as secretary of state, by authority of the president of the United States, in the absence of the secretary of state. *Held*, that at the times that claimant discharged the duties of two offices he was entitled to compensation accordingly. *Ibid*.

§ 184. It seems that where the president of the United States, under the act of May 8, 1792, authorized any one to perform the duties, in case of absence or sickness, of secretary of state, of secretary of the treasury, or of secretary of war, the one so authorized is entitled to receive for his services as acting secretary of state, acting secretary of the treasury, or acting secretary of war, the same compensation for the time he so acted which the law then allowed to the secretaries of state, of the treasury, and of war, respectively. *Ibid.*

§ 185. The collector for the port of Michilimackinac was appointed also inspector of the revenue and customs of that port. *Held*, that neither the act of March 2, 1799, nor any other act passed up to the time the collector ceased to exercise the duties of collector and inspector in 1833, authorized the two positions to be filled by the same person, and that the claim of the collector for compensation as inspector could not be allowed, though the allowance paid long before would not be disturbed. *Stewart v. United States*, 17 How., 116.

§ 186. Under the act of congress of September 30, 1850, providing that no one individual shall be paid the salaries of two different offices on account of having performed the duties thereof at the same time, it was held that the secretary of a territory could not, in addition to his salary as secretary, draw a salary as acting governor. *United States v. Smith*, 1 Bond, 68. Where Governor Cass had been employed to render services by the government, not belonging to his duty as governor of Michigan Territory, he was entitled to claim for the same on the principles of a *quantum meruit*. *Governor Cass' Claim*, * 2 Op. Att'y Gen'l, 189.

§ 187. *Held*, that where not specifically prohibited by law, a deputy collector can be appointed as inspector, and hold both offices at the same time, and receive the emoluments thereof, under section 14 of the act of May, 1822. *United States v. Morse*, * 3 Story, 87.

§ 188. Where a navy agent was appointed by the secretary of the navy as acting purser of the naval academy at Annapolis, his claim for compensation as such was allowed. *United States v. White*, * Taney, 152.

§ 189. Claimant sues to recover salary as a clerk in the office of the attorney-general of the United States; during the period that he served as clerk in the office of the attorney-general he was clerk in the internal revenue department, duly appointed, and served and received his pay as such, giving receipts in full therefor. *Held*, that the act of congress of September 30, 1850 (9 Stat. at L., 542, 543), providing that "hereafter the proper accounting officers of the treasury, or other pay officers of the United States, shall in no case allow any pay to one individual (of) the salaries of two different officers, on account of having performed the duties thereof at the same time," forbids the claim from being allowed. *Talbot v. United States*, * 10 Ct. Cl., 426.

§ 190. A clerk in the custom-house at New York was appointed and served as deputy collector *ad interim*. The appointment was on the express terms that it was made "without increase of his compensation as clerk." During the time that he served as deputy collector he received and receipted for his compensation as clerk. He now claims \$1,258.83, an amount which, if added to the pay he has received as clerk, will make the legal compensation of a deputy surveyor. The act of congress of September 30, 1850, provides "that hereafter the proper accounting officers of the treasury, or other pay officers of the United States, shall in no case allow any pay to one individual (of) the salaries of two different offices, on account of having performed the duties thereof at the same time." *Jackson v. United States*, * 8 Ct. Cl., 354.

§ 191. *Twenty per cent. cases*.—The claim for twenty per cent. additional pay under the joint resolution of congress of February 28, 1867, did not accrue until the fiscal year had ended, and it was at that time that the statute of limitations began to run against it. *Bell v. United States*, * 9 Ct. Cl., 302; *Park v. United States*, * 9 Ct. Cl., 315.

§ 192. Fitzpatrick and seven other employees of the government claimed additional compensation by virtue of the joint resolution of February 28, 1867, which provided for a twenty per cent. increase in the salaries of certain designated persons, employed in the civil service of the United States at Washington. *Held*, that, for the purpose of enabling parties to take advantage of the resolution, the term "civil service" applied to all who are not connected with the military or naval service, and was not necessarily restricted to salaried officers. *Twenty Per Cent. Cases*, * 13 Wall., 568.

§ 193. Fourteen employees of the government having made claims for additional compensation by virtue of the joint resolution of February 28, 1867, which provided that twenty per cent. additional compensation should be granted to certain described persons employed in the civil service of the United States at Washington, it was held that the words of the resolution touching the term "civil service" should not be so restricted as to apply only to persons filling offices or holding appointments established by law. *Twenty Per cent. Cases*, * 20 Wall., 179.

§ 194. The public printer of the house of representatives, elected under section 8 of the act of August 3, 1846, is an "officer," and also an "employee" in the legislative department of the government. within the meaning of the joint resolution of July 20, 1854, and as such entitled

to the "increased compensation of twenty per cent." provided by that resolution. *Nicholson v. United States*, * Dev., 128; 19 Law Rep., 20.

§ 195. Claimant is one of a class of special agents whose duties are not confined to the place where they are stationed; but on the 1st November, 1866, "by order of the postoffice department, he was called to Washington and assigned to the duty of superintendent of route agents;" in the discharge of these duties he was sometimes called away from Washington, but most of the time he was at his office in the postoffice department at Washington; his salary was paid monthly, as were the salaries of all the employees of that department. *Held*, that claimant was employed "in the civil service of the United States at Washington," and entitled to twenty per cent. additional pay under the joint resolution of congress of the 28th of February, 1867. *Park v. United States*, * 9 Ct. Cl., 815.

§ 196. The assistant of the United States attorney for the District of Columbia, legally appointed by the attorney-general, is "in the civil service of the United States at Washington," an "employee" in the department of the attorney-general, and entitled to twenty per cent. additional pay under the joint resolution of congress of February 28, 1867. *Wilson v. United States*, * 11 Ct. Cl., 565.

§ 197. Claimant was an employee in the surgeon-general's office; his employment was not the result of an appointment to office, the compensation of which is fixed by law, but his services were rendered under a contract. *Held*, that he was an employee in an executive department, and entitled to two months' pay under a joint resolution of congress of 23d June, 1874, authorizing such payment to "employees of the executive departments" who should be discharged without fault on their part but by reason of a deduction made necessary by legislation. *Schaeffer v. United States*, * 11 Ct. Cl., 780.

§ 198. The joint resolution of congress of the 28th of February, 1867, allowing twenty per centum additional pay to "employees" in the office of the commissioner of public buildings, applies to a member of the capitol police; to a watchman on the capitol grounds; to the keeper of the western gate of the capitol; to a watchman on the dome of the capitol; to a watchman on the east grounds of the capitol; to the watchman at the government stables at the capitol; to the watchman at the crypt of the capitol; to a watchman at the Smithsonian Institute; to a laborer on the public grounds; and to a guard of the jail. *Marce v. United States*, * 5 Ct. Cl., 523.

§ 199. A laborer in the capitol, appointed by the commissioner of public buildings in conformity with law, is an "employee" in the office of said commissioner, and entitled to twenty per centum additional compensation under a joint resolution of congress of the 22d of February, 1867. *Kirby v. United States*, * 3 Ct. Cl., 265.

§ 200. The public gardener of the United States, duly appointed by the commissioner of public buildings, is an "employee" in the office of said commissioner, and entitled to twenty per centum additional compensation under a joint resolution of congress of the 28th of February, 1867. *Nokes v. United States*, * 3 Ct. Cl., 267.

§ 201. Employees of the secret service division of the treasury department, whose salaries are fixed by law, and who are stationed at Washington, though liable to be sent elsewhere, are entitled to twenty per cent. additional pay under the joint resolution of congress of February 28, 1867. *Bell v. United States*, * 9 Ct. Cl., 302.

§ 202. Laborers in the commissary department are entitled to twenty per cent. additional pay under the joint resolution of congress of the 28th of February, 1867. *Ibid*.

§ 203. The "police of the capitol" are appointed by the commissioner of public buildings, and are by the joint resolution of congress of 28th of February, 1867, allowed twenty per centum as additional compensation. *Mallory v. United States*, * 3 Ct. Cl., 257.

§ 204. A laborer on the public grounds in the city of Washington, appointed, in conformity with law, by the commissioner of public buildings, is an "employee" in the office of said commissioner, and is entitled to twenty per centum additional compensation under a joint resolution of the second session of the thirty-ninth congress granting such additional compensation to "employees in the office" of the commissioner of public buildings. *Stone v. United States*, * 3 Ct. Cl., 260.

§ 205. A watchman in the Smithsonian grounds, and in the pay of the commissioner of public buildings, is an "employee" in the office of said commissioner, and entitled to the twenty per centum additional compensation allowed to such "employees" by a joint resolution of congress of the 28th of February, 1867. *Ashfield v. United States*, * 3 Ct. Cl., 263.

§ 206. The act of congress of July 28, 1866, provides that twenty per cent. additional compensation shall be paid to officers and employees of the senate and house of representatives. An act of February 23, 1867, declares that the congressional printer "shall be deemed an officer of the senate;" he is required to superintend all the printing and binding which, by law, are required to be done at the government printing office. *Held*, that neither the congressional printer nor his employees were "officers" or "employees" of the senate in the sense of the act of July 28,

1866; and that an employee in the office of the congressional printer was not entitled to the twenty per cent. additional pay. *Clapp v. United States*,* 7 Ct. Cl., 851.

§ 207. Printers in the government printing office, who are paid by the "em," are not entitled to twenty per cent. additional pay under the joint resolution of congress of February 28, 1867. *Allison v. United States*,* 10 Ct. Cl., 449.

§ 208. The assessor of internal revenue for the District of Columbia, though his district coincides to some extent with the city of Washington, is not an officer in the treasury department at the seat of the government within the meaning of the joint resolution of congress of February 28, 1867, and is not entitled to twenty per cent. additional pay allowed by that resolution to certain officers. *Pearson v. United States*,* 9 Ct. Cl., 152.

§ 209. Plate-printers in the bureau of engraving and printing in the treasury department, who receive their pay at an agreed rate for the amount of work done, are not persons "in the civil service of the United States" whose pay is "fixed by," and are not entitled to twenty per cent. additional pay under the joint resolution of congress of the 28th of February, 1867. *Bell v. United States*,* 9 Ct. Cl., 802.

§ 210. The "superintendent of gardens in the department of agriculture" applied for and received the twenty per cent. increase of salary for one year authorized by the joint resolution of February 28, 1867, and applied for the same advance for subsequent years. *Held*, that he did not come within the intent and meaning of section 18, act of July 28, 1866, giving a similar increase to the "three superintendents of the public gardens." *United States v. Saunders*,* 22 Wall., 492.

§ 211. Laborers on the treasury extension whose services are rendered under contracts for "finished work" at the "highest market wages" are not employees in the civil service of the United States, and are not entitled to twenty per cent. additional pay under the joint resolution of congress of 23th February, 1867. *Bell v. United States*,* 9 Ct. Cl., 802.

§ 212. Laborers in the medical department of the army are civil employees of the army, and not in any sense in the civil service. They are not entitled to twenty per cent. additional pay under the joint resolution of congress of the 28th February, 1867. *Ibid*.

§ 213. Laborers employed by the quartermaster's department at Washington, but whose services are rendered at Arlington, are not in the civil service "at Washington," and are not entitled to twenty per cent. additional pay under the joint resolution of congress of February 28, 1867. *Ibid*.

§ 214. The joint resolution of congress of the 28th February, 1867, granting twenty per cent. additional pay to certain persons employed in any of the executive departments, does not apply to those employed in the judicial department, and the clerk, assistant clerk and bailiff of the court of claims are not entitled to the twenty per cent. additional pay allowed by that resolution. *Huntington v. United States*,* 8 Ct. Cl., 495.

§ 215. The keeper of the western gate of the capitol, whose services terminated before the passage of the joint resolution of congress of February, 1867, is not entitled to the twenty per cent. additional pay allowed by that resolution to "persons now employed in the civil service." *Magee v. United States*,* 8 Ct. Cl., 208.

§ 216. Persons employed in the national currency bureau, who are paid by the day or amount of work they do, are not persons "in the civil service of the United States," and are not entitled to twenty per cent. additional compensation under the joint resolution of congress of 28th of February, 1867. *Baker v. United States*,* 4 Ct. Cl., 227.

§ 217. The joint resolution of congress of February 28, 1867, allowing twenty per centum additional compensation to persons employed "in the civil service of the United States at Washington," does not apply to an assistant assessor of internal revenue whose duties are performed within the city of Washington. *Marche v. United States*,* 5 Ct. Cl., 523.

§ 218. A deputy marshal of the District of Columbia, though he is in the civil service of the government at Washington, receives no pay or salary from the government, but only a portion of the emoluments earned by him for the marshal, and is not entitled to twenty per cent. additional pay under the joint resolution of congress of the 28th of February, 1867. *Phillips v. United States*,* 11 Ct. Cl., 570.

§ 219. Miscellaneous.—The act of congress of August 23, 1842, which enacts that no officer in any branch of the public service, whose pay is fixed by law or regulation, shall receive any additional pay, extra allowance or compensation in any form for the disbursement of public money or any other service, unless the same shall be authorized by law, applies to a secretary of legation who was obliged by the accumulation of business, and confusion of papers in his office as left by his predecessor, to devote much time and labor to these arrears, in addition to all the ordinary duties of his station. *Holman v. United States*,* 19 Law Rep., 88.

§ 220. A law of congress, forbidding extra compensation to officers for doing extra work, unless the same should have been authorized by law, supersedes a contract for such extra com-

pensation, made between the head of a department and officers, prior to the passage of the law. *Compensation of Officers of Exploring Expedition*,* 4 Op. Att'y Gen'l, 128.

§ 221. Claimant had a contract for carrying the mails on a route in Florida, in two-horse coaches, at a certain rate. It became absolutely necessary to employ four-horse coaches, and the claimant employed them accordingly, with the knowledge of the postoffice department. *Held*, that he was entitled, on the ground of an implied promise, to extra compensation reckoned on the basis of the original contract. *Huston v. United States*,* 19 Law Rep., 88.

§ 222. Where the secretary of the navy authorizes an allowance to an officer for extra work, the officer will be entitled to the allowance in a suit against him by the United States for a balance claimed to be due, though it has been rejected by a subsequent secretary, unless the United States prove that the former secretary had no authority to make the allowance, or made it under a misapprehension of the facts, or was induced to make it by fraud or imposition. *United States v. Kuhn*, 4 Cr. C. C., 401.

§ 223. Defendant, one of the commissioners to erect the penitentiary, was chosen by the board acting commissioner, and as such performed services and incurred expenses worth several hundred dollars more than the salary allowed therefor by law. The board allowed and paid him the extra compensation. *Held*, that he was not entitled to more than the statutory compensation; and that the territory could recover back the amount thus wrongfully paid him. *Territory v. King*,* 1 Or., 106.

§ 224. Whiting was duly appointed to take charge of the records and correspondence and to attend to all the details connected with the execution of the law of March 2, 1831, for the suppression of the slave trade, and his salary was fixed by the head of the department which was charged with the execution of the law. The same department afterwards appointed Whiting to take charge of the correspondence relative to the capitol extension, and agreed to pay him \$500 per annum. *Held*, that Whiting, under the first appointment, was an officer whose salary was fixed by law, and the acts of March 3, 1839, May 15, 1842, August 23, 1842, August 26, 1842, September 30, 1850, and August 31, 1852, forbade the payment of compensation, for services rendered, under the second appointment, no compensation therefor having been fixed by law. *Whiting's Case*,* 10 Op. Att'y Gen'l, 354; *French's Case*,* 10 Op. Att'y Gen'l, 444.

§ 225. A clerk in the general land office receiving a fixed salary was appointed to sign land patents, and did sign the same outside of the time which, by regulations of the department, he was required to devote to his duties as clerk. The remuneration for said services was not "fixed by law." *Held*, that under the acts of congress of March 3, 1839, May 15, 1842, August 23, 1842, August 26, 1842, September 30, 1850, and August 31, 1852, he could not be allowed any compensation for signing the land patents. *White's Case*,* 10 Op. Att'y Gen'l, 442. No posterior claim for extra compensation can be based on the official acts done by a clerk, where those acts were merely a part of the general duties of the department. *Extra Pay of Clerks in the Departments*,* 6 Op. Att'y Gen'l, 583. President Polk directed the heads of departments to appoint clerks to audit and settle the accounts of officers who had received military contributions in Mexico. Claimant, who was a clerk in the navy department at a fixed salary, was required by the secretary to do this duty. *Held*, that under the act of August 23, 1842, forbidding a public officer whose salary is fixed by law to hold any other office or receive any other compensation whatsoever, claimant was not entitled to recover anything for such services. *Harvey v. United States*,* 3 Ct. Cl., 38.

§ 226. Petitioner was appointed in June, 1850, assistant marshal to take the seventh census, and, in consequence of an unforeseen calamity (crevasses of the Mississippi) was put necessarily to additional labor and expense in order to complete his duties. The act of congress of May 23, 1850, prescribed his duties and his compensation. *Held*, that petitioner could not claim any other compensation than that allowed by the act of 1850. *Boyd v. United States*,* Dev., 34.

§ 227. An Indian agent, who, at the request of the secretary of war, performs extra services in negotiating a treaty, is entitled to compensation for such services at the rate that is allowed for the same services in similar cases. *United States v. Duval, Gilp.*, 356.

§ 228. The services of the chief of the corps of engineers, in conducting the affairs connected with the civil works of internal improvement carried on by the United States, are not extra official services for which he is entitled to compensation beyond his pay as chief engineer. *Gratiot v. United States*, 4 How., 80.

§ 229. General Gratiot, chief of the corps of engineers, performed certain services at the bureaus of the war department, which, under the regulations of the army, his predecessors had performed as a part of the duties of the chief of the corps of engineers. *Held*, that General Gratiot could charge no extra compensation for said services. *Ibid.*

§ 230. A superintending engineer, acting also as agent of fortifications under the provisions of the sixty-seventh article of the general regulations of the army, published in July, 1821,

granting a specific compensation for such sum, was allowed the proper amount by the government. He also claimed a commission of two and a half per cent. for disbursing a part of some money for the disbursing of which he had been paid as agent of fortifications, and for collecting a part of the same when the collections consisted of stoppages from payments to be made to certain persons, and for sales when the sales were of property bought with a part of the same money referred to above and resold for the same account. *Held*, that he had received the compensation allowed by law for services rendered as agent of fortifications, and was not entitled to pay in another character for doing the same things. *Ibid*.

§ 231. The act of 1836, establishing the office of auditor of the treasury for the postoffice department, gives no authority to any person to employ the messengers in said office to perform extra services; the secretary of the treasury being the head of the department to which said office is attached, and having the exclusive authority to appoint the clerks and messengers of that office, is the proper person to contract for extra services by messengers in said office. *Cox v. United States*,* Dev., 82.

§ 232. Where an assistant messenger and a laborer employed in the general postoffice department, by order of that department rendered extra services, it was held that they were entitled to compensation for extra services rendered prior to the passage of the act of March 3, 1839; that for extra services rendered after the passage of said act they were entitled to no compensation, it being expressly forbidden by said act. *White v. United States*,* Dev., 128.

§ 233. A clerk in the interior department was appointed by the secretary of the interior the agent of that department to prepare for it a report of the London Industrial Exhibition, and promised his expenses and a reasonable compensation. During all the time the agent was attending the exhibition and preparing his report he was paid as clerk in the interior department, and his expenses as agent to the exhibition were paid. *Held*, that under the act of congress of 23d of August, 1842, he could recover no extra compensation for acting as agent at the exhibition and preparing the report. *Stanbury v. United States*,* 1 Ct. Cl., 123.

§ 234. A navy agent will be reimbursed his actual expenses of clerk hire where there is no evidence of bad faith or wanton extravagance in the expedition. *Armstrong v. United States*, Gilp., 390.

§ 235. The act of August 28, 1842, is applicable to the United States secretary of legation to Chili, and he has, therefore, no legal demand against the United States for extra services rendered in arranging the papers and records of the office of legation and making necessary indexes therefor. *Holman v. United States*,* Dev., 151.

§ 236. No increase of pay can be allowed to an officer of the United States for the performance of any act within the scope of his employment when he serves for a fixed compensation. So it was held that the district attorney for the southern district of New York was not entitled to extra pay for prosecuting prize cases. *The Anna*, Bl. Pr. Cas., 337.

§ 237. The house of representatives by resolution (May 4, 1848) directed the clerk of the house to have prepared, under the supervision of the commissioner of the general land office, a map of the public lands in each state. The first clerk in the general land office performed these services, in addition to the duties of his office, under the expectation of additional pay; the officers who employed him, and under whom he acted as clerk, expected him to receive additional pay. *Held*, that under the act of congress of the 23d of August, 1842, he could not be allowed any additional pay. *Wilson v. United States*,* 1 Ct. Cl., 206.

§ 238. A clerk in the interior department at Washington was engaged by the secretary of that department to go to Europe and perform certain services, the secretary agreeing in writing to pay him a reasonable compensation. The clerk's salary having been paid to his family during his absence, the secretary's successor refused to pay the additional compensation. *Held*, that under the act of August, 1842, declaring that no officer of the government, drawing a fixed salary, shall receive additional compensation for any service, unless it is authorized by law and a specific appropriation made to pay it, he was not entitled to maintain his claim. *Stansbury v. United States*,* 8 Wall., 33.

§ 239. The act of June 30, 1876, chapter 159 (19 Stat., 65), allowing officers of the United States navy, engaged in the public business of the government, mileage at the rate of eight cents a mile in lieu of actual expenses, is unequivocal, and applies to distance traveled by sea as well as by land. *United States v. Temple*,* 15 Otto, 97.

§ 240. The case of a clerk employed in the internal revenue department on account of temporary increase of business caused by the abolition of the offices of assessor and assistant assessor of the internal revenue, and discharged as soon as the stress of business caused by the change had ceased (such abolition of offices being caused by act of congress of May, 1873), does not fall within the provisions of the joint resolution of congress of June 23, 1874, allowing two months' pay "to such clerks as shall be discharged at the close of the present fiscal year . . . by reason of the reductions made necessary by the legislation of the present session of congress." *United States v. Murray*,* 10 Otto, 536.

§ 241. A captain in regular service, having been brevetted lieutenant-colonel, claimed an allowance for responsibility and care of clothing as a captain, and also during the same period the extra compensation of a lieutenant-colonel, and having received the latter, it was held the former must be disallowed. *United States v. Freeman*,* 1 Woodb. & M., 45.

§ 242. Under the act of June 30, 1834, no officer of the army performing the duties of an Indian agent shall receive any other compensation than his actual traveling expenses. *Minis v. United States*,* 15 Pet., 423.

§ 243. Under the act of May, 1822, section 15, the limitation of the salary of a deputy collector to \$1,000 does not exclude the receipt by him of other emoluments for other services. *United States v. Morse*,* 3 Story, 87.

§ 244. The question was presented whether a subordinate officer of the army, claiming under a regulation which he thinks either is or ought to be in force, shall obtain emoluments from the government, which a subsequent order from his superior, duly empowered to make such order, had warned him he was not entitled to, and it was held to be an error to allow such a claim. *United States v. Eliason*,* 16 Pet., 291.

§ 245. The act of congress for the organization of the territory of Minnesota provides that congress shall make an annual appropriation of a sufficient sum "to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses." This appropriation is to be expended by the secretary of the territory. *Held*, that the claims of the secretary for services outside of his duties as secretary, and within the designation of "expenses of the legislative assembly, the printing of laws, or other incidental expenses," should be allowed. *United States v. Smith*, 5 Am. L. Reg., 268; 1 Bond, 68.

§ 246. Though by the act for the organization of the territory of Minnesota it is made the duty of the secretary of the treasury to make estimates of the expenses to be defrayed by congress, yet if he fails to make the estimates, or they prove too small, the secretary of the territory, whose duty it is to disburse the money under said act, will be allowed his claims of expenses incurred in the conduct of his official duty coming fairly within the scope and intention of the act. *Ibid*.

§ 247. The secretary of the territory of Minnesota, in order to hasten the remittance of funds for the support of the territorial government, made a trip to Washington. *Held*, that he should be reimbursed his actual expenses if the jury believed that the public interests of the territory required the journey. *Ibid*.

§ 248. The engineer department employed a surgeon, and petitioner, an officer in the department, paid him. The surgeon was assistant surgeon in the navy. *Held*, that the act of March 3, 1835, did not prohibit the surgeon from receiving pay for his services not within the line of his duty, from third persons, and that petitioner lawfully paid him, and was entitled to have the sum so paid credited to him by the United States. *Chase v. United States*,* Dev., 19; 19 Law Rep., 88.

IV. CASES IN WHICH THE UNITED STATES ARE LIABLE.

SUMMARY — *Revenue cases*, §§ 249, 250. — *Distinction between costs and fees*, § 250.

§ 249. The practice heretofore pursued, of allowing officers in revenue cases to retain their fees earned, and account for them to the treasury, is not changed by section 856, United States Revised Statutes, providing that "the fees of district attorneys, clerks and marshals, . . . in cases where the United States is liable to pay the same, shall be paid on settling their accounts at the treasury;" this section applying to costs incurred by the United States in unsuccessful suits, and for services for which no fees are taxed, not to fees due such officers out of collections in successful suits. *In re United States v. Cigars*, § 251.

§ 250. In suits by the United States there is a distinction between *costs* to which the successful party is entitled, and *fees* which belong to the officer rendering services in a cause; and the act of July 13, 1866, which has the effect of requiring *costs* in internal revenue cases to be paid to the internal revenue department, does not affect officers' *fees* in such cases, which may still be retained by the officers and accounted for to the treasury. *Ibid*.

[NOTES.— See § 252.]

IN RE UNITED STATES v. CIGARS.

(District Court for Pennsylvania: 2 Federal Reporter, 494-497. 1880.)

Opinion by BUTLER, J.

STATEMENT OF FACTS.— This motion contemplates a change of practice respecting the officers' fees in revenue cases. Heretofore, the fees, in these as

in other cases, have been retained by the officers when collected and received, and accounted for in their semi-annual returns. Now, it is claimed that the amount should be paid over to the internal revenue department, through the collector, and the officers look to the treasury for its return.

That the practice heretofore pursued conformed to the law, as it existed prior to the act of June 30, 1864, re-enacted July 13, 1866 (R. S., § 3216), is not, I believe, open to doubt. The act of February 26, 1853 (R. S., §§ 823, 828, 839, 842), prescribes what fees shall be allowed to the clerk, district attorney, and other officers; and sections 839, 842 and 844 show, with great distinctness, that these fees are to be retained by the officers, when received, until the limit fixed as the maximum of their compensation is exceeded. Each one of these sections 839, 842 and 844 recognizes this right to retain in plain terms, the last declaring "that every district attorney, clerk and marshal shall, at the time of making his half-yearly return to the attorney-general, pay into the treasury . . . any surplus of the fees and emoluments of his office, which said return shows to exist, over and above the compensation and allowances authorized by law to be retained by him."

§ 251. *Rule as to fees of district attorneys, clerks, etc., in cases in which the United States are liable for them, and where they are not.*

Section 856 provides that "the fees of district attorneys, clerks and marshals, . . . in cases where the United States are liable to pay the same, shall be paid on settling their accounts at the treasury." And on this language, and that of the act of July 13, 1866 (R. S., 3216), the argument in support of the motion is based. The "cases where the United States are liable to pay" (referred to in section 856) are not, however, suits in which the fees are collected from its antagonists; but others, in which it is an unsuccessful party, and, also, where services are required (such as the act specifies) for which no fees are taxed to the defendant. Where the United States is successful, and the fees are recovered from the defendant, it is not liable to pay, and the case does not fall within this section. This construction is reasonable, and conforms to the language employed; while any other would bring the section into conflict, not only with the several sections before referred to (which provide, as has been seen, for the officers' retention of their fees), but also with the section immediately following it (section 857), which directs that "the fees and compensation of officers, and persons hereinbefore mentioned, *except* those which are directed to be paid out of the treasury, shall be recovered in like manner as fees of the officers of the states, respectively, for like services are recovered."

The distinction in the mind of the draughtsman of the act, which, without this section, would have been plain, is thus put beyond doubt. The fees, other than those which are to be paid out of the treasury, are those which are taxed and collected in suits; and these are to be recovered as like fees are recovered by similar officers of the state. In Pennsylvania such fees are recovered by taxation and execution, if not voluntarily paid; and when recovered belong exclusively to the officer. The plaintiff in whose suit they are collected has no claim upon, nor responsibility respecting, them. *Beale v. The Commonwealth*, 7 Watts, 186. In this case Chief Justice Gibson says: "He who orders the service is also liable on an implied contract. Down to the receipt of them (the fees) by the sheriff he certainly is; but it cannot be doubted that payment to the agent of the creditor, by the debtor ultimately liable, discharges the collateral liability of the intermediate one. If the money be lost in the sheriff's hands it is lost to him whose property it was at the time; for

a loss which would not have happened without some degree of negligence must be borne by him whose inattention occasioned it, and it is the business of the officer to see that the sheriff pay over his fees."

The act of July 13, 1866, which provides "that all judgments and moneys recovered or received for taxes, costs, forfeitures and penalties shall be paid to collectors as internal taxes are required to be paid," effects no change in the existing law, except to require the costs, *which belong to the government*, to be paid into a different department in internal revenue cases. These costs consist in expenditures made by it during the progress of suits, and taxed to and recovered from defendants on its account, and this, manifestly, was its only purpose. It does not require the officers' *fees* to be thus paid over, and no proper object is discoverable for such a requirement. The fees belong to the officers as the emoluments of their offices. Conceding that congress might require the payment, and send the officers to another department to recover them back, such a purpose will not be attributed to the statute in the absence of plain terms to that effect.

This interpretation gives full force to the language of the statute, and, I have no doubt, to its purpose. The distinction between *costs* to which a successful party is entitled, and *fees* belonging to an officer, is well understood by the profession, and is judicially stated by the court in *Messer v. Good*, 1 S. & R., 248, and again in *Beale v. The Commonwealth*, before cited. In the former case the court says: "*Costs* are an allowance to a *party* for expenses incurred in conducting his suit; *fees* are a compensation to an *officer* for services rendered in the progress of the cause." The act of 1866, manifestly, recognizes this distinction, and was not intended to affect the officers referred to, by taking possession of their fees, but simply to turn the money coming to the government, in the form of costs, from revenue cases, into another department, more appropriate for its reception.

The entire amount collected in the cases referred to has been paid into court; and we regard this as a proper practice, as it affords all persons interested an opportunity of contesting the officers' claims. The motion is therefore denied.

McKENNAN, J., concurred.

§ 252. The district attorney claimed an item of \$8.88 as being taxable and payable to him under the provisions of section 11 of the act of March 3, 1863 (12 U. S. Stat. at Large), which gives him "two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws" conducted by him, in which the United States is a party; the clerk's claim was one for \$4.44, under the act of February 26, 1853, giving him one per centum "for receiving, keeping, and paying out money," etc. *Held*, that the act of June 23, 1874, providing that all provisions of law under which "moiety of any fines, penalties or forfeitures under the customs revenue laws, . . . or commission thereon, are paid to informers, . . . or other officers of the United States," are repealed, did not affect the right of either the district attorney of clerk to their fees. *United States v. One Horse*, * 7 Ben., 405.

V. UNITED STATES MARSHALS.

SUMMARY—*Settlement of claim without sale of property*, §§ 253-255.—*Levy of execution; compromise*, § 256.—*Arrest; state laws*, § 257.—*Mileage*, §§ 258, 260-263, 268, 269.—*Attending examinations before commissioners*, § 259.—*Arrest of person not named in warrant*, § 264.—*Arrest of proper person under wrong name*, § 265.—*Arrest beyond jurisdiction of court*, § 266.—*Charge for time in endeavoring to make an arrest*, § 267.—*Caution as to appointment of special bailiffs*, § 270.—*What a proper service of warrant of arrest*, §§ 271, 273.—*Arrest after a bond has been given*, §§ 272, 274.—*Failure to take prisoner into custody*, §§ 271, 273.—*Rule as to allowance of guards*, §§ 275, 276.

§ 253. The act of congress providing that in case of an action *in rem* or a libel in admiralty the marshal shall be entitled to a commission of one per cent. on the first \$500 of the claim or decree, and one half of one per cent. on the excess over \$500, in all cases in which the debt or claim was settled by the parties without sale of the property, was not intended to apply to claims settled without sale of the property and without the appearance of any claimant in court; the law contemplates the presence of both parties in court and progress of litigation short of sale under final decree, and is only meant to prevent the parties from depriving the marshal of his just compensation for the custody of the *res* and responsibility assumed by a compromise before sale under final decree or a sale under an interlocutory order of court. *Bone v. The Steamer Norma*, § 277.

§ 254. A seizure was made under admiralty process, by a marshal, of a vessel libeled, to recover salvage services. Afterwards the property was released on stipulation, the claim compromised, the suit withdrawn previous to any decree, and a certain sum received by libelants by way of compromise. It was held that the marshal was entitled to his commission on the sum thus received by libelants under the provision of section 829 of the Revised Statutes, allowing the marshal a commission on the amount of the claim or decree, when the debt or claim in admiralty is settled by the parties without a sale of the property. *The Clintonia*, § 278.

§ 255. An attachment on the filing of a libel in admiralty was issued to and served by A., a marshal, against a vessel, which was immediately discharged from seizure and custody of A., by being bonded under a stipulation for value, before decree; subsequently, and before decree entered, B. became marshal; after final decree the sum was paid into the registry without any execution or sale of the property; *held*, that as under the provisions of the fee-bill act of February, 1853 (10 U. S. Stat. at Large, 101), a commission is given to the marshal who attached or libeled the property in case the debt or claim is settled by the parties without a sale of the property, A., the marshal serving the attachment, was entitled to the fee. *The Steamship Russia*, §§ 279-80.

§ 256. Execution was issued against the defendants for one sum, but subsequently a compromise for a much less amount was accepted by the secretary of the treasury. *Held*, the marshal should be allowed poundage on the entire sum for which the execution was issued. *United States v. Haas*, §§ 281-82.

§ 257. By section 829, Revised Statutes United States, the fees and poundage, for serving execution, of the United States marshal are assimilated to those allowed to the sheriffs of the state for like services; so, where the marshal made an arrest in the county of New York, but charged the highest rate allowed in other counties, it was held that the fee should be the same as that of the sheriff of the county in which the services are performed. *Ibid*.

§ 258. Under section 829 of the Revised Statutes, allowing the marshal mileage "from the place where the process is returned to the place of service," the word "returned" is to be so construed as to indicate the identical place from which the process issues. So in a case in which a commissioner at A., having directed the arrest of a person at B., and the return of the warrant before another commissioner at C., it was decided that the marshal could charge mileage for the distance between A. and B., and that the commissioner could not, by directing the return of the warrant to C., limit his mileage to the distance between B. and C. *In re Crittenden*, §§ 283-90.

§ 259. A marshal may charge a fee for attending, by special bailiff, examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime. *Ibid*.

§ 260. A marshal is entitled, under section 829 of the Revised Statutes, to charge mileage for serving each individual warrant delivered into his hands, though two or more of them are placed in his hands at the same time, and are in favor of or against the same parties, who reside at the same place. The only restriction is in case more than two writs of any kind are required to be served in behalf of the same party on the same person, to be served at the same time. In such case he can charge mileage for two writs only. *Ibid*.

§ 261. When, under the provision of section 829 of the Revised Statutes, allowing actual expenses in lieu of mileage, a marshal elects to take actual expenses, the items must be sworn to by the marshal, if incurred personally, by the deputies incurring them, if incurred by proxy; and if proof by affidavit is allowable, the affidavit should refer to the charges specifically, and if practicable be accompanied by vouchers. *Ibid.*

§ 262. Under the statute allowing ten cents a mile to the marshal (or his bailiffs) for the transportation of criminals, and ten cents for each prisoner and necessary guard, it must clearly appear to the court that the guard was necessary. So held in a case in which three bailiffs arrested three prisoners, and each bailiff procured himself a guard, the item of expense for guards being in this instance rejected. *Ibid.*

§ 263. In a case in which persons whose mileage was paid as witnesses by the United States were employed as guards by the marshal, it was held that the marshal might nevertheless under the statute charge ten cents a mile for their mileage. *Ibid.*

§ 264. The marshal cannot charge a fee arising out of the arrest of a person not called for in the warrant, though the mistake was an honest one. *Ibid.*

§ 265. In a case in which the person arrested was actually the party desired, but there was a misnomer in the warrant which gave his name as Buck Gallagher, while his name was in fact John Gallagher, it was held that the marshal might charge his fees for such arrest. *Ibid.*

§ 266. An arrest made beyond the jurisdiction of the warrant, though in good faith, is illegal, and the marshal is not entitled to fees. *Ibid.*

§ 267. A marshal charged in his bill an item for eight days expended by his deputy in endeavoring to make an arrest, such item not being sworn to by such deputy, but merely verified by the affidavit of the general deputy in whose hands the bill was found, to the effect that the whole account was correct; held, that as it did not appear by the oath of the deputy making the endeavor what circumstances justified the expenditure of so much time not obviously necessary, nor what endeavors were made by him, nor why the arrest was not made sooner, the court would fix two days' time as a reasonable time for making the arrest, and reduce the item accordingly. *Ibid.*

§ 268. In charging mileage for transportation, the charges should be by the usual route, not by the most convenient one. *Ibid.*

§ 269. Section 829 of the Revised Statutes provides for mileage "from the place where the process is returned to the place of service." Section 7 of the act of 1875 especially provides against "any allowance for mileage or travel not actually and necessarily performed." The intent of this latter act was not to increase but reduce mileage. So held in a case in which a warrant was issued at Louisville, returnable at that place, for the arrest of a person at Lexington. The marshal went from Louisville to Lexington, and not finding the prisoner there, followed him to Mt. Sterling, from there to Paris (in Kentucky), and from there back to Lexington, where he arrested him. In this case it was held that section 829 furnished the rule of computation of mileage, the mileage thus allowed being the distance from Louisville to Lexington; and that the act of 1875, providing for mileage actually and necessarily traveled, being intended to reduce, not to increase, mileage, could not govern in this case, in which, if applied, it might have the effect of increasing the mileage to the circuit made in this case by the marshal. *Ibid.*

§ 270. The careless and unrestricted appointment of special bailiffs by United States deputy marshals condemned. *Ibid.*

§ 271. The marshal cannot charge fees for the service of a warrant, when it appears that the deputy marshal read the warrant to the prisoner, who at once submitted to its authority, and then allowed him to depart upon promising his attendance at a day named; due service consists both in arrest and custody. *United States v. Ebbs*, §§ 800-806.

§ 272. A bond taken by a commissioner for the appearance of a third person, therein named, before him, while such person is still evading the force of a warrant out against him, acts as a supersedeas of the warrant, and the marshal cannot charge fees for arresting the prisoner on the warrant superseded, the bond having been rejected by the commissioner after its acceptance, and an arrest on the old warrant ordered. *Ibid.*

§ 273. A deputy marshal who, upon making an arrest, voluntarily allows the prisoner to depart from custody upon his promise to appear at the day required, cannot charge for the time and expense of subsequently recapturing him, upon his failure to appear according to his promise. *Ibid.*

§ 274. A marshal cannot charge for the guarding of a prisoner, who was arrested upon the verbal order of the commissioner directing his arrest on a warrant which had been superseded by the acceptance on the part of the commissioner of a bond from third persons for the prisoner's appearance, the verbal order to arrest on the superseded warrant being illegal, and the prisoner, up to the time of hearing, being in the constructive custody of the court and in the keep and guard of his sureties. *Ibid.*

§ 275. The rule of this court, authorizing the commissioner to judge of the necessity of a guard for the marshal to aid in the custody of a prisoner before the court under arrest, is set aside. The marshal alone is the proper judge. *Ibid.*

§ 276. The marshal is entitled to fees for guarding a prisoner, put into his hands for custody by order of the commissioner till sufficient bail be given for an appearance at court to answer an indictment, though his presence at the commissioners' court be not required by law; and he may charge for the entire time he holds him in custody, as nothing but obvious necessity or a written *mittimus* will justify the marshal in committing him to jail. *Ibid.*

[NOTES.—See §§ 307-376.]

BONE v. THE STEAMER NORMA.

(District Court for Louisiana: Newberry, 533-535. 1850.)

Opinion by McCaleb, J.

STATEMENT OF FACTS.—The claim for salvage compensation in this case has been settled without a sale of the property libeled, and before any claimant thereof appeared in court. A rule has been taken on behalf of the United States marshal, upon the libelant, to show cause why a commission of one per cent. on the first \$500 of said claim, and one-half of one per cent. on the residue thereof, should not be paid to him (the United States marshal), in conformity to the act of congress, approved February 26, 1853, entitled "An act to regulate the fees and costs to be allowed clerks, marshals and attorneys of the circuit and district courts of the United States, and for other purposes." The provision of the first section, upon which his claim for commissions is founded, is as follows: "For serving an attachment *in rem* or a libel in admiralty, \$2; and the necessary expenses of keeping boats, vessels or other property, attached or libeled in admiralty, not exceeding \$2.50 per day; and in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first \$500 of the claim or decree, and one-half of one per cent. on the excess over \$500; provided, that in case the value of the property shall be less than the claim, then and in such case such commission shall be allowed only on the appraised value thereof."

§ 277. *Statute on allowance of fees to marshals construed.*

It is admitted that the marshal has received his fees for serving the usual process upon the property, and for the custody thereof. For services actually rendered, therefore, he has been duly compensated; and the question now to be determined is, can he, in conformity to the provisions of the act referred to, be paid a commission on the amount of libelant's claim? If he can, upon the grounds contended for by his counsel, then it must be given to him as a mere gratuity. Is the law to receive such a construction as would be positively unjust in principle, and render it oppressive in its operation upon suitors who claim the aid of the court in the assertion of their rights? The language of the law is certainly not free from difficulty. But it can hardly be supposed that the lawgiver intended that an officer of the court should be gratuitously compensated at the expense of a litigant. In this case it is not pretended that any services have been rendered, to entitle him to be paid the commission demanded. The law, I think, contemplated the presence of *both the parties litigant in court*, and the whole progress of the litigation short of the sale under the final decree, or it contemplated the possession of the property by the marshal, and the usual proceedings by advertisement, etc., under an *interlocutory* order of sale without the sale itself. It intended to provide an adequate compensation to the marshal for the trouble and responsibility he as-

sumes up to the moment of sale, and to put it out of the power of litigants to deprive him of such compensation for the trouble and responsibility thus assumed, by a compromise or settlement before a sale under a final decree, or a sale under an *interlocutory* order of court. This, in my judgment, is the only fair and rational interpretation to be given to the provision of the act of congress referred to. It is therefore ordered that the rule be discharged.

THE CLINTONIA.

(District Court for Louisiana: 11 Federal Reporter, 740-742. 1882.)

Opinion by BILLINGS, J.

STATEMENT OF FACTS.—The matter here presented is on an appeal from the taxation of costs for the marshal by the clerk under that subdivision of section 829 of the Revised Statutes which provides: "When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first \$500 of the claim or decree, and one-half of one per centum on the excess of any sum thereof over \$500; provided, that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof." In this case a libel was filed to recover for salvage service. There was a seizure by the marshal under admiralty process, and the property was released on stipulation, when the claim was compromised, and the suit withdrawn previous to any decree, and it is admitted that the libelants received by way of such compromise the sum of \$25,000. Upon this sum the marshal claimed commissions, the clerk rejected the claim, and the marshal has appealed. The preceding subdivision establishes a fee not to exceed \$2.50 per diem for the necessary expenses of keeping boats, etc., attached or libeled in admiralty, and the following subdivision fixes the commissions of the marshal for sale of vessels and other property under admiralty process, or under the order of a court of admiralty.

§ 278. *Fees of marshal on a seizure under admiralty process, release on stipulation, and a compromise of the claim.*

It will be seen, therefore, that the expenses for keeping property libeled, and the fee for the sale of the libeled property, are provided for by these two juxtaposed subdivisions, and that congress intended to provide a third compensation, namely, a commission in case of settlement without a sale. In the case of *Steamer Norma*, Newb., 533 (§ 277, *supra*), my predecessor refused to tax this commission for the marshal on the ground that there had been no substantial service, and therefore it would have been a mere gratuity. In my opinion courts must not attempt to assess the compensation of officers under the fee bill by a determination of what had been earned in that particular case. Necessarily the fees can be established only by classifying the various services of the officers, and fixing the fees for the services as thus classified; the classification being arrived at so as, in the opinion of congress, to provide upon the whole adequate and proper compensation. Undoubtedly such a systemized regulation of fees will give more fees in some cases than will have been earned; but, on the other hand, in the same case often much service is demanded and little compensation allowed. It is the duty of the courts simply to see into what class the service in question falls, and then to award the fee or commission which acts of that class are entitled to.

For the service and responsibility of the marshal in case of a seizure and

settlement of the claim, congress has said there shall be this commission. Here is a class established. The case here presented falls within that class, and the officer must receive the corresponding fee. This is the view of Judge Blatchford in *The Russia*, 5 Ben., 84 (§§ 279-80, *infra*), and of Judge Benedict in *The City of Washington*, 13 Blatch., 410, and they are well-supported views. But it is urged for the libelants in this case that there had been no decree, and therefore there could be no assessment of commission. The answer to that argument is that the statute says the commission shall be allowed upon the "claim or debt," and shall be at such a per centum "of the claim or decree." The meaning clearly is that the decree shall determine the amount, if there has been a decree arrived at and it does not exceed the value of the property; but if the settlement has been effected before the cause had ripened to a decree, then the sum realized or paid is the basis of the commissions. The adjudications with reference to the fees of sheriffs and marshals, in cases of levies under executions and settlements by payment to plaintiffs, are in point.

In *Swan v. Ringgold*, 4 Cr. C. C., 246, the language of the statute being, "the sheriff or marshal should have a commission if the property be actually sold or the debt paid," the court says: "If the act gives the whole commission when the whole debt is paid, the equity of the act would give part of the commission when part of the debt is paid; that is, *pro rata*." In *Hildreth v. Ellise, Caines*, 194, where the law regulating sheriffs' fees gave, "for securing an execution for \$250, two cents and four mills per dollar, and for each dollar more one cent and two mills, with a limitation that 'poundage' should be taken only for the sum levied," the court said:

"Whenever the plaintiff interposes and a compromise takes place, he [the sheriff] is entitled to a poundage on the sum realized by the plaintiff, or that might have been collected on the property levied on. . . . Cases no doubt may be supposed where the sheriff will receive more than a valuable consideration for his services; but we think much less injustice will be done by adopting the rule we have laid down, than to say the sheriff shall be deprived of all his poundage whenever a compromise takes place." See, also, *Alchin v. Wells*, 5 Durn. & East, 470.

Applying the statute to this case, the claim is the amount received by the libelant in settlement or compromise of the same. That amount being \$25,000, the marshal is entitled to a commission of \$127.50, which amount the clerk is directed to tax.

THE STEAMSHIP RUSSIA.

(District Court for New York: 5 Benedict, 84-88. 1871.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—In this case, after a final decree for the libelant for the sum of \$148,700, that sum was paid into the registry of the court by the claimants, without an execution having been issued, and without a sale of any property having taken place under the decree. The present marshal of the United States for this district was not marshal thereof when the attachment on the filing of the libel was issued. Such attachment was issued to and served by Francis C. Barlow, Esquire, who was at the time marshal of this district. The vessel was almost immediately discharged from seizure and from the custody of Mr. Barlow, as marshal, by having been bonded under a

stipulation for value, before decree. On this state of facts, Mr. Barlow presented for taxation to the clerk, as a charge against the claimants, a bill for commissions as due to him on the \$148,700, amounting to \$746, being one per cent. on the first \$500 of the decree, and one-half of one per cent. on the excess over \$500, namely, on \$148,200. The clerk declined to tax the item, on the ground that, as the vessel had been discharged from the custody of the marshal prior to the entry of the decree, and as the decree had been paid by the claimants, the commissions could not be allowed to Mr. Barlow. From this decision Mr. Barlow has appealed to this court. It is stated that the present marshal, who was marshal when the decree was entered and paid, makes no claim for any commissions on the amount paid thereunder.

§ 279. *The payment of the amount decreed into the registry of the court is a "settlement of the claim," and the marshal is entitled to the commissions prescribed by the fee bill.*

The claim of Mr. Barlow is made under the provisions of the fee bill of February 26, 1853 (10 U. S. Stat. at Large, 161), which provides (§ 1) as follows, in respect to "marshals' fees:" "For serving an attachment *in rem*, or a libel in admiralty, \$2; and the necessary expenses of keeping boats, vessels or other property attached or libeled in admiralty, not exceeding \$2.50 per day; and, in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first \$500 of the claim or decree, and one-half of one per cent. on the excess over \$500: *Provided*, that, in case the value of the property shall be less than the claim, then, and in such case, such commission shall be allowed only on the appraised value thereof." The same section contains, also, the following provision, under the head of "marshals' fees:" "For sales of vessels or other property, under process in admiralty, or under the order of a court of admiralty, and for receiving and paying the money, for any sum under \$500, two and one-half per centum; for any larger sum, one and one-quarter per centum upon the excess."

§ 280. *The Norma, Newb., 533, criticised.*

The only case to which I have been referred on this subject is that of *The Norma*, 1 Newb., 533 (§ 277, *supra*). In that case the claim was settled without a sale of the property libeled, and before any claimant thereof appeared in court. The marshal claimed the commission here insisted on. The court (McCaleb, J.) admitted that the language of the act of 1853, in the passage in question, was not free from difficulty, but denied the claim of the marshal, on the ground that to allow it would be to give him a gratuitous compensation for services not actually rendered. It adds: "The law, I think, contemplated the presence of both the parties litigant in court, and the whole progress of the litigation short of the sale under the final decree; or it contemplated the possession of the property by the marshal, and the usual proceedings by advertisement, etc., under an interlocutory order of sale, without the sale itself. It intended to provide an adequate compensation to the marshal for the trouble and responsibility he assumes up to the moment of sale, and to put it out of the power of litigants to deprive him of such compensation for the trouble and responsibility thus assumed, by a compromise or settlement before a sale under a final decree, or a sale under an interlocutory order of court. This, in my judgment, is the only fair and rational interpretation to be given to the provision of the act of congress referred to."

It seems to me that the construction put by Judge McCaleb upon the statute

is a strained one. I see no ground for holding that the words "the parties," in respect to a suit *in rem*, require that there should be a party personally in court as a claimant, aside from the acquiring of jurisdiction by the court, by the service of proper process, or that a party must come into court as a claimant, to litigate, to make him a party settling the debt or claim, within the act. In a suit *in rem*, the party who settles the debt or claim, without a sale of the property, in order to relieve the property seized, on the stipulation for value, is one of "the parties" within the act, although he files no formal claim to the property. Nor do I see anything in the statute to warrant the view that there must be the whole progress of the litigation short of a sale under a final decree, or possession of the property by the marshal under an order of sale, and steps by him towards a sale, but not followed by a sale. The commission is to be computed on the amount of "the claim or decree," thus making the statute applicable to a settlement either before or after a decree, but without a sale. The words "without a sale" are as applicable to a settlement before decree as to one after, and, in respect to a settlement before a decree, cannot require that there should be the whole progress of the litigation short of a sale. A settlement "without a sale" means a settlement at any time, in the absence of a sale. In case of a sale under process in admiralty, or under the order of a court of admiralty, special compensation by way of commission is given in the passage before cited from the act. By the clause now under consideration, a fee is given for serving an attachment *in rem*, or a libel in admiralty, and then the necessary expenses of keeping property attached or libeled in admiralty are provided for, and then a commission to the marshal, that is, to the marshal who attached or libeled the property, is prescribed, in case the debt or claim is settled by the parties without a sale of the property, such commission to be computed on the amount of the claim or decree. In case there is a sale, the commissions therefor, which are at a different rate, go to the marshal to whom the process or order for a sale belongs, for execution, and who makes the sale, and no commission is allowed under the clause relating to the settlement without a sale. It seems to me the language of the statute is too plain for any other construction.

A payment of the amount awarded by a decree is a settlement, within the statute. The commission is allowed in case of a decree, to be computed on the amount of the decree. Therefore, a settlement cannot be limited merely on an arrangement or compromise before decree.

Nor does the fact that the property is discharged from custody on a stipulation for value make any difference. If the legislature had intended that the commission should be given only when the property continued in the custody of the marshal until the settlement, it would have been easy to so declare. But such a provision would have been easily evaded, by bonding the property, after the trouble of custody had all of it been undergone, and on the very eve of making the settlement.

A case of the collection of the amount of a decree, or stipulation, by execution against the stipulators, would come under another provision of the act of 1853, which gives to a marshal, for serving a writ of execution, mileage, and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off, or otherwise, according to law, and receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the state sheriff. Such a collection by execution could not be called a settlement by the parties of the debt or claim without

a sale of the property seized on the original attachment, so as to make it possible that a party should be subjected to a double charge, one for the commissions and one for the fees and poundage.

The decision of the clerk on the taxation must be reversed.

UNITED STATES v. HAAS.

(District Court for New York: 5 Federal Reporter, 29-31. 1880.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—In this case, after return of an execution against the property of the defendants unsatisfied, an execution against their persons was issued and served by the marshal, who held them under arrest for some time, when they gave bonds for the limits. The amount of the execution was \$48,605.47. Subsequently a compromise of \$15,000 was accepted by the secretary of the treasury, and the plaintiff's costs are payable out of this sum. The marshal's costs for serving the execution have been taxed at \$875.30, being fee for serving, sixty-nine cents; poundage, three per cent. on \$250, and two per cent. on \$48,355.47. The plaintiff has appealed from the clerk's taxation.

§ 281. *Rule as to the poundage of the marshal when an execution in his hands has been settled by compromise for a less sum than that expressed on the face of the execution.*

The question to be determined is whether the marshal is entitled to poundage on the sum collected or realized by the compromise, or on the whole amount for which the execution issued. By Revised Statutes United States, section 829, the marshal is entitled to the same fees and poundage for serving an execution as are or shall be allowed to sheriffs of the state for similar services. The question then is, what poundage is the sheriff entitled to? The right of the sheriff in that respect is governed by 2 Revised Statutes, 645, section 33 (5th ed., vol. 3, p. 924), which provided as follows: "For serving an attachment for the payment of money, or an execution for the collection of money, or a warrant for the same purpose, issued by the comptroller, or by any county treasurer, for collecting the sum of \$250 or less, two cents and five mills per dollar, and for every dollar collected more than \$250, one cent and two and a half mills." By an act of April 12, 1871, the sheriff's poundage was raised to three cents on the first \$250, and two cents on all above that sum, except in the counties of New York, Westchester and Kings. An earlier statute, which is included in the Revision of 1813, provided that the sheriff should receive for "serving an execution, for or under \$250, two cents and four mills per dollar, and for every dollar more than \$250, one cent and two mills; the poundage on writs of *fiere facias*, and all other writs for levying moneys, to be taken only for the sum levied." This earlier statute received in several cases a judicial construction that, as applied to a *ca. sa.*, or execution against the person, it entitled the sheriff to full poundage, on the ground that the service of such an execution by arrest was, so long as the imprisonment continued, a satisfaction of the execution, and that the sheriff's liability, in case of escape, was for the full amount of the execution. The change of phraseology in the later statute is relied on as changing the law in this respect; but I do not think this is the result of the authorities, nor a proper inference to be drawn from the statute itself. The practical construction that has been given to the statute is that it entitled the sheriff to full poundage upon service of the execution against the person. 2 Rev. Laws, 19; *Adams v. Hopkins*, 5 John., 252; *Scott v. Shaw*, 13

John., 378; *Campbell v. Cothran*, 56 N. Y., 279; *Cooper v. Bigelow*, 1 Cow., 56; *Chapman v. Hatt*, 11 Wend., 41; *Koenig v. Steckel*, 58 N. Y., 475. The new provision contained in the code, which took effect September 1, 1880, does not affect this case.

§ 282. *Rates of poundage and other fees allowed to the marshal. How far regulated by state practice.*

It is, however, objected that in this case, as the arrest was in the county of New York, the rate of poundage to be allowed should be that allowed to the sheriff in the county of New York for the same service. It is argued on behalf of the marshal that a uniform rate of poundage is designed to be established by the act of congress, and that the rate should be the highest rate allowed to any sheriff in any county within the state, or at least the prevailing rate allowed to sheriffs. I do not, however, see any difficulty in adapting the rate to those allowed to sheriffs in different counties. I think that by doing so the purpose of the statute is more effectually carried out, and so only is the rate of marshals' fees conformed to that of the sheriff for similar services. As the computation was made on the higher rate allowed in other counties, the appeal is to this extent sustained, and the amount reduced accordingly.

IN RE CRITTENDEN.

(Circuit Court for Kentucky: 2 Flippin, 212-237. 1878.)

Opinion by BALLARD, J.

STATEMENT OF FACTS.—In the case of *The United States v. Landrum*, the warrant was issued at Louisville by a commissioner there, and it came to the hands of the marshal there. It directed the arrest of Landrum and the return of the warrant before another commissioner at London, in this state.

§ 283. *How "travel" or "mileage" of marshal is to be computed.*

It is not disputed that the marshal actually traveled, to execute the warrant, the number of miles charged in this account, and it is not questioned that had the warrant been returned before the commissioner who issued it, the mileage charged would not be excessive; but it is insisted that "travel" or "mileage" is, by the terms of section 829 of the Revised Statutes, to be computed "from the place where the process is returned to the place of service;" that, as the prisoner was arrested near London and taken by command of the warrant before the commissioner in London, the warrant was, in contemplation of law, "returned" to him, and that the marshal can charge for going to serve the warrant for travel of only ten miles, this being the distance from the place where, under this view, the process was "returned" to the place of service.

If the provisions of section 7 of the act of February 22, 1875, apply to this case, it is clear that the charge of the marshal is not excessive. He asks no allowance for travel in going to serve the warrant which was not actually and necessarily performed. But, as I am strongly inclined to think that the act of 1875 does not alter the mode of computing the mileage of marshals on process executed within the judicial district in which such process is issued, I proceed to consider the question as if it depended entirely on the proper construction of section 829.

§ 284. *A commissioner has no power to have warrants issued by him returned before another commissioner.*

I am of the opinion that the commissioner in Louisville had no authority to

make the warrant issued by him returnable before the commissioner in London, or before any other commissioner than himself. If it is conceded that he might direct the marshal to take the person before any other commissioner for examination, I suppose the process should be finally returned to himself. Every process which is issued by a court must be returned, unless some special statute otherwise provides, to the court which issues it. This is essential in order, first, that the court may know that its order has been obeyed; and, second, that the records of the court may be complete.

§ 285. *Definition of the word "return."*

The very term "return" implies that the process is taken back to the place whence it is issued. A thing delivered by one person to another is not "returned" when it is delivered to a stranger, and at a place other than the place of original delivery.

I am of the opinion, therefore, that, in contemplation of the statutes, every process is to be returned to the court or commissioner which issued it, and that for the purpose of computing the mileage of the marshal, the place of return is the place of issue.

Any other construction would enable commissioners to enlarge or lessen the fees of marshals at pleasure, and thus defeat the policy of the statute. Unquestionably the statute intends, as far as practicable, to furnish fixed rules for ascertaining the fees of marshals. Hence it has declared that his "travel, in going . . . to serve any process . . . shall be not the actual distance traveled, but the distance from one fixed point to another fixed point; that is, the distance from the place of service to the place whence the process was issued, or, which is the same thing, the place of return. But, if the commissioner can direct the warrant to be returned before another commissioner, he may direct it to be returned before a commissioner most remote from the "place of service," and thus make the marshal's fees for mileage ten or more times as much as they would be if the process were returnable before himself; if, indeed, for the purpose of computing mileage, we are not confined to the distance from the "place of service" to the place whence the process issued—that is, unless we regard the place of issue and place of return of process as one and the same place. I am of the opinion, therefore, that the objection taken by the attorney to the charge of the marshal in the case of Landrum, and in other similar cases, is not well taken.

§ 286. *Power of a marshal to appoint a bailiff.*

The second exception raises the question whether the marshal can charge a fee for attending, by a "special bailiff, examinations before a commissioner, and bringing in, guarding and returning prisoners charged with crime," etc. I am of the opinion that he may. I have heretofore decided in case of *Ex parte Roberts*, 2 Abbott's Circuit Court Reports, 265, that a marshal may appoint a bailiff, and authorize him to perform a particular act or duty. When the bailiff is appointed and engaged in the performance of the act authorized, he is the deputy of the marshal; not the general deputy, it is true, but the special deputy. He is deputed by the marshal to do a particular thing, and is, therefore, in fact, as well as in law, his deputy.

§ 287. *Fees of marshals for attending examinations.*

Section 829 of the Revised Statutes allows the marshal "for attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, \$2 a day, and for each *deputy*, not exceeding two, necessarily attending, \$2 a day."

§ 288. *Rules of marshal's fees and mileage in certain cases.*

Third. It is objected that the marshal has charged mileage for going to execute a warrant in the case of *The United States v. Tolbee*, and also a warrant in the case of *The United States v. Sally*, although both warrants were placed in his hands at the same time, and although both of the defendants reside at the same place, and were in fact arrested there.

I am of the opinion that the objection is not well taken. Section 829 allows the marshal for "travel in going to serve *any warrant*, . . . six cents a mile, to be computed," etc. If this were all of the statute, it would be obvious enough that he is entitled to mileage on each and every warrant which is served; but the remainder of the section limits the charge when more than two writs of any kind, required to be served in behalf of the same party on the same person, might be served at the same time. In such case the marshal is entitled to compensation for travel on only two of such writs. If the meaning of the former part of the section were at all doubtful, this limitation, by the plainest implication, gives him compensation for travel in going to serve any number of writs, provided they are in behalf of different plaintiffs or against different defendants. Here the warrants, although in behalf of the same plaintiffs, are against different defendants. Nor do I think that the provisions of section 7 of the act of 1875 affect the claim. I have already intimated that I am inclined to the opinion that the fees of the marshal for serving process issued in his own district are not modified by the act of 1875; but conceding that it does in some respects modify them, I am clear it does not exclude a charge for travel in going at the same time to serve two or more writs in behalf of different plaintiffs or against different defendants. The provision is that "No such officer shall . . . become entitled to any allowance for mileage or travel not actually and necessarily performed, under the provisions of the existing law." In my opinion this provision was intended to cut off *constructive* mileage only—that is, mileage allowed by section 829, to marshals, on writs coming into their hands from districts other than their own; but if it applies to writs issued and served in the same district, it changes only the mode of computing mileage. Certainly the marshal does actually and necessarily travel to serve every process placed in his hands; and if he does so travel, he is, by the terms of section 829, and by implication of the act of 1875, entitled to charge for travel in going to serve each process, to be computed by the miles actually traveled, or the distance from the place of service to the place of return, according as the act of 1875 or section 829 shall be held to furnish the rule. There is nothing in the act of 1875 to indicate that it was intended to take away from the marshal allowance for travel actually performed, to which he was entitled under existing laws. This will, I think, be made plain by bringing together the provisions of the original and amendatory law.

The original act provides that the marshal shall be allowed:

"For travel, in going only, to serve any process, . . . six cents a mile, to be computed from the place where the process is returned to the place of service. . . . But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation on only two of such writs." The amendatory act provides that "from and after the 1st day of January, 1875, no such officer . . . shall become entitled to any allowance for mileage or travel not actually and necessarily performed."

The last act does not in terms repeal the first, and consequently it cannot be held to repeal it, except so far as the provisions of the two acts are inconsistent. Now, under the first act, as a consequence of the rule there presented for computing "travel," the marshal was occasionally entitled to an allowance for travel not actually performed. For example, when process was sent to him from a district other than his own, he was entitled to mileage, to be computed, not from the place where the process was received to the place of service, but from the place of service to the place of return. It was to remedy this that the amendatory act was passed. The object was to limit the allowance for travel to the miles actually traveled, and not to modify the compensation for travel actually performed. The amendatory act leaves wholly unrepealed and unaffected so much of the former act as gives the marshal mileage on all process which he necessarily and actually travels to execute and which he does execute, and which are issued on behalf of different plaintiffs or different defendants.

§ 289. *Rule as to actual traveling expenses of marshal.*

There are several items of charge in the bill of the marshal for "actual traveling expenses." Section 829 of the Revised Statutes provides that "in all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court." None of these items are proved by the oath of the marshal himself, and many of them are not proven by the oath of the bailiff who incurred the expenses. They are simply verified by the general affidavit of the deputy, in whose account they are included, to the effect that his account is correct. This proof is not satisfactory to the court. My construction of the statute is that all charges for actual traveling expenses must be proven by the oath of the marshal, deputy or bailiff who incurs such alleged expenses, and who alone can know of or be heard to testify of them, and that no deputy can be heard to testify in respect to expenses incurred by another deputy or bailiff of which he knows nothing. I am also of opinion that if these expenses can be proven otherwise than by oath in open court; if they can be proven by affidavit, the affidavit should be specific, referring to the charges particularly, and, when practicable, the proper vouchers should accompany the proof. All items in the account not supported by this proof must be stricken out, and in lieu thereof the marshal may charge mileage.

In the account of W. M. Adair there is a charge for transporting three prisoners, Mark Gallagher, T. W. Wilson and Buck Gallagher, from Adair county to Louisville. The prisoners were arrested by different deputies or bailiffs, but they were all transported together. Still, each bailiff supplied himself with a guard, and there is a charge for his transportation.

§ 290. *Costs of transporting criminals.*

The statute allows the marshal, for transporting criminals, ten cents a mile for himself and for each prisoner and *necessary* guard. The term criminals has always been construed to include prisoners arrested, charged with crime; and the term marshal has always been held to include deputy or bailiff. But there is no proof that these guards were necessary, and judging from the facts before me, I think they were unnecessary. I think three officers were sufficient to guard three ordinary prisoners.

I concede that, in this matter, much must be left to the good faith and judgment of the officer. Sitting here, I cannot ordinarily tell whether a guard is

necessary or not; but I wish to say that, in respect to a privilege which is so liable to abuse, in which the officer is constantly tempted to act in his own interest, and not in the interest of the government, I shall be inclined to reject all charges for transporting guards unless I can perceive from the nature of the service that a guard was necessary, or unless the necessity for a guard be otherwise satisfactorily shown. The proof should be made by the officer employing the guard. It should also show who the guard was, and the necessity for having him, and it should, when practicable, be accompanied by the certificate of the commissioner before whom the prisoner was taken, of the presence of the guard.

§ 291. *Rule when guards are also witnesses, summoned on behalf of the United States.*

In cases of *United States v. James Young*, and *Same v. Faulbree*, and *Same v. Roberts*, the district attorney objects that the guards, for whom transportation is charged, were witnesses for the United States in said cases, who had been summoned and were paid for their mileage and attendance as witnesses, and he insists that the marshal should not be allowed for the transportation of them as guards. I am of the opinion that the objection is not well taken. It is not disputed that the guards were necessary, and by the express terms of the statute the marshal is allowed for transporting criminals, himself and guard, ten cents each. It matters not whether the marshal pays the guard anything for his service, or whether he pays anything for transportation, he is allowed, under any and all circumstances, for transporting criminals, himself and necessary guard, a certain arbitrary, fixed fee.

§ 292. *Where the wrong person is arrested no fees are allowed.*

In the case of *The United States v. J. N. Parks*, the marshal arrested one Jeree M. Parks, but he was not the person charged with the crime mentioned on the warrant, nor the person whom the United States desired to be arrested. The marshal acted in good faith, believing the person arrested to be the person whom he was directed to arrest. I am of the opinion that none of the fees charged, growing out of the arrest, can be allowed. The prisoner arrested was falsely arrested, and no lawful fee can be based on or grow out of a false imprisonment.

§ 293. *Effect of misnomer of party arrested.*

In the case of *The United States v. Buck Gallagher*, it appears that the person who made the affidavit on which the warrant was founded did not know the Christian name of the offender, but supposed it to be "Buck;" that the name of the person whom he really accused and charged with crime is John Gallagher; that the name "Buck" was thus by mistake inserted in both the affidavit and warrant; that the person who made the affidavit accompanied the officer to the place of arrest and pointed out to the officer John Gallagher as the person charged and as the person mentioned in the warrant.

The district attorney objects that as the warrant did not specifically direct the arrest of John Gallagher, the charges made for his arrest, transportation, etc., cannot be allowed. I am inclined to the opinion that the objection is not well taken. I think the case the converse, or very nearly, of the case last stated. I think that John Gallagher, when brought before the commissioner, could not claim his discharge on the sole ground that his name was not correctly spelled or given in the warrant. Being the person actually accused, he could not, I think, complain of a false arrest or a false imprisonment.

§ 294. *An arrest out of the state is illegal and no fees allowed, though officer acted in good faith.*

In the case of *The United States v. Jack Bristow*, the person was arrested in the state of Tennessee, only a few yards beyond the Kentucky line. The officer acted in good faith, believing that he was in Kentucky, and that he was making the arrest in this state. I am of the opinion that the original arrest was illegal, and that the prisoner could not lawfully be held after he was brought into this state. *Hooper v. Lane*, 6 House of Lords Cases, 443. I am of opinion, therefore, that none of the fees growing out of or connected with this arrest can be allowed.

§ 295. *Rule as to charge for time employed in trying to arrest.*

In the case of *The United States v. John Howard*, the marshal claims that his deputy was employed eight days in endeavoring to arrest the prisoner, and he charges for expenses while so employed \$2 per day — in all, \$16. It appears that the prisoner resided only thirty miles from the place whence the process issued, and that the bailiff was actually employed eight days "in endeavoring to arrest" is not shown by the oath or affidavit of the bailiff who made the alleged endeavor, but by the affidavit of the general deputy in whose account the charge is found, to the effect that his account is correct. I do not think this charge is sufficiently proven. It should be proven by the oath or affidavit of the bailiff who made the endeavor, and he should, when he charges for more days of endeavor than are obviously necessary, explain in his affidavit why he was employed the number of days charged, what endeavor he was making, and why the arrest was not made sooner. It is precisely in respect to these charges, where something must be left to the good faith of the officer, that there is the greatest danger of abuse. The officer is constantly tempted to charge for service which he does not perform, and the court and district attorney are limited in the opportunities to expose its error. I think, therefore, full and strict proof of all such charges should be required. In this case I shall allow for only two days endeavor to arrest; and consequently will reduce the item of \$16 to \$4.

§ 296. *Travel by unusual route.*

In the case of *The United States v. James Grimes*, the charge is transporting himself, prisoner and guard from Columbia to Louisville, one hundred and forty miles, \$42. By the route traveled the distance was actually one hundred and forty miles; but by the usual route between Columbia and Louisville the distance is only one hundred and seven miles. The route taken was by way of South Danville, and from the latter place to Louisville by railroad. The route usually taken is by way of Lebanon, and thence by railroad. The first route is often taken, and is in some respects the most comfortable and convenient, but it is not the usual one. I am of the opinion that the mileage must be computed by the route usually traveled.

All the foregoing questions might and would have been decided, just as they have been, whether the rule for computing mileage on process issued and served in this district remains as fixed by the act of 1853, and section 829 of the Revised Statutes, or as is to be found in the act of 1875; but now a case has arisen in which it has become absolutely necessary to determine which statute furnishes the rule.

In case of *The United States v. James M. Johnson*, the warrant was issued at Louisville and returned there. The defendant resided at Lexington. The

marshal actually traveled to Lexington, ninety-three miles, to execute the warrant. There he learned the defendant had gone to Mt. Sterling, where he would probably remain two days; so, to execute the warrant, he traveled from Lexington to Mt. Sterling, thirty-four miles. When he reached Mt. Sterling he learned that the prisoner had gone to Paris, and he followed him there, traveling eighteen miles. There he learned the prisoner had returned home. He then returned to Lexington, traveling eighteen miles, and there served the process. If the mileage is to be computed by the rule prescribed in section 829, the allowance will be limited to ninety-three miles; but if the act of 1875 furnishes the rule, then as the number of miles actually and necessarily traveled to serve the process is one hundred and sixty-three, the allowance must be for one hundred and sixty-three miles.

Now, I think the act of 1875 was not intended to increase the mileage of marshals, but to diminish it. The complaint was not that the act of 1853 and section 829 did not allow enough mileage; the complaint was that they allowed too much. The complaint was that they allowed for mileage not traveled, and the object was to cut off all allowance for travel not performed, not to give an allowance for travel, though actually performed, if it exceeded the distance from the place of return to the place of service.

I have already shown that process must, unless otherwise provided by statute, be returned to the court which issues it. All process is ordinarily placed in the hands of the marshal at the place of its issue. The consequence is that a marshal can rarely, if ever, travel, in going to serve any process issued in the district in which it is served, less than the distance "from the place of return to the place of service," but he may, and often will, have to travel more. The consequence is that if the act of 1875 furnishes the rule for computing mileage on process issued and executed in the same district, it has signally failed to accomplish the end intended. It has not decreased allowance for mileage, but has provided for a largely increased allowance. The act of 1853, and section 829, Revised Statutes, made an allowance for mileage not actually traveled. It allowed a marshal, who served process coming from districts other than his own, mileage to be computed "from the place of return to the place of service," though this distance might be hundreds or thousands of miles, and though he had not actually traveled to serve the process more than one mile. It was to remedy this, and this only, that in my opinion the provision found in the act of 1875 was made. It was not made to change that of which there was no complaint. But the objection that the act of 1875 should not be so construed as to alter the rule for computing mileage prescribed by section 829, on process issued and executed in the same district, does not rest solely on the ground that the evil which it was intended to remedy, so far from being cured, would be made worse. It rests also on the more rational ground that there is no express repeal of any of the provisions of the old law, and that the negative language of the act of 1875 is scarcely appropriate to an increase, but rather to a decrease of allowance for mileage.

§ 297. *Policy of the laws of the United States as to fees.*

Moreover, the policy of all the statutes of the United States regulating the fees of officers has been to prescribe certain fixed fees easily ascertainable, leaving nothing to the discretion of the officer, as little as possible to his integrity, and as little as possible to depend on proofs. If the construction of the act of 1875 contended for be admitted; if the marshal is entitled on every process executed by him an allowance for the miles actually and necessarily traveled, then on

every process served the question will arise, what was the number of miles actually and necessarily traveled? and the court thus have much of its time consumed in determining unpleasant squabbles over fees in which the complaining party can rarely obtain any relief, since, at last, the officer making the charge will ordinarily be the only witness who will know the facts.

§ 298. *Rule for computing mileage of marshal in executing process.*

I shrink from such labor and from such investigations, and I shall not undertake them unless congress shall clearly impose them upon me. In all the investigations which I have ever made of the fees of marshals, I have rarely found anything wrong in those matters which are definitely fixed by statute, or are easily ascertainable by the court without reference to the oath of the officer. In almost every instance in which I have found a charge either wholly false or partially erroneous, it has depended for its verification on the discretion and good faith of the officer. So strong is the temptation to the officer to consult his own interest and to disregard that of him whom he serves; so strong is this temptation — when he may adopt without exposure either of two courses — to adopt the course which will yield him most, that, in my opinion, he should, if possible, never be subjected to such temptation. His fees should, as far as possible, be fixed and definite, and not depend, except in cases which cannot be otherwise regulated, either on his discretion or integrity, or on facts which can be known to himself only.

So far as this court is concerned, I shall adhere to the rule prescribed in section 829 for computing mileage on all process issued and served in this district, without reference to the number of miles actually traveled to execute it, until congress shall manifest a more certain intention to alter it than is to be found in the act of 1875.

§ 299. *Marshal cautioned as to conduct of his deputies.*

To avoid misconception, I deem it proper to say that none of the charges which have been found to be erroneous are connected with any service rendered by the marshal himself. They all relate to service alleged to have been performed by his deputies or by bailiffs appointed by them, generally to service alleged to have been returned by the latter. The marshal himself did not suspect that any of the accounts rendered to him were incorrect. I acquit him of all blame, but in the future I shall expect him to examine and scrutinize every account before it is presented to the court, and to eliminate every item which he may deem incorrect or not proven, as required by the law as expressed in this opinion. Moreover, I shall expect him to dismiss from office every deputy who shall render to him a false account, or who shall abuse his authority by appointing bailiffs, or who shall, in any way, manifest a stronger desire to make fees than to serve the public.

So many criminals attempt to avoid arrest by flight or concealment, whenever the marshal comes into their neighborhood, that it is no doubt often necessary for him to avail himself of the services of a special bailiff. I would not, therefore, restrict his authority to appoint special bailiffs; but so universal has become the practice of deputy marshals to appoint bailiffs, and the fees of the marshal have thereby been so enormously increased to the apparent gain of such deputies, that I cannot but suspect their incentive to such appointments is to make fees rather than to perform their duty. The marshal should hold every deputy to a strict account for every bailiff appointed by him.

UNITED STATES v. EBBS.

(District Court for North Carolina: 4 Hughes, 473-483; 10 Federal Reporter, 369. 1881.)

Opinion by DICK, J.

STATEMENT OF FACTS.—The exceptions presented in the affidavit to the costs taxed before the commissioner are as follows:

(1) The marshal charges for service of the warrant, when there was no valid service.

(2) The marshal charges expenses for fourteen days in endeavoring to arrest the defendant, when the defendant might have been easily arrested, as he made no effort to evade the process of the law.

(3) The marshal charges for attending the court of the commissioner and guarding the defendant, when there was no necessity for such service, as the defendant was upon bail.

§ 300. *A service of process which does not entitle the officer to fees.*

As to the first exception it appears in evidence that the deputy marshal, while he had the warrant in his hands, met the defendant and read the warrant to him, and told him that he was under arrest. The defendant at once submitted to the authority of the deputy marshal, who told him that he might depart from custody if he would promise to attend the commissioner's court on a certain designated day. The defendant agreed to the proposition and went off, and did not afterwards appear at the time and place designated.

I am of opinion that this was not such a service of the warrant as entitled the marshal to the fee charged. The service of a commissioner's warrant in a criminal case consists of more than a mere arrest, as the marshal must keep the defendant in custody until he is carried before an examining magistrate for a preliminary hearing upon the charges in the warrant. Where an arrest is made on a commissioner's warrant, the officer making the arrest has no authority in law to take bail, and if he voluntarily allows the defendant to depart from custody before the case has been heard by the magistrate, it is a voluntary escape. The liability of the officer is absolute, and cannot be relieved by a subsequent arrest of the defendant; but the warrant is not invalidated, and the defendant may be retaken under the same warrant, and by the same officer. The misconduct of the officer does not prevent an arrest, as the public good requires that the defendant should be brought to justice. 1 Chit. Crim. Law, 61.

The rule of law is somewhat different in mesne process in civil cases, as the officer becomes special bail if he allows a defendant to depart out of custody without giving a bail bond. Upon final process of execution, if there is a voluntary escape, the liability of the officer is absolute. If there is a negligent escape, the officer may retake the prisoner on fresh pursuit and hold him, so as to relieve his liability. *Adams v. Turrentine*, 8 Ired., 147.

The action of the deputy marshal in this case, and the submission of the defendant to the control of the officer, constituted a valid arrest. Whether acts constitute an arrest depends upon the intent of the parties at the time. An arrest may be made without touching the person of the defendant at the time, if he voluntarily submits to the process of the law in the hands of the officer. *Jones v. Jones*, 13 Ired., 448.

Although there was a valid arrest in this case there was not a due service of process, and the marshal is not entitled to the fee charged. In his answer the marshal insists that the defendant was retaken on the warrant on a subsequent

day and carried before the commissioner for a preliminary hearing. The evidence shows that the defendant, previous to the second arrest, and while he was still lurking in the woods and evading the officer, had an appearance bond, with sureties, prepared by his brother, I. N. Ebbs, with a condition to appear before the commissioner for an examination on the 20th day of August. This bond was presented by I. N. Ebbs to the commissioner and was by him accepted in the absence of the defendant, and the deputy marshal knew that said bond had been accepted. The defendant made his appearance at the time and place designated in the bond. Before the hearing of the case commenced, the commissioner, then regarding the said bond as erroneous and void, gave a verbal direction to the deputy marshal to arrest the defendant and hold him in custody until the case could be heard. The deputy marshal made an arrest on the warrant which he had long had in his hands.

§ 301. *When a warrant is vacated by the acceptance of an appearance bond.*

I am of the opinion that when the appearance bond was accepted by the commissioner, and the deputy marshal was advised of that fact, the warrant in his hands was virtually superseded and did not authorize an arrest. If the bond accepted by the commissioner was irregular, or in any way insufficient, he ought to have proceeded to have the defendant arrested in the manner provided in section 1019, Revised Statutes. This verbal direction to arrest was without legal force and authority. An examining and committing magistrate has no power verbally to command an arrest, except for a felony or breach of the peace committed in his presence, or for contempt in open court, or so near as to disturb his official proceedings. After hearing a case he may, by verbal order, direct an officer to take a defendant into custody until a proper *mittimus* can be prepared, but in no case can he commit a defendant to prison without a written warrant setting forth the cause of such commitment in specific terms.

§ 302. *Sufficiency of appearance bond.*

The correctness of the form of the bond, as an appearance bond, and the solvency of the sureties, are not denied, but the counsel of the marshal insisted that the bond was erroneous and void, as the commissioner had no power to take such a bond in the nature of a recognizance in the absence of the principal, and before a hearing of the matter. It is well-settled law in this state that a bond duly signed, with sureties, and with a condition for the appearance of the principal in a criminal case before a court, accepted by a person authorized to take bail, is good as a recognizance. *Edney's Case*, 2 Winst., 463; *Houston's Case*, 76 N. C., 256.

In the case of a formal recognizance the obligation is generally acknowledged by the parties in open court and entered of record, and they need not sign their names; but in the case of a bond in the nature of a recognizance, where the parties sign their names, I can see no absolute necessity for the principal being present before the person authorized to accept such bond. During the absence of the principal the magistrate might refuse to accept such bond, but if he is satisfied that the bond was duly signed and sealed, and the sureties are sufficient, and he accepts the bond, I am of the opinion that it is valid. At the common law, even in the case of a formal recognizance, where the defendant is an infant or in prison, and so absent, sureties were allowed to enter into recognizance of bail, and a warrant called a *liberate* was issued by the person taking bail for the enlargement of the defendant. 2 Hale, P. C., 126.

If the bond in this case was as good as a recognizance, I am of opinion

that it operated as a *supersedeas* of the warrant in the hands of the deputy marshal without any formal *supersedeas* writ.' At the common law an apprehension under a warrant could, in many cases, be prevented by a party going before a justice of the peace and finding sufficient sureties for his appearance to answer any indictment, and obtaining the *supersedeas* of the magistrate. This could be done even after an indictment found in a court. 1 Chit. Crim. Law, 43. If process of arrest from a court after indictment could thus be superseded by a justice of the peace, I see no reason why a commissioner, having the powers of a justice of the peace in such matters, cannot supersede a warrant which he has issued to bring a person before him for an examination upon a charge of crime, by accepting a bond with sufficient sureties to secure an appearance in a bailable case, and where the defendant is entitled to have his witnesses heard upon the investigation.

I do not approve of this practice of accepting bail to prevent an apprehension upon legal process, and I will instruct the commissioners of this district not to adopt it, as I think it most proper and regular for defendants to enter into bond or recognizance in person before the magistrate, and that other proceedings should be in accordance with the usual course and practice of the courts. No justice of the peace can supersede the warrant of another without a formal and legal examination (1 Chit., 36), but we may reasonably suppose that a justice with whom a complaint was filed, and who had issued the warrant, may supersede such warrant when the appearance of the defendant had been secured by him in taking a sufficient bond.

§ 303. *Powers of commissioners as examining and committing magistrates.*

Commissioners are invested with many of the powers and functions of justices of the peace, and they act within the scope of such powers upon their own judgment and responsibility. A district attorney has no authority to direct a marshal not to execute a warrant issued by a commissioner. *United States v. Scroggins*, 3 Woods, 523. He may appear before the commissioner and attend to the presentation of the evidence, but he is only counsel for the government. He cannot direct the commissioner in his judgment, or as to what course he shall pursue, or dismiss the proceedings. *United States v. Schumann*, 2 Abb. (U. S.), 523 (CRIMES, §§ 2680-82).

I am inclined to doubt the power of a federal judge, by writ of prohibition or otherwise, to control the discretion of a commissioner in the hearing of a cause before his order of commitment. The decision of a commissioner may in some things be reviewed upon writs of *habeas corpus* and *certiorari*, and rules of court may be adopted regulating the practice and modes of procedure in such inferior courts. As an examining and committing magistrate a commissioner has similar powers to those of a justice of the peace, in the state where he acts, and his proceedings must be agreeable "to the usual mode of process against offenders in such states." In this state a justice of the peace is authorized and directed to hear the witnesses of the defendant, and allow him reasonable time to employ counsel in his defense, and determine the matter after hearing evidence and argument on both sides of the case. The justice being vested with such powers and duties of investigation, he must necessarily have the incidental powers of continuing the matter to a future day, to enable parties to have a fair and full investigation, and also allowing a defendant bail in bailable cases, during such continuance of the cause. This course of procedure was adopted by the justice of the peace in *Queen's Case*,

66 N. C., 615; and the supreme court seemed to regard such course as regular and proper.

As the commissioner in this case adopted a similar course in accepting the appearance bond of the defendant, he could not by a mere verbal order revive a superseded warrant, and legally direct an arrest of a person on bail, which had been accepted, before an examination of the merits of the case. I think that the deputy marshal made the charge with an honest belief that he was entitled to such fee for service of the warrant, and the commissioner is not blamable for approving the same, as required by the rules of court.

§ 304. *Fees for endeavoring to make an arrest.*

The second exception presented by the defendant is not fully sustained by the evidence. It appears that the warrant was issued on the 16th day of May, and that the defendant knew it was in the hands of the deputy marshal, and he used all the means in his power to evade an arrest. His brother, I. N. Ebbs, wrote to the deputy marshal that if he would meet him at his house on the 17th day of July, an arrangement could be made for the surrender of the defendant and three other co-defendants. The deputy went to the place at the time designated, but a satisfactory arrangement was not made. The deputy, on his return, passed by a place where a number of men had met to have "a shooting match." The defendant was there, and the deputy remained some time with him, but did not make an arrest, as he did not have the warrant in his possession. On several subsequent days the deputy made active efforts to arrest the defendant, but did not succeed until the day of the first arrest mentioned in considering the first exception.

The marshal is entitled to the expenses charged for the days his deputy endeavored to make an arrest previous to the 17th of July. I disallow the expenses for the subsequent days.

§ 305. *Duty of officer when a warrant of arrest is placed in his hands.*

When a warrant of arrest is put in the hands of an officer it is his duty, as soon as he conveniently can, to proceed with secrecy and diligence to apprehend the defendant. He must always be ready to perform the mandate of the warrant. In this instance I am disposed to hold the officer to the highest and strictest rule of duty, for when he subsequently made an arrest he voluntarily allowed the defendant to depart from custody on a promise to appear before the commissioner for trial on a future day. He had no right to show favor or trust to the promise of a criminal who had so long been evading the process of law. At the common law it was allowable for a constable, when he had made an arrest without a warrant in a case of a petty nature, to take the defendant's word for an appearance before a magistrate if he was of good repute and there was no probability of his absconding (1 Chit. Crim. Law, 59); but such indulgence was not allowable in this case.

§ 306. *Fees for guarding prisoners who are under bond. Duties of officers in keeping and guarding prisoners stated.*

As to the third exception, the evidence shows that the defendant had given bond to appear before the commissioner on the 20th day of August, and we have above decided that such bond was valid. While under bond, and before the case was heard, there was no necessity for guarding him, as he was in the constructive custody of the court, and his sureties were his keepers. The defendant gave a new bond for his appearance on the 27th day of August, and the custody in which he was placed by the verbal order of the magistrate was unlawful.

The law fixes no time and place for the session of a commissioner's court, and the marshal and his deputies are not required to be present at such court, except where they have process to return and defendants to bring in and guard. When a defendant is admitted to bail he is placed in the custody of his sureties, who have power to arrest him at any time they may desire; and they must have him before the court at the time and place designated in the bond, and they are not freed from this responsibility until the defendant is discharged, admitted again to bail or placed in the custody of an officer of the law. If the magistrate hears the case and decides that the defendant shall give bail for his appearance in court to answer an indictment, and the defendant fails to give sufficient bail, he may be committed to prison, and if no regular officer can conveniently be found the *mittimus* may be directed to any person who shall have power to execute the same. Bat. Rev., ch. 33, § 97; Dean's Case, 3 Jones (N. C.), 393.

In such a case there is no legal requirement for the marshal or his deputy being present, but if either should be present and the defendant is committed to the custody of such officer, then the marshal would be entitled to charge for his own attendance and the service of a guard, if such service was rendered and was necessary, and the marshal must judge of such necessity. He would be responsible if the defendant should make an escape through his negligence in not summoning a guard. The law does not require or expect an officer, without assistance, to keep the custody of a prisoner charged with crime. If he relies upon his own vigilance, strength and courage, and the prisoner escapes, he is not excused, no matter how earnestly and faithfully he endeavored to perform the duty imposed upon him. When the marshal or his deputy arrests a person under a warrant, the law requires him to carry the alleged offender before some examining magistrate as soon as the circumstances will permit. He may lodge the prisoner in the common jail, or resort to other modes of confinement, if any necessity or serious emergency should require such a course,—*he must keep the prisoner*. Nothing, however, but obvious necessity will authorize an officer to lodge a prisoner in jail before an examination and regular written commitment by a magistrate. This course may be adopted if the arrest is made in or near night, whereby he cannot attend the magistrate, or if there be danger of a rescue, or the party be too ill to appear before the magistrate, etc. 1 Chit. Crim. Law, 59; State v. James, 78 N. C., 455.

When a prisoner is brought before the magistrate he is still in the custody of the officer, who must keep him securely until he is disposed of in due course of law. As this high and strict responsibility is imposed by law upon the marshal, he is authorized to summon the necessary assistance, and he can keep such assistance as long as the responsibility continues, and he is entitled to the fees allowed by law for such important and responsible service. The rule of this court, which requires the commissioner to determine the question whether a guard is necessary for the marshal when a prisoner is before the court under arrest, must be set aside, as it is contrary to law. The marshal alone can determine this question, and say how far he is willing to subject himself to the chances and responsibilities of an escape. The marshal cannot be relieved by any action of the commissioner, as he has no power to commit a prisoner brought before him for examination until a cause of commitment judicially appears. When any commitment is ordered, a written *mittimus*, setting forth the cause, must be directed to the marshal or his

deputy, commanding him to deliver the prisoner to the keeper of the common jail, and when the mandate of the warrant is obeyed then the marshal is relieved from the responsibility of custody. *Randolph v. Donaldson*, 9 Cranch, 78.

The marshal is clearly entitled to the fees charged for attending court and guarding the defendant on the 27th of August, as the defendant was put in his custody by order of the commissioner until sufficient bail was given for an appearance at court to answer an indictment. After hearing a case and determining to hold a defendant to bail, the commissioner can by verbal order put the defendant in custody of an officer until the bail required is given, but the officer cannot commit to jail without a written *mittimus* from the commissioner.

It is ordered that the clerk of this court retax the costs in this case in conformity with this opinion.

§ 307. In general.—It seems that the certificate of a judge is *prima facie* evidence of the accuracy of a marshal's accounts. *United States v. Smith*,* 1 Woodb. & M., 184.

§ 308. The marshal cannot claim a fee for superintending prisons. *Ibid.*

§ 309. Where witnesses in a criminal case were detained for failing to procure recognizances for their appearance to testify, and were paid \$1.50 a day and boarded independently during their detention, it was held that a claim for "aid" could not be permitted in the absence of strong, positive proof that they were anxious to escape. *Ex parte Paris*,* 3 Woodb. & M., 227.

§ 310. A marshal gave a receipt in full upon payment of his fees by the plaintiff, and also a release from all further liability for the same; when, subsequently, the costs were adjudged against the plaintiff, it was held that the marshal's fees could not be collected by the defendants from the plaintiff. *Wintermute v. Smith*,* 1 Bond, 210.

§ 311. A claim for rent paid for an office for the clerk of the court by the marshal is a just charge against the United States. *United States v. Cogswell*,* 3 Sumn., 204.

§ 312. The marshal cannot charge any commissions when a delivery bond is given and forfeited. *Anonymous*,* Hemp., 450.

§ 313. There was no legal authority for any charge of half commissions by the marshal, when no property was sold or money made or received by him on execution, at any time from the 20th of February to the second Monday in April, 1849. *Erwin v. Cummins*,* Hemp., 703.

§ 314. Under the acts of congress of February 27, 1801, concerning the District of Columbia, and 28th February, 1799, providing compensation for marshals, and the act of assembly of Maryland, of November, 1799, chapter 25, regulating officers' fees, the marshal is entitled to a fee of ninety pounds of tobacco for impaneling a jury in a criminal case. *United States v. McDonald*, 1 Cr. C. C., 78.

§ 315. A replevin bond for goods distrained for rent may and ought to include the marshal's commission of five per cent. *Alexander v. Thomas*, 1 Cr. C. C., 92.

§ 316. For summoning and impaneling a coroner's jury, by order of the coroner, the marshal of the District of Columbia is entitled to a fee of \$5.50. *Brent v. The Justices of the Peace*, 1 Cr. C. C., 434.

§ 317. The marshal cannot charge for services which are required by the practice of the United States court to be performed by the clerk. *The Trial*, Bl. & How., 94.

§ 318. The act of congress of February 28, 1799, directing the compensation of the marshal for certain services to be governed by the allowances made by the supreme court of the state where such services are rendered, does not require that the like services should be performed in the state by the officer corresponding to the marshal, but he is entitled to the allowances, though according to the state practice the services are rendered by an attorney or clerk. *Ibid.*

§ 319. The act of congress of February 28, 1799, after designating the specific fees that marshals shall be entitled to, provides that "for all other services not herein enumerated, except as shall hereafter be provided, such fees and compensations as are allowed in the supreme court of the state where such services are rendered." *Held*, that the court would allow the marshal such fees and compensation, for services and disbursements, not expressly provided in the act of 1799, as were provided by statute of the state where the court sits, and as were allowed by the supreme court of the state, in the absence of a statute, for like services and disbursements rendered by the state officers: and that when the court finds no fixed rules to guide its allowances, it will determine them by analogy to the modes of compensation authorized by the state. *Ibid.*

§ 320. The act of congress, after declaring the fees to be allowed the marshal for certain enumerated services, adds, "For all other services not herein enumerated, such fees or compensation as are allowed in the supreme court of the state where the services are rendered." *Held*, that the compensation of the marshal for keeping and maintaining Africans, taken under the act of congress for prohibiting the slave trade, was not specified in the fees act, and wholly unprovided for by the laws and usages of the state; and that for such services the marshal was entitled to a reasonable compensation, depending upon the circumstances of the case. *The Antelope*, 12 Wheat., 546.

§ 321. The act of congress regulating fees and compensation of marshals provides "that the same having been examined and certified by the court, or one of the judges of it, in which the services shall have been rendered, shall be passed in the usual manner at, and the amount thereof paid out of, the treasury of the United States." *Held*, where the marshal had rendered services in keeping and maintaining certain Africans, which were adjudged to belong to the United States, that he must get his compensation in the manner pointed out by the above statute; that the court could not make a direct judgment or decree against the United States, for costs and expenses in behalf of an officer of the government. *Ibid*.

§ 322. The act of congress of February 26, 1853, regulating the fees and costs to be allowed to marshals, makes no provision for transporting a witness in custody for safe keeping; and, at the outset, declares that in lieu of the present compensation "the following and no other compensation shall be allowed." *Held*, that the clause quoted must be understood as "the following and no other compensation for any service mentioned in the act;" and, that, if the marshal is compelled by law to perform a service or incur a charge in a matter not specified in the act, he is entitled to a reasonable allowance therefor, which should be the fee of the nearest analogous case allowed by the act of congress, or actual expenses, to be certified by the court. *Fees of Marshals*,* 6 Op. Att'y Gen'l, 58.

§ 323. The act of 1853 declares that "the marshal shall not incur an expense of more than \$20 in any one year for furniture, or \$50 for rent of building and making improvements thereon, without submitting a statement and estimates to the secretary of the interior, and getting his instructions in the premises." *Held*, that the authority conferred by the statute on the secretary was to approve of the marshal's estimates and instruct him in making the contracts contemplated in the statute, and he could not approve or allow his claim for past expenses; and that he could not make compensation to third parties for the furniture and house rent. *Rent and Furniture of Court Rooms*,* 9 Op. Att'y Gen'l, 98.

§ 324. The act of 1851-2, re-enacted in 1853, requires the marshal to make return "of the fees and emoluments of his office;" he gets his compensation from "the fees and emoluments of his office;" he is required to pay into the treasury "any surplus of the fees and emoluments of his office" which his return shall show to exist. *Held*, that the marshal should be charged with all the fees and emoluments which accrued to him, and not merely with those collected by him; though it seems that he may entitle himself to a credit for such of them as he shows, to the satisfaction of the accounting officers, that he could not recover by any reasonable effort. *Fees of Marshals*,* 9 Op. Att'y Gen'l, 176.

§ 325. Under the act of congress of May 8, 1792, which provides that the marshal shall be allowed "for the maintenance of prisoners confined in jail for any criminal offense," allowance may be made to a marshal for clothing, medicine, and medical attendance of prisoners who are in jail awaiting trial. *Allowances to Marshals*,* 1 Op. Att'y Gen'l, 322.

§ 326. By the act of congress of February 27, 1801, the laws of Maryland, as they then existed, were continued in force in the county of Washington. The Maryland law did not authorize the sheriff to charge the state with the maintenance of persons committed as runaways, and the marshal cannot make such a charge against the United States. *Runaways, and Petitioners for Freedom*, 4 Cr. C. C., 489.

§ 327. The United States are liable to the marshal for the maintenance of petitioners for freedom, committed, by order of the court, for safe keeping, because their pretended masters or owners will not give security for the petitioners' appearance in court, to attend the trial, if the petitioners gain their freedom, otherwise the expense must be paid by their owners. *Ibid*.

§ 328. Poundage.—Where, under a law of Maryland, in force in the District of Columbia, the marshal of the latter place is entitled to poundage on an execution in favor of the United States as plaintiff, it was held that, if the latter release their debtor from imprisonment, they are still liable for the poundage. *United States v. Ringgold*,* 8 Pet., 150.

§ 329. If, upon the question of the marshal's right to poundage for lands levied on in execution, resisted because of insufficient description of the lands, there is nothing to show that the boundaries described in the execution are incorrect, the levy cannot be held invalid for want of certainty. *Mason v. Muncaster*,* 3 Cr. C. C., 403.

§ 330. The plaintiff in *fi. fa.* is liable to the marshal for his whole poundage on the debt, if he levy on goods to the amount of the debt, whether they be sold or not. The original defend-

ant in *fl. fa.* is not liable in any form of action to the marshal or to the original plaintiff for poundage, nor is he or his property liable for poundage, unless the judgment against him is for a sum larger than due the one by him, the original defendant, to be released upon payment of the amount really due with costs. In such a case, and in such a case only, the marshal may, if he has not returned the *fl. fa.*, proceed to execute it on defendant's lands for his poundage. *Ibid.*

§ 831. The act of congress of March 3, 1807, provided that the United States marshal for the District of Columbia should receive, for services rendered in Alexandria county, the like fees and compensation as by the laws of Virginia in force on the first Monday of December, 1800, were allowed to a sheriff for like services. *Held*, that the marshal of that District was not entitled to poundage for the arrest of a defendant on *ca. sa.* in Alexandria county when the defendant was discharged, by order of the plaintiff, without payment. *Swann v. Ringgold*, 4 Cr. C. C., 288.

§ 832. The Maryland act of 1799, chapter 25, section 3, gives the sheriff "For all goods and chattels which the sheriff shall attach and take into his possession, or wherewith he shall be chargeable, the same fees as on execution." *Held*, that the marshal was not entitled to poundage on bank-notes not taken into his actual custody so as to make himself chargeable therefor; that summoning, as garnishees, the officers of a bank in which defendant in an attachment suit had deposits, was not taking the funds there deposited into his actual custody. *Ringgold v. Lewis*, 3 Cr. C. C., 367.

§ 833. Service of writs.—Bringing a prisoner up by a regular writ of *habeas corpus*, or imprisoning him by a regular warrant, constitutes a "service" of these writs, as a valid basis for taxing a fee. *Ex parte Paris*,* 3 Woodb. & M., 227.

§ 834. The fees act allows no special fees to the marshal for the bringing in and returning an intermediate commitment, whether before the circuit or district court or a commissioner, of parties under examination and trial, and of witnesses, but pays for that service in the *per diem* fee which it awards in lieu of all other compensation. Fees of Marshals,* 7 Op. Att'y Gen'l, 667.

§ 835. In some districts it is the practice for the court to issue formal warrants in writing, signed and sealed, each and every time parties and witnesses in custody are brought up; for executing which warrants the marshal is properly entitled to charge for a "service" for each and every one of them. Where, however, this practice does not obtain, an order of the court to bring up an imprisoned party or witness for trial or to testify, or on an order to commit them during an adjournment or during a session, will not warrant the charge of a fee. *Ex parte Paris*,* 3 Woodb. & M., 227.

§ 836. A distinction exists between *distributing* and *serving venires*; and for the former service it was held that the marshal was entitled only to the fee of \$2 for each *venire* distributed, as provided by the act of February 28, 1799 (1 U. S. Stat. at Large, 624), and that he was not entitled to the mileage allowed by the same section in case of serving a *venire*. *United States v. Smith*,* 1 Woodb. & M., 184.

§ 837. Having served an execution on the property of a debtor, a marshal is entitled to his fees for such service, though such property be yet unsold. *Ibid.*

§ 838. The fee allowed by the act of February 28, 1799 (1 U. S. Stat. at Large, 624), for "service" of a precept is intended to cover the duty of a "commitment" as part of the service, when the service is made of an ordinary writ by arresting and committing the party. *Ex parte Paris*,* 3 Woodb. & M., 227.

§ 839. The omission of acknowledgment of service on writs of subpoena, where the deputy marshal swears that he served the writs, and where several of the persons served say they acknowledged service, will not act to deprive the deputy of his fees. *Wintermute v. Smith*,* 1 Bond, 210.

§ 840. *Held*, that under the act of 1799 a marshal is entitled to fees for distributing *venires* to town clerks. *United States v. Cogswell*,* 3 Sumn., 204.

§ 841. The marshal's fees on executions being made by act of congress the same as allowed to sheriffs for similar services, and the Indiana law providing that the sheriff's fee should be, for selling property on execution, a commission of five per centum on the first \$300, and two per centum on sums above that amount, and one-half of such commission when the money was paid without sale, it was held, in a case in which the money was paid by the defendant to the plaintiff while the execution was in the hands of the marshal, that the marshal was entitled to charge his commission on the judgment. *Pomroy v. Harter*,* 1 McL., 448.

§ 842. By act of congress of May 8, 1792, the fees of a United States marshal are the same as are allowed by the supreme court of the state. By the fee bill of Maryland, the sheriff, for levying an attachment, or when he is chargeable, is entitled to the same fee as on executions; and upon *feri facias* the same as upon attachments; upon an execution for money he is entitled to a commission. *Held*, that the marshal of the District of Columbia was entitled

to a commission on an execution upon a forthcoming bond and a commission on a former execution levied upon the goods. *Thomas v. Brent*,* 1 Cr. C. C., 161.

§ 843. A marshal received, in due course of law, process directing him to summon witnesses, and also a writ of subpoena, in addition to the summons, and distinct therefrom. This double process was according to the usual course of proceeding in the court from which it issued, and the costs thereof were allowed and certified by the judge. *Held*, that the marshal was entitled to fees both for summoning the witnesses and serving the subpoena. *Certified Fees of Marshals*,* 8 Op. Att'y Gen'l, 496; *Compensation of Marshals*,* 8 Op. Att'y Gen'l, 536.

§ 844. A marshal is not entitled to a fee or mileage for serving the rule to plead on defendant. *Parker v. Bigler*,* 1 Fish. Pat. Cas., 285.

§ 845. Prize cases.—Under the acts of 1862 and 1864, in prize cases the marshal must deposit the gross proceeds of the sale with the assistant treasurer subject to the order of the court, and all costs, fees and charges, whether of the sale or otherwise, are paid by order of the court on the assistant treasurer. *United States v. Fifty-one Dozen Pieces of Merchandise*,* 2 Spr., 100.

§ 846. The act of congress of January 27, 1818, applies only to sales of captured property, after a final condemnation, and not to sales made *pendente lite* under interlocutory decrees. The marshal is still entitled to a commission for the sale of prize property under an interlocutory decree under the act of February 28, 1799. *The Avery*, 2 Gall., 808.

§ 847. Prize goods, by agreement of the parties, were removed from the district of Maine to Boston and there sold. The proceeds were paid into the circuit court before which the case was brought by appeal. Part of the cargo was condemned, and the marshal of the district of Maine claimed commissions on the sale. *Held*, that the parties could not, by selling the property out of the district, defeat the marshal's claim to commissions; that his claim should be allowed. *The San Jose Indiano*, 2 Gall., 311.

§ 848. Deputies.—It seems that a deputy marshal's remedy for compensation for his services is against the marshal for whom he performed the service. *Wintermute v. Smith*,* 1 Bond, 210.

§ 849. A claim by a marshal for commissions on fees paid to deputy marshals or assistants in taking the census was held not a valid one. *United States v. Smith*,* 1 Woodb. & M., 184.

§ 850. Where a deputy is appointed by a marshal, and is duly sworn as such, an omission by the marshal to make a return of the appointment to the district judge will not affect the legality of the service of subpoenas by such deputy so as to deprive him of the right to fees. *Wintermute v. Smith*,* 1 Bond, 210.

§ 851. A deputy marshal is not entitled to charge for service or mileage for himself as a witness. *Ibid*.

§ 851a. Statute construed as to *per diem* allowed a marshal for an arrest by his deputy. *Held*, that he may charge a *per diem* not to exceed \$2 per day. *United States v. Harker*,* 8 Saw., 287.

§ 852. Fee for discharge.—The mere removal of a prisoner from one place to another, in the absence of his release from the custody of the marshal or the law, will not justify the taxing of a fee for a "discharge." *Ex parte Paris*,* 8 Woodb. & M., 227.

§ 853. The term "discharge" is held not to apply to the mere bringing up of a prisoner to testify or to be tried, so as to admit of taxing a fee. *Ibid*.

§ 854. Attendance on court.—The general *per diem* fee for attendance on the court that is paid to the marshal extends to the keeping of peace and regularity during its sessions, taking care of prisoners in custody, and executing the various orders of the court, about bringing them up or into court; but where a "commitment" is one of these orders, it may be proper that the assigned fee for that should be paid in addition, though it happen during the regular term of the court and by an order made in court. *Ibid*.

§ 855. Commitment.—A fee for a "commitment" is proper only when such "commitment" is ordered by the court, or when a criminal is imprisoned under final sentence. *Ibid*.

§ 856. Expenses and disbursements.—Where a marshal in the performance of the duties of his office necessarily incurs expenses and makes disbursements not provided for by the Revised Statutes, he may be reimbursed such expenses. So it is held that a charge of \$180.50 for wharfage, though not expressly provided for by the fee bill, yet being reasonable in amount and properly incurred, might be properly taxed. *The Schooner F. Merwin*,* 10 Ben., 403.

§ 857. In revenue cases.—Under act of 1799, chapter 22, section 90 (1 U. S. Stats. at Large, 696), in cases of sale of property forfeited for breach of the revenue laws, the marshal must pay over into the registry the gross proceeds of the sale *minus* the expenses attendant on the sale, the marshal's commission on the sale and on collecting and paying over the proceeds being accounted part of said expenses. All other fees and expenses, whether of the marshal or any other officer or person, for services not directly related to the sale, are paid by order of court out of the proceeds thus paid into the registry. *United States v. Fifty-one Dozen Pieces of Merchandise*,* 2 Spr., 100.

§ 358. *Mileage.*—The marshal is entitled to mileage on a return of *nulla bona* for mileage actually traveled by him or his deputies in enabling him to make that return. *Anonymous*,* *Hemp.*, 450.

§ 359. To justify a charge made by a marshal, for travel and attendance at the monthly rules, actual travel and attendance at the same were held indispensable. *United States v. Cogswell*,* 3 *Sumn.* 204.

§ 360. If the marshal, at the request of plaintiff, travels over one hundred miles to serve a subpoena on a person living out of the state where the court is holden, the plaintiff may be liable to him for his mileage for the whole distance, but mileage for one hundred miles only can be taxed against defendant. *Parker v. Bigler*,* 1 *Fish. Pat. Cas.*, 285.

§ 361. *Settlement of claim.*—Section 829, Revised Statutes of United States, which gives to marshals a commission when "a debt or claim in admiralty is settled by the parties without a sale of the property," refers to a final disposition of the cause, and will not apply to a case where the vessel is bonded by the claimants without any settlement of the debt or claim; thus, where a vessel was seized by a marshal, but subsequently released on stipulation for her value, it was held that the marshal was not entitled to any commission. *The Steamship Acadia*,* 10 *Ben.*, 482.

§ 362. Where defendant has paid the debt and costs to the plaintiff, the marshal cannot detain him upon the *ca. sa.* for poundage, it being no part of the judgment. *Causin v. Chubb*, 1 *Cr. C. C.*, 267.

§ 363. *Process in rem* was issued against a vessel, but service of process was waived, and claimants gave a bond under the provisions of the act of congress of March 3, 1847. The case proceeded to final decree, the amount of which having been paid, the marshal claimed his commission thereon under section 829 of the Revised Statutes, which provides that "when the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission." *Held*, that when the amount of the final decree is paid, the debt or claim is settled and the marshal entitled to the commission. *The City of Washington*, 13 *Blatch.*, 410.

§ 364. Defendant was discharged from a *ca. sa.* under the act of March 3, 1817. He made an agreement with the marshal to pay his poundage fees by instalments, and if he should make default the marshal should arrest him again on a new *ca. sa.* Upon defendant making default, it was held that the marshal could not detain him for poundage fees, the principal debt having been discharged. *United States v. Smith*, 3 *Cr. C. C.*, 66.

§ 365. A marshal sued, in *assumpsit*, for poundage fees, the defendant, who was committed on *ca. sa.* in a former action. *Held*, that the marshal could recover. *Ringgold v. Glover*, 2 *Cr. C. C.*, 427.

§ 366. A captured vessel was taken under the act of congress of 1863, by the secretary of the navy, for the use of the navy, after she had been libeled and was in the marshal's possession. The law requires the secretary to deposit the value of the vessel in the treasury of the United States; he sent the amount to the marshal, with a bill of sale, which was signed by the marshal and returned to the department, and the money was deposited by the marshal with the assistant treasurer to the order of the court. *Held*, that this was not a sale of the vessel, notwithstanding the secretary of the navy and the marshal treated it as such; neither is it a settlement by the parties without a sale; and that the marshal was not entitled to a commission on the amount deposited, under the act of 1853, providing to the marshal a percentage "for sales of vessels" under process in admiralty, nor to half commissions as in a case "where the debt or claim shall be settled by the parties without a sale." *The Victory*, 2 *Spr.*, 226.

§ 367. *Custody fees.*—The question was raised, where a vessel was in custody of the marshal on process in each one of several cases, whether the entire custody fees were to be charged in the case in which process was first served. *Held*, that the proper rule in those cases was to divide the *per diem* custody fee, for each day, equally among the cases wherein the vessel was held by process in force on such day, saving to the marshal, in case any party fails to pay his proper proportion, a remedy therefor against the other parties. *The Steamship Circassian*,* 6 *Ben.*, 512.

§ 368. The marshal having attached personal property in admiralty claimed as a compensation a sum greater than \$2.50 a day as the necessary expenses of keeping said property. It was held that, as the act of February 26, 1853 (10 U. S. Stat. at Large, 161), provides as compensation for the "necessary expense of keeping boats, vessels, or other property attached . . . in admiralty, not exceeding \$2.50 per day," and further provides that no other compensation to marshals than that prescribed by said act shall be taxed and allowed, the sum in excess of \$2.50 must be disallowed. *Ibid.*

§ 369. The marshal will be allowed \$1.50 per day for the safe keeping of a vessel which has been seized on process of the federal court, and a moderate compensation for a keeper when it is necessary to employ one. *The Trial*, Bl. & How., 94.

§ 370. The claim of a United States marshal for fees for keeping vessels, under the act of congress of 1853, is like any other claim or lien on a fund in court; it must be established by vouchers or otherwise to the court's satisfaction, and can be paid only by the court's order. He is entitled under this law to receive from the fund in court the actual necessary expenses he has paid, or obligated himself to pay, and no more. *The Free Trader*,* 1 Brown, 72.

§ 371. It is impracticable to lay down a general rule governing the question of the fees of a marshal, for custody of goods in his possession, in cases of seizures and other proceedings *in rem*. He should receive such reasonable compensation as is received for like services in the ordinary business of life; he is entitled to be repaid the actual disbursements reasonably made for the care and custody of the goods by his under-keepers, and to receive compensation for his own superintendence and responsibility for the safe custody of the goods. *Bottomley v. United States*, 1 Story, 135.

§ 372. Where a marshal holds a vessel under two warrants of arrest in different suits, the custody fees should be apportioned equally, charging one-half to each suit. *The John Walls, Jr.*, 1 Spr., 178.

§ 373. A sum actually paid a keeper to watch property seized by a United States marshal, not exceeding \$2.50 a day, may be taxed by the clerk in favor of the marshal on proof of the necessity of a keeper daily. 300 Barrels of Alcohol, 1 Ben., 72; S. C., 8 Int. Rev. Rec., 103.

§ 374. The charges of the United States marshal for the expenses in removing and storing property seized by him will be allowed and taxed when the amount charged is not excessive. *Ibid.*

§ 375. A marshal of the United States seized certain barrels of alcohol for violation of internal revenue laws. He insured it at its market value, not knowing that the tax was secured by bond. Its value is much less as alcohol in bond than as free alcohol. The insurance was effected by a monthly instead of a yearly policy; the marshal was not requested to do otherwise, and the claimant's attention was called to the policy. Furthermore, a written consent signed by claimant's attorney was filed, in which it was stipulated that the marshal's fees and expenses are to be paid by the claimant before the discharge of the property. *Held*, that the item of premiums of insurance must be allowed by the marshal. *Ibid.*

§ 376. A marshal may become responsible to both parties for the safe custody of a vessel, and yet not be entitled to fees for the safe-keeping thereof. So it was held, where a marshal went on board a vessel alone, found no one there, and took formal possession, and sent a verbal message to the owner, which was not received, and neither went on board again himself nor appointed any person to take charge thereof, that he was not entitled to custody fees. *The Hibernia*, 1 Spr., 78.

VI. POSTMASTERS.

SUMMARY — Increase of salary, § 377.

§ 377. After the salary of a postmaster has been fixed, no increase can be made save by readjustment by the postmaster-general, which can only take effect prospectively and upon cause shown by the quarterly returns of the postoffice; and though cause be shown by such return, yet the mere omission of the postmaster-general to make such readjustment thereupon will not charge the government with the increased salary for which cause is shown in the petition. *United States v. McLean*, §§ 378-79.

[NOTES.— See § 380.]

UNITED STATES *v.* McLEAN.

(5 Otto, 750-753. 1877.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE STRONG.

STATEMENT OF FACTS.— The case of the claimant appears to be a hard one; but we think he has no remedy by suit in the court of claims. His claim rests not upon any contract with the government, either express or implied, but upon acts of congress providing for a regulation of the salaries of deputy postmasters. On the 13th day of March, 1871, he was appointed postmaster at Florence, Kansas, and his salary was fixed at \$7 until it could be ascertained what the business of his office would be. He entered upon the duties of the appointment on the 14th of April, 1871, and continued therein until

after July 1, 1872, from which date his salary was fixed at \$560 a year. His claim now is that, under the statutes prescribing the basis for compensation, adjustment and readjustment of salaries of postmasters, he is entitled to be paid for his service between April 14, 1871, and July 1, 1872, the sum of \$578.

Before examining the acts of congress bearing upon the subject, some further notice of the facts is necessary. In a letter accompanying the claimant's appointment he was required to make out, at the end of each quarter, and forward to the third assistant postmaster-general, a statement, under oath, of the total value of postage stamps canceled during the quarter; and he was informed that his salary could not exceed the amount to which the office would be entitled from commissions and box-rents under the former laws, but that it would be readjusted at the proper time by the postmaster-general, on the basis of the amount of business done, as shown by the quarterly statements required. On the 1st of June, 1871, he was instructed from the department that, in order to enable the postmaster-general to review and readjust his salary from and after the 1st day of July, 1872, he should keep an account of the total number of stamps canceled at his office for the six months beginning July 1, 1871, and ending December 31, 1871; also the amount collected on unpaid letters, on newspapers, and other printed matter, and for box-rents during the same period; and that, on the 1st of January, 1872, he should make out and forward a sworn statement of the amount arising from each of those sources. With this latter order he complied, and on the 1st of January, 1872, he forwarded a sworn statement, showing the revenue of his office to have been \$482.67 during the six months next preceding January 1, 1872; and at the regular biennial adjustment of salaries, in June next following, the postmaster-general readjusted his salary on the basis of his statement and fixed it at \$560 a year from July 1, 1872. From April 14, 1871, till July 1, 1872, the claimant made no application for readjustment of his salary as first fixed, unless a letter written by him to the third assistant postmaster-general, complaining of the inadequacy of his compensation, can be regarded as an application for readjustment. But that letter was unaccompanied by any sworn statement of the income of his office and it furnished no basis for readjustment; nor was there any subsequent application, except that in October, 1872, after the salary had been fixed at \$560 from July 1 of that year, a person claiming to be the claimant's attorney wrote to the department, requesting that the order readjusting the salary should be modified so as to take effect from April 14, 1871. But this application also was accompanied by no sworn statement of revenue.

§ 378. *After the salary of a postmaster has been fixed it cannot be increased except by the postmaster-general.*

Upon this statement of facts it appears to us very clear that the acts of congress give to the claimant no right to any greater salary between April 14, 1871, and July 1, 1872, than that which was fixed at the time of his appointment and which he has received. The act of June 22, 1854, authorized the postmaster-general to allow to deputy postmasters, in lieu of the compensation before allowed, commissions on the postage collected at their respective offices, at varying rates, according to the amounts collected. 10 Stat., 298. The act of July 1, 1864, divided such postmasters into five classes and substituted fixed salaries for commissions. In the classification made, the claimant, when appointed, belonged to the fifth class—his salary being less than \$100. The second section of the act enacted that the postmaster-general shall review once in two years, and in special cases, upon satisfactory representation, as

much oftener as he may deem expedient, and readjust on the basis of the first section the salary assigned by him to any office; but that any change made in such salary should not take effect until the first day of the quarter next following such order. The fourth section enacted that, at offices which had not been established for two years prior to July 1, 1864, the salary might be adjusted upon a satisfactory return by the postmaster of the receipts, expenditures and business of his office. 13 id., 335. The act of June 12, 1866 (14 id., 60), amended the second section of the act of 1864, by adding the proviso, that when the quarterly returns of any postmaster of the third, fourth or fifth class show that the salary allowed is ten per cent. less than it would be on the basis of commissions under the act of 1854, fixing compensation, then the postmaster-general shall review and adjust under the provisions of that, the second, section.

§ 379. *The action of the postmaster-general upon the salary of a postmaster is prospective only.*

From a review of these statutory provisions it appears plainly that, after a salary of a postmaster has been fixed, a readjustment by the postmaster-general must be made before it can be increased, and the readjustment takes effect in all cases prospectively. The law imposes no obligation upon the government to pay an increased salary, unless a readjustment has preceded it. And by the act of 1866, the postmaster-general is not to readjust an existing salary, unless the quarterly returns made show cause for it. Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the postmaster-general to make a readjustment immediately on the receipt of the returns, still his readjustment was an executive act, made necessary by the law, in order to perfect any liability of the government. If the executive officer failed to do his duty, he might have been constrained by a *mandamus*. But courts cannot perform executive duties, or treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled. The judgment was therefore erroneous, and must be reversed, and the record remitted to the court of claims, with instructions to dismiss the petition; and it is so ordered.

§ 380. *Extra compensation.*—Under the act of congress of March 3, 1863, the postmaster-general is made the sole judge of the fitness of allowing postmasters extra compensation for increased labor and expense on account of the vicinity of national forces; thus an instruction, in a suit on a postmaster's bond, that the jury might inquire into the facts of increased labor and expense and vicinity of troops, to determine the validity of a claim for extra compensation put in issue by way of set-off, was held erroneous. *United States v. Wright*,* 11 Wall., 648.

VII. WITNESS FEES.

SUMMARY — *Witness must be subpoenaed*, § 381. — *Attending as juror and witness*, § 382.

§ 381. By section 107, 10 U. S. Stats. at Large, compensation is allowed only to witnesses who have been regularly subpoenaed; and where a motion was made to tax the costs of witnesses in a case who had attended and testified at the request of the prevailing party, but were not subpoenaed, such motion was overruled, as being contrary to the law and a rule of court. *Sawyer v. Aultman & Taylor Manuf. Co.*, § 383.

§ 382. A person summoned as a juror and subpoenaed in court afterward as a witness is entitled to fees for attendance in both capacities. *Edwards v. Bond*, § 384.

[NOTES. — See §§ 385-414.]

SAWYER v. AULTMAN & TAYLOR MANUFACTURING COMPANY.

(Circuit Court for Illinois: 5 Bissell, 165, 166. 1870.)

MOTION to tax fees of witnesses who attended without being subpoenaed.

§ 383. *Witness fees will not be taxed as costs in federal courts, unless the witnesses have been subpoenaed.*

Opinion by BLODGETT, J.

There has been a rule in existence in this court since some time about 1842, prohibiting the clerk from taxing the costs of any witnesses except such as were regularly subpoenaed. The witnesses in this case were not subpoenaed, but attended and testified at the request of the plaintiff; and counsel of plaintiff, I presume, acting as is the practice in the state courts, now claim to have their costs taxed as witness fees. On consultation with Judge Drummond, we are not disposed to change the rule which has been standing so long in this court, and so long acquiesced in that counsel should by this time understand it. We are satisfied that more mischief would result from a change of the rule than by strictly adhering to it; and, more than all that, I am somewhat in doubt whether the court has any right to tax costs for witnesses not regularly subpoenaed. By act of congress, provision for compensation for witnesses reads, "for each day's attendance in court, or before any officer pursuant to law, each witness shall," etc. 10 Stats. at Large, 167. Now no person can be said to be in attendance before the court pursuant to law unless duly subpoenaed. Then, again, another paragraph in the same act commences: "When a witness is subpoenaed in more than one cause," etc.; thereby clearly conveying the idea that the only case in which witnesses can draw their compensation is when they are acting in pursuance of a subpoena. This being the act of congress, and the rule being in consonance with the act of congress, we are disposed to adhere strictly to it. Motion overruled.

EDWARDS v. BOND.

(Circuit Court for Illinois: 5 McLean, 800-803. 1851.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—In this case the plaintiff has presented a petition setting forth that at a former term of this court he was summoned as a juror, and at the same term was subpoenaed as a witness on behalf of the United States in a certain cause pending in this court. The petition alleges that he attended both as a juror and witness, and that according to the practice of the court he filed an affidavit of such attendance with the clerk, showing the number of days he was present in court, and the distance in miles of his place of abode from Springfield, where the court was held. The petition also states that he claimed of the marshal his compensation for each service, but that the marshal has paid him for one service only, and absolutely refuses to pay him for the other. He asks for a rule on the marshal requiring him to pay the amount he claims.

The marshal has filed an answer in which he admits the facts stated in the affidavit to be true. He also admits that he has sufficient funds of the United States in his hands to pay the plaintiff, but gives as a reason for refusing payment that such claim has not been allowed by the accounting officers of the treasury department at Washington.

There is no controversy between the parties as to the amount claimed. It is conceded that the sole question is, whether, having rendered the service as

juror and as witness at the same time, he is entitled to compensation in both capacities. The sixth section of the act of February 28, 1799 (1 Statutes at Large, 626), provides for the compensation of jurors and witnesses in the courts of the United States, and, after prescribing the per diem and mileage of each grand and petit juror, declares that the same allowance shall be made witnesses as to jurors. The counsel of the government admits that he has not been able to find any decision of a court which would defeat the claim of the plaintiff; and no act of congress exists which provides for the contingency.

I am called on to decide whether the claim of the plaintiff is in conformity with law. The ordinary mode of bringing an individual into court to serve as a juror is by summoning him on the *venire*. That being done, he is subject to the court, and if disobedience follow, he can be punished for it. In this instance the plaintiff was summoned on the *venire*. In obedience to it he served as a juror. He was called into court to discharge a particular duty.

The usual method of requiring the attendance of a witness is by the service of a subpoena. If the witness disobey it, he is in contempt and subject to an attachment. Now, it is apparent, if the *venire* and subpoena concur in identity of person, of court and of time, there is not the less a distinction as to the duty to be fulfilled. Indeed, the only identity of time was that each duty began on the first day of the term. Here the plaintiff was directed to be present as a juror and as a witness on the same day, but neither process specified how long he might be needed in the one or other capacity. That depended upon future contingencies. When he had finished his duty as juror he had not necessarily performed his duty as a witness, and so of the converse of this. And yet, if he had performed one duty, why might he not leave the court and return home, leaving the other unperformed? Simply because the process of the court operated on him, and called on him to discharge the other duty. If a person attends court as this party did he assumes a twofold character, and for each is entitled to his compensation. Suppose, after a person is summoned as a juror, it is ascertained that he is an important witness for the government, shall the district attorney decline to have him subpoenaed because he has been summoned at the same term as a juror? Certainly not. If he did not attend, it would be no sufficient reason for continuing the cause that it was supposed he would be present as a juror. The process to him as juror does not demand his attendance as a witness, and there is, in general, no method by which a person, if absent, can be compelled to attend as a witness, but by the service of a subpoena. Besides, it is no part of the duty of the district attorney to know who is on the panel, and, in fact, he is usually ignorant of it till the meeting of the court. On the other hand, if he does attend, and his duty as juror is finished, is the officer of the government to watch the moment that it happens, and then serve a subpoena on him to compel his attendance as a witness? If his service in one capacity is performed it will not be pretended but that he may be compelled to remain under the process of the court, and if he do remain, then clearly is he entitled to compensation for so doing. It is plain that the only safe course is to have the appropriate process for witnesses duly served. Again, if a juror summoned by the government has already been paid by another party for attendance as a witness at the same term, why may not the United States refuse to pay him? It would still be double pay. It is said one party does not pay double. True, it is another party, but the case put shows that the fact of double pay does not determine the right. It must, then, rest upon the circumstance of the party being the same. But it may be rea-

sonably asked, for which service shall he be paid, as a juror or witness? It is true that the per diem and mileage of each is the same,—it is generally so, but not necessarily,—and if it were by law different, which should he have?

The argument which is drawn from the liability to abuse, which exists in these cases, is no sufficient reason for giving a construction to the statute which its language will not justify. If a flagrant case of abuse were made to appear, the court might interfere, or, if this were a questionable power, it is always within the province of the legislature to interfere and correct it.

§ 384. *A person summoned as juror and witness is entitled to compensation in each case.*

I think, therefore, upon principle, the plaintiff is entitled to compensation in each case. The point seems not less clear upon authority. And the example of the government is not wanting to sanction the view taken by the court. When the courts of the United States were first created, the circuit and district courts were held by different judges and at different times, though by the act of 1789 the judge of the district court was one of the judges of the circuit court. Of late years, however, as the district judge performs a large part of the duties of the circuit court, the circuit and district courts, in most of the states, are now required to be held at the same time and place. And yet, prior to 1842, though both courts were held at the same time, it is understood it was the practice for the officers of the court to claim, and for the government to allow, compensation in each court. But the act of May 18, 1842 (5 Statutes at Large, 484), expressly provided that in such case no greater per diem or other allowance should be made to certain officers named, than for attendance on one court. This being the practice acquiesced in by the government, to prevent which an act of congress was necessary, it is not unfair to presume that prior to the passage of that act the compensation charged and allowed in each court was a legal one.

So here I hold, for a much stronger reason, that the charge of the plaintiff is a proper one. Even the act of 1842 requires that both courts must be held at the same time to exclude the officers from compensation, and it is probable, if both courts should meet on the same day, and after sitting from day to day one of the courts should adjourn over for one or more days,—the other court sitting on,—the officers in attendance on this last court would have a right to their compensation, and thus it might happen that they would receive pay for two courts at the same term. However this may be, it is enough to say that the law of 1799 gives the compensation as well to the witness as the juror, and the law of 1842 has made no change in this respect. That both characters united in the plaintiff in this instance was his fortune.

Recently, the circuit court of the United States for the eastern district of Pennsylvania, where a case had been postponed for several days, some of the jurors residing at a distance, held that they were entitled to compensation for attendance, though in fact they were absent from court. *Parker v. Kempton*, 1 Wall. Jr., 344. And see *Hathaway v. Road*, 2 Woodb. & M., 63.

The laws of the states provide, in general terms, not unlike the act of congress of 1799, for the compensation of witnesses and jurors. A similar law exists in Illinois, and when the same person is a juror or witness at the same time, his right to compensation in each character, so far as I have understood, has never been questioned. Indeed, when a person attends, at the same time, in the same case, but subpoenaed by both parties, it has been usual to have the costs taxed for both services,—that is, as the witness of the plaintiff and

of the defendant. On this last point, however, the practice is not uniform in the states. *Place v. Penn*, 1 Murphy (N. C.), 188; *Renfor v. Kelly*, 10 Ala., 338. In *Whipple v. Cumberland Cotton Co.*, 3 Story, 84, the court allowed the costs of a witness who had traveled a distance of more than a hundred miles from the place where the court was held, to be taxed in the cause, though he had come from another state. And this was followed in a very recent case. *Hathaway v. Road*, 2 Woodb. & M., 84.

In the case of *Willink v. Reckle*, 19 Wend., 82, the court decided that witnesses subpoenaed by the same party in three cases at the same term were entitled to their fees in such case for going and returning and for attendance. This is a much stronger case than that, for, if witnesses subpoenaed by the same party could receive pay in each cause, much more would a person summoned as a witness and a juror by the same party be warranted in receiving pay in each character. These authorities, not to multiply others, conclusively show that the courts have uniformly given a liberal construction to the law, and I think they justify the plaintiff's claim. Let the rule, therefore, be made absolute.

§ 885. Same allowance as jurors.—The act of congress of February 28, 1799, providing that the compensation of each grand and other juror shall be a fee of \$1.25 for each day he shall attend in court, and five cents a mile for travel, going and returning; and to witnesses, summoned in any court of the United States, the same allowance as is provided for jurors, applies to witnesses in civil as well as criminal cases. *Sebring's Lessee v. Ward*, 4 Wash., 546.

§ 886. Service by private person.—A witness who attends in consequence of a summons, though it be served by a private person, is entitled to his fees. *Power v. Semmes*, 1 Cr. C. C., 247.

§ 887. A witness who was not summoned, but who attended and testified before the grand jury, at the request of the attorney for the United States, may be allowed his fees. *United States v. Williams*, 1 Cr. C. C., 178.

§ 888. A party who attends court as a witness, on the request of a party, without the actual service of a subpoena, is entitled to his fees; and such fees may be taxed against the defeated party. *Cummings v. The Akron Cement & Plaster Co.*,* 6 Blatch., 510.

§ 889. Where the witness actually attends the trial, and the affidavit shows that the sum charged as his fee has been actually paid, taxation of such sum is permitted. *Beckwith v. Easton*,* 4 Ben., 857.

§ 890. If a witness attend voluntarily without sufficient summons, his fees cannot be charged against the losing party, and the indorsement of accepted by the witness on the subpoena, which was never placed in the marshal's hands, is not a sufficient summons. *Dreskill v. Parish*,* 5 M. L., 218 and 241.

§ 891. Under the act of congress of February 28, 1853, a person who attends the court as a witness, in good faith, on the request of a party, without the actual service of a subpoena, is entitled to his fees, and such fees may be taxed against the party liable for costs. *Dennis v. Eddy*, 12 Blatch., 195.

§ 892. Where the cause is postponed for two or three days by the court, witnesses will be allowed for attendance. *Hance v. McCormick*, 1 Cr. C. C., 522.

§ 893. Where both parties were ready for trial at the beginning of the term, and the court adjourned for several weeks, and after recess plaintiff's witnesses were present, but defendant was forced to continue on payment of costs, it was held that the fees of the witnesses for the whole attendance, including Sunday, were allowable. *Schott v. Benson*,* 1 Blatch., 564.

§ 894. Where the trial was postponed for a few days on account of sickness of counsel, and the witnesses remained after the trial was closed, they were entitled to charge for their entire attendance. *Whipple v. Cumberland Cotton Co.*,* 8 Story, 85.

§ 895. Liability of United States.—The court will not allow a claim against the United States for fees and mileage for attending as a witness before a court-martial, where there is no allegation nor proof that the claim was ever submitted to the proper department for settlement. *Powell v. United States*,* 1 Ct. Cl., 400.

§ 896. Where a witness recognized to appear for a defendant indicted for murder was marked as a witness on the indictment by the United States district attorney, and by him sent up to testify before the grand jury, from a desire on said attorney's part that the grand jury might hear both sides of the case, it was held that the district attorney had thereby made the

witness a witness for the prosecution, and that the United States should pay such witness' fees. *Ex parte Johnson*,* 1 Wash., 47.

§ 397. A person detained in prison as a witness in a criminal case, from his inability to give security for his appearance in the recognizance required by law, is not entitled to the compensation of a witness for the time he is detained. A person is not "attending on court" as a witness until the session of court at which he is to testify; the law providing for the reasonable contingent expenses in holding court does not authorize the payment to a person of witness fees when not "attending on court." Fees of Imprisoned Witnesses,* 1 Op. Att'y Gen'l, 427.

§ 398. Where a person was ordered by a justice of the peace to recognize with surety to appear and testify against a certain party on a charge of felony, and being a stranger and unable to get surety was committed to prison and detained until the trial, the court allowed the witness to prove her attendance, and ordered her to be paid for the whole time she was detained. *Higginson's Case*, 1 Cr. C. C., 73.

§ 399. Payment in advance.—A witness was subpoenaed in a civil cause in the United States circuit court, and demanded of the marshal, at the time of the service of the subpoena, his traveling fee and his fee for one day's attendance, which the marshal did not pay. According to the statutes of the state in which the court was sitting, a witness who makes such a demand is not obliged to obey the subpoena if the fees are not paid. *Held*, that he could not be attached for disobeying the subpoena. *In re Thomas*, 1 Dill., 420.

§ 400. A witness, being examined *de bene esse*, is not precluded from claiming his fees for attending the trial in person if he is there examined. *Beckwith v. Easton*,* 4 Ben., 357.

§ 401. And if the deposition is admitted in evidence the fee of the proctor for taking the same is taxable. *Ibid*.

§ 402. Mileage.—Where traveling expenses were prepaid to witnesses residing at a distance from the place of trial, in order to compel their attendance, it was held that the taxation of costs could not exceed five cents per mile for going to and returning from the place of trial, and for a distance not beyond one hundred miles. *The Sunnyside*,* 5 Ben., 162.

§ 403. It seems that a witness residing at a distance from the place of trial, but subpoenaed at the place of trial on the day the subpoena requires him to attend court, is not entitled to a traveling fee for coming to the court. *Ibid*.

§ 404. A witness' mileage fees are allowable for any distance within the district, but for not exceeding one hundred miles from the place of trial where witness resides outside the district. *Anonymous*,* 5 Blatch., 134.

§ 405. Where the attendance of a witness is necessary and proper, he may charge his travel for the several terms at which he actually attended court. *Whipple v. Cumberland Cotton Co.*,* 3 Story, 85.

§ 406. A witness is entitled to his fees for traveling from Boston to Portland, although his residence was not at Boston. *Ibid*.

§ 407. Travel fees for one hundred miles only from place of trial can be allowed, where witness resides beyond the court's jurisdiction. *Beckwith v. Easton*,* 4 Ben., 357.

§ 408. Distance from place of trial.—The question arises in connection with the clerk's taxation of witness fees, whether the traveling fees of a witness subpoenaed without the district could be taxed for a greater distance than one hundred miles from the place of trial. *Held*, that the practice in that district was to tax for no greater distance than one hundred miles from place of trial outside the district. *The Leo*,* 5 Ben., 486.

§ 409. *Held*, that witnesses residing outside the jurisdiction of the court, but at a less distance than one hundred miles therefrom, could be reached by subpoena from said court. *Beckwith v. Easton*,* 4 Ben., 357.

§ 410. In several suits.—Plaintiff subpoenaed the same witnesses in each of seven suits, brought against seven several defendants. *Held*, that the witnesses were entitled to fees in each suit. *Parker v. Bigler*,* 1 Fish. Pat. Cas., 285.

§ 411. Though federal courts generally follow the practice of the state courts in allowing witness fees, yet this court will alter the state practice by the adoption of the rule "that where a witness shall be summoned in several causes, he shall be allowed a per diem and mileage only in one case; and such allowance shall be distributed and charged equally among the cases in which he shall be summoned." *Parker v. Cartzler*,* 5 McL., 4.

§ 412. Party as witness.—In regard to an endeavor on the part of the claimants, upon the dismissal of a libel, to recover from the libellant, as a part of the taxable costs, witness fees or mileage for the attendance of one of the claimants as a witness, the court held that such recovery could not be had. *The Schooner Elizabeth & Helen*,* 4 Ben., 101.

§ 413. Where a party is examined as a witness in his own behalf he is not entitled to travel and attendance as a witness. *Nichols v. Inhabitants of Brunswick*, 3 Cliff., 88.

§ 414. He may be sworn or not in his own behalf, but he cannot claim compensation for doing what he may omit if he sees fit. *Ibid*.

VIII. COLLECTORS OF REVENUE.

SUMMARY — Collectors of non-enumerated ports, §§ 415, 417. — Receipts from rent and storage, §§ 416, 418. — Surveyors acting as collectors, § 417. — Acts of 1822 and 1841, § 419. — Construction of revenue laws, §§ 420, 421. — In Upper California, §§ 422, 423. — Government estopped to deny claim for services, §§ 424-426, 428. — Where a district is divided, § 427. — Sale without regular forfeiture, § 428. — Power of secretary of the treasury to remit forfeitures, §§ 429, 430. — Bonds received for goods forfeited, § 431. — Additional duties on goods entered below their value, § 432. — Charging interest against collector, §§ 433, 434. — Fees for permits for landing passengers, §§ 435-438. — Liability for illegal fees collected, §§ 436-438. — Payment under protest, § 438.

§ 415. The maximum limit of compensation allowed collectors of non-enumerated ports by the law of May 7, 1822, has not been repealed by the provisions of the various "additional compensation acts" passed after tariff act of July 14, 1832, to compensate collectors for reductions in receipts effected by that act; and the provisions of such acts, that no collector shall receive more than \$4,000 (being the maximum allowed collectors of enumerated ports by the law of 1822), do not, by implication, repeal the provisions in the law of 1822 as to the compensation of collectors of non-enumerated ports, but simply acts as an affirmation of the provisions of the law of 1822 in regard to the compensation of collectors of enumerated ports. *United States v. Walker*, §§ 439-42.

§ 416. The provisions of the act of March 3, 1841, allowing collectors to retain receipts from rent and storage of goods, to the maximum amount of \$2,000 a year, simply has the effect of adding a sum limited to \$2,000 to the yearly compensation before allowed collectors of enumerated and non-enumerated ports, and does not repeal the provisions of the act of May 7, 1822, in regard to the compensation of collectors of non-enumerated ports, which still remains fixed by that act at the maximum sum of \$3,000 a year, to which is added, by the above act of March 3, 1841, the maximum sum of \$2,000 a year from receipts of rent and storage. *Ibid.*

§ 417. A claim having been made on behalf of one who had been surveyor of the port of St. Louis, charged with the duties of collector of customs, that he was entitled to a salary of \$6,000, it was held that surveyors acting also as collectors except those of the ports enumerated in section 5 of the act of May 7, 1822 (St. Louis not being enumerated), are entitled to no greater salary than \$5,000, including emoluments for rent and storage, and even though such ports are established subsequent to such act. *Donovan v. United States*, § 443.

§ 418. Under section 5 of the act of March 3, 1841 (5 U. S. Stat. at Large, 432), a collector of customs may retain a sum not exceeding \$2,000 per annum, from his receipts as storage, for the custody and safe keeping of imported merchandise entered for warehousing and stored in public warehouses under the acts of congress. *United States v. MacDonald*, § 444.

§ 419. Section 10 of the act of May 7, 1822, provides that the emoluments of a collector shall not exceed \$3,000 a year; the act of March 3, 1841, provides that the same shall not exceed \$6,000. *Held*, that the compensation of a collector entering upon his office on the 8d of April, 1849, would, as between the two statutes, be governed by the later enactment, but that a statute in relation to compensation passed March 3, 1849, was decisive of the case. *United States v. Collier*, §§ 445-56.

§ 420. All revenue laws are regarded as forming an entire system, in which the construction of any one act may be aided by the examination of other acts and provisions composing the system. *Ibid.*

§ 421. If the provisions of an act in relation to a collector's compensation are obscure, they should be construed as favorably as possible for the collector. *Ibid.*

§ 422. Provisions appointing fees to collectors for their services under the revenue laws, being contained in section 34 of the act of February 18, 1793 (1 U. S. Statutes at Large, 316), and section 2 of the act of March 2, 1799 (1 id., 706), the act of March 3, 1849, creating Upper California a collection district, and giving collectors therein a certain salary and "fees and commissions allowed by law," has the effect of fixing the tariff of commissions and fees thus allowed, by the tariff allowed in the acts above cited. *Ibid.*

§ 423. The act of March 3, 1849, providing for the compensation of the collector of the district of Upper California by a salary of \$1,500 "and fees and commissions allowed by law," has the effect of giving him the fees and commissions independent of his salary and unrestricted as to amount, though previous revenue acts (1 U. S. Statutes at Large, 316; 1 id., 706) provided that the commissions and salary should not exceed a specified amount. So held from the peculiar state of facts in Upper California, and a comparison and examination of various acts in relation to compensation passed by congress at nearly the same time. *Ibid.*

§ 424. A collector entered upon his duties under the provision of an act passed March 3,

1849; subsequently, September 28, 1850, an act was passed which, it was claimed, deprived him of his office and avoided claims for services rendered thereafter. The collector continued to act till January 14, 1851, and the court held that the government, by continuing an account with him during that interval, as an officer acting under the law of 1849, ratified his acts, and was concluded from denying that the act of 1849 afforded the rule of compensation. *Ibid.*

§ 425. More especially is this so when the proof of entry was in a remote though important section of the Union, where notice of his cessation of office could not reach him in due time, and his continuance in office till such notice was a public necessity. *Ibid.*

§ 426. It seems that, independent of estoppel, the law of 1849 might be adopted as furnishing a measure of *quantum meruit* as to services rendered. *Ibid.*

§ 427. It seems, in case a law divides into six collection districts with separate collectors a territory theretofore composing but one district with a single collector, that if the compensation allowed to the collectors appointed by the later act is at all governing in modifying the compensation given the collector by the former act, the amount allotted to the six collectors for the same territory over which the authority of the single collector theretofore extended, should be the true rule of compensation, rather than any of the separate sums designated to any one of the six collectors. *Ibid.*

§ 428. It seems, in a case in which under peculiar circumstances, in the absence of regular courts, a collector sold goods claimed as forfeited, without regular forfeiture proceedings, and remitted the moiety of the amount thus realized to the United States treasury, retaining the other moiety as his own, that the government, by approval and ratification of such acts, concluded itself from afterwards disavowing them and holding the collector liable for the whole amount realized. *Ibid.*

§ 429. The authority of the secretary of the treasury to remit forfeitures embraces the interests of officers entitled to share in the forfeitures, and may be exercised after judgment of condemnation, but ceases after the share is received by the collector, either for himself or for distribution among his co-officers; and this rule applies whether the award of moneys to the owners of the goods seized is strictly in the form of a remission under the authority of the act of March 3, 1797 (1 U. S. Stat. at. Large, 506), or whether, under section 4 of the act of September, 1850, the secretary of the treasury had directed the technical remission of the forfeitures. *Ibid.*

§ 430. A mere order of restoration of the proceeds of goods forfeited to the former owner, at the discretion of the secretary of the treasury, without the concurrence of the collector claiming a moiety of such proceeds as his share by law, or notice to him that such an order was applied for or intended to be made, cannot be regarded as a remission of such forfeitures under the provisions of the act of March 3, 1797, or of September 28, 1850, so as to deprive the officer of his share of the forfeiture. *Ibid.*

§ 431. A collector claimed one-half of the amount of certain bonds received by him for goods forfeited, upon which no money had been paid into the treasury nor any steps taken to enforce collection upon the same. *Held*, that the collector could not have these bonds regarded as money actually paid into the treasury, so as to support his claim for a credit to the amount of one-half the amount of the bonds, no action of the treasury indicating the acceptance of these bonds in satisfaction of the value of the property forfeited. *Ibid.*

§ 432. Under section 8 of the act of July 30, 1846, prescribing an additional twenty per cent. *ad valorem* duty on goods whose appraised value shall exceed by ten per cent. or more the value declared on the entry, duties so imposed are not to be regarded in the light of penalties so as to entitle the collector or other officer to a moiety of the amounts imposed. *Ibid.*

§ 433. The treasury department has no right to augment the debit side of an account with a collector at any time after the first statement has been adopted, by charging interest on the account, more especially when the first account, without interest, has been subsequently repeated; technically because this creates a new cause of action after suit brought, but in a broader view because the department acts judicially in determining what shall be charged against an officer's account, and cannot vary the adjudication subsequently to his prejudice. *Ibid.*

§ 434. Interest cannot be charged against a collector under the act charging receivers of public moneys with interest if they "shall neglect or refuse to pay into the treasury the sum or balance reported to be due by the United States upon the adjustment of their accounts," when the balance so reported is found by the verdict of the jury, upon trial, not to be due. *Ibid.*

§ 435. Under section 2 of the act of congress of March 3, 1799 (1 U. S. Stat. at Large, 706), allowing the collector a fee of twenty cents for every permit granted for the landing of passengers' baggage, no fees can be charged save for permits actually issued, and a practice of issuing one or two such permits for a large number of passengers, and then charging fees for the constructive issue of permits for each individual passenger, is in contravention of the stat-

ute, and the fees thus charged are illegal. No custom or usage of the port can make such fees legal. *Ogden v. Maxwell*, §§ 457-60.

§ 436. A collector is personally liable for fees illegally collected by his deputies, though the collection was enforced in good faith, and though the collector has paid the fees thus illegally collected into the United States treasury. *Ibid.*

§ 437. If an illegal charge is exacted by the collector for the landing of a ship's passengers or baggage, an action for the recovery of such fees charged is properly brought by the ship-owners, and it is no objection that the action is not brought in the name of the individual passengers. *Ibid.*

§ 438. The act of February 26, 1845 (5 U. S. Statutes at Large, 727), requiring notice in writing to be given to the collector, of objections to payments exacted by him, is expressly confined to the payment of duties, and does not apply to objections made to fees charged for landing passengers' baggage. *Ibid.*

[NOTES.— See §§ 461-474.]

UNITED STATES v. WALKER.

(22 Howard, 299-315. 1859.)

ERROR to U. S. Circuit Court, Southern District of Alabama.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This case comes before the court upon a writ of error to the circuit court of the United States for the southern district of Alabama. It was an action of debt brought by the United States upon the official bond of the defendant as collector of the customs for the district and inspector of the revenue for the port of Mobile. He gave the bond, with sureties, on the 7th day of September, 1850, conditioned that he had truly and faithfully executed and discharged, and that he would continue truly and faithfully to execute and discharge, all the duties of the office according to law. Neglect and refusal on the part of the defendant to pay to the plaintiffs certain sums of money received by him as such collector before the commencement of the suit, beyond what he was entitled to retain as compensation for discharging the duties of the office, constituted the breaches of the condition of the bond, as assigned in the declaration.

Those balances, as claimed by the plaintiffs, amounted to the sum of \$13,184.42; and the charge was, as alleged in the declaration, that the defendant had wholly failed and refused to pay the same. As appears by the transcript, the defendant pleaded the general issue, and that he had fully performed the conditions of the writing obligatory set forth in the declaration.

To maintain the issue on their part, the plaintiffs introduced a certified copy of the bond given by the defendant, and two duly certified copies of transcripts from the treasury department, showing that the official accounts of the defendant had been examined and adjusted by the accounting officers of that department. According to those transcripts, the respective balances claimed by the plaintiffs as the accounts are there stated, had not been paid by the defendant, and remained due and payable at the time the suit was commenced.

No evidence was adduced by the defendant. He was charged in the account against him, as collector of the customs, with all sums collected from duties on merchandise, tonnage duties, hospital money, and for all sums received for rent and storage of goods, wares and merchandise, stored in the public storehouses, for which a rent was paid beyond the rents paid by the collector. On the other side, he was credited in the account of official emoluments with the sum of \$3,000 as the maximum rate of the annual salary or compensation allowed to the collector of that port. Further details of those accounts are omitted, for the reason that the charge for rent and storage in the account of

customs, and the credit for salary in the account of official emoluments, are the only two items which come in review at the present time.

Reference to the ninth section of the act of the 7th of May, 1822, will show that Mobile is not one of the seven ports enumerated in that provision, and consequently that the maximum rate of annual compensation or salary allowed to the office under that law was \$3,000, as limited by the tenth section, which includes all the ports not enumerated in the previous provision. All of the accounts of the defendant were adjusted at the treasury department upon the principle that the act of the 7th of May, 1822, was still in force, and that the maximum rate of compensation belonging to the collector was \$3,000, as therein prescribed. It was insisted by the defendant that the provision in question had been repealed by subsequent acts upon the same subject, and that the maximum compensation allowed by law to the office was \$6,000.

Assuming that the theory of the defendant was correct, then his accounts had been improperly adjusted, and there was nothing due to the plaintiffs. On the other hand, if the charge for rent and storage in his customs account was properly made, and the maximum rate of compensation belonging to the office was only \$3,000, then he was justly indebted to the plaintiffs for the whole amount of the respective balances, as stated in the transcripts.

After argument the court instructed the jury, among other things, that "the act of 3d March, 1841, was the last and controlling law as to the amount of compensation which collectors are allowed annually to retain; and that under that enactment the collector of this port was entitled to a compensation of \$6,000 per annum, provided the same was yielded from the office from commissions for duties and fees for storage, and fees and emoluments, and any other commissions and salaries now allowed and limited by law, or so much from those sources, not exceeding \$6,000, as the office yielded."

That instruction affirmed the right of the defendant, under the act of the 3d of March, 1841, to a compensation of \$6,000 per annum, or so much thereof, not exceeding that sum, as the office yielded from commissions of every description, fees and emoluments, including rents and storage, and salaries, as allowed and limited by law. Beyond question, it assumed that the tenth section of the act of the 7th of May, 1822, was repealed. Prayers for instruction were then presented by the district attorney, who was counsel for the plaintiffs. He requested the court to instruct the jury to the effect that the provisions of the act of the 7th of May, 1822, respecting the maximum compensation allowed to collectors of the customs, were not repealed by the act of the 3d of March, 1841, or by any other act, but that the same were in full force. 2. That the only effect the act of the 3d of March, 1841, had upon the former act, in so far as the same applied to a case like the present, was to create a new and additional source of emolument to such collectors, allowing them to retain not exceeding \$2,000 for rent and storage of goods, wares and merchandise, stored in the public stores, and for which a rent was paid beyond the rents paid by such collectors. Each of these prayers was separately presented, and separately refused by the court.

Another prayer for instruction was then presented by the district attorney. It affirmed, in effect, that it was the duty of the defendant, as collector, whenever his emoluments in any one year exceeded \$3,000 after deducting the necessary expenses incident to the office, to pay the excess into the treasury, and that the plaintiffs were entitled to recover for all such balances thus ascertained, as were shown to be due from the evidence. Apply the first and third requested

instructions to the fact of the case, and it will be seen that they affirmed the principles adopted by the accounting officers of the treasury, in restating the accounts of the defendant; and if correct, then the whole amount of the respective balances, as stated in the transcript, was due to the plaintiffs.

Taken together, they assume that the tenth section of the act of the 7th of May, 1822, is in full force, and that the defendant had no right, under the act of the 3d of March, 1841, to retain any portion of the amount received for rent and storage. Those prayers for instructions having been refused, the district attorney then prayed the court to instruct the jury as follows:

"That under those acts, it was the duty of the defendant, as collector of the customs, whenever his emoluments exceeded \$3,000 in any one year, after deducting the necessary expenses incident to his office, to pay the excess, if any, into the treasury, and the plaintiffs are entitled to recover the amount of any such surplus or surpluses, if any, as may be shown by the evidence; but, in ascertaining the amount of the defendant's emoluments as such collector, the jury must exclude all moneys derived by him from fines, penalties and forfeitures, and also all moneys derived by him from rent and storage of goods, wares and merchandise, which may have been stored in the public storehouses, and for which a rent was paid beyond the rents paid by him as collector, unless the proceeds of such rents and storage exceed \$2,000, in which event, the excess over and above that sum must be taken into account by them, in computing the value of the annual emoluments."

That prayer was also refused by the court. To understand its precise effect, it is necessary that it should be read in connection with the first and second prayers, which had previously been presented and refused. When considered together, those three prayers disclose the second theory of the plaintiffs, as assumed at the trial. Like the one assumed in the third prayer, it affirms that the tenth section of the act of the 7th of May, 1822, was unrepealed, but conceded that the defendant had a right to retain to his own use the moneys received for rent and storage, to an amount not exceeding \$2,000. Under the instruction of the court, the jury returned their verdict for the defendant; and the plaintiffs excepted to the charge, and to the several refusals of the court to give the requested instructions. Three questions are presented in the case for decision, which will be briefly and separately considered:

1. Whether the tenth section of the act of the 7th of May, 1822, is repealed by any subsequent act; and if not, then, 2. What is the true construction of the act of the 3d of March, 1841, so far as the same applies to the present case? 3. Whether, by the true construction of the two acts, the defendant had a right to retain to his own use the moneys received from rent and storage, to an amount not exceeding \$2,000.

1. It is insisted by the defendant that the maximum prescribed by the tenth section of the act of the 7th of May, 1822, is repealed, and that, under the law regulating his compensation, the legal capacity of the office he held was \$6,000, subject to the condition that \$2,000 only could be received from rent and storage. Six thousand dollars, he maintains, is the maximum under the law of the 3d of March, 1841, applicable to every collector, and that the compensation of each, within that limit, and subject to the before-named condition, is regulated solely by the amount of labor performed.

To show that the tenth section of the act of the 7th of May, 1822, is repealed, his counsel, at the argument, referred to various acts of congress, passed subse-

quently to the tariff act of the 14th of July, 1832, entitled "An act to alter and amend the several acts imposing duties on imports." They are as follows: 1833, 4 Stat., 629; 1834, 4 Stat., 698; 1835, 4 Stat., 771; 1836, 5 Stat., 113; 1837, 5 Stat., 175; 1838, 5 Stat., 264; 1840, 6 Stat., 815, private act; 1841, 5 Stat., 431, sec. 2.

By the first of those acts, usually called additional compensation acts, the secretary of the treasury was authorized, among other things, to pay to the collectors, out of any money in the treasury not otherwise appropriated, such sums as would give those officers respectively the same compensation in that year, according to the importations of the year, as they would have been entitled to receive if the tariff act of the preceding year had not gone into effect. That provision, with certain additions and modifications, which will presently be noticed, was annually re-enacted to the year 1840, when it was made permanent. For the most part, it was inserted in some one of the annual appropriation acts, and was designed to accomplish the precise object which its language describes, and nothing more.

§ 439. *Compensation of collectors derived principally from fees, commissions, etc.*

Compensation to collectors, from the organization of the government to the present time, has been derived chiefly from certain enumerated fees, commissions and allowances, to which has been added a prescribed sum, called salary, and which is much less than the compensation to which the officer is entitled. Provision for such fees, commission and allowances was first made by the act of the 31st of July, 1789, which also allowed to collectors certain proportions of fines, penalties and forfeitures. 1 Stat., 64.

More permanent provision, however, was made by the act of the 18th of February, 1793, by the act to regulate the collection of duties on imports and tonnage, passed on the 2d of March, 1799, and by the compensation act passed on the same day. 1 Stat., 316, 627, 786.

By these several acts, certain enumerated fees and commissions are made payable to collectors. They are also entitled to certain proportions of fines, penalties and forfeitures. Accurate accounts were required to be kept by them of all fees and official emoluments by them received, and of all expenses for rent, fuel, stationery, and clerk hire, which they were required annually to transmit to the comptroller of the treasury; but they were allowed to retain to their own use the whole amount of emolument derived from that source, without any limitation. Maximum rate of compensation was first prescribed by the act of the 13th of April, 1802. That limit was \$5,000, and it was applicable to all collectors. By that act it was provided that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amounted to more than \$5,000, the surplus should be accounted for and paid into the treasury. 2 Stat., 172.

§ 440. *Act of 1822 as to compensation of collectors not repealed by implication.*

Further regulations as to fees, commissions, other emoluments, and salaries were made by the act of the 7th of May, 1822, as therein prescribed. One of those regulations was, that whenever the emoluments of any collector, for seven enumerated ports, after deducting the necessary expenses incident to the office, should exceed \$4,000, the excess should be paid into the treasury, for the use of the United States. By the tenth section it was also provided that whenever the emoluments of any other collector of the customs should

exceed \$3,000, after deducting such expenses, the excess should be paid into the treasury for the same purpose. They were also required to account to the treasury for all emoluments and for all expenses incident to their offices, and those accounts were to be rendered upon oath. Neither of the two last mentioned acts extended to fines, penalties and forfeitures. 3 Stat., 695. Under that act, \$3,000 was the maximum which could be allowed to the office held by the defendant; and it is conceded by his counsel that it remained in full force to the time when the additional compensation acts before mentioned were passed. Large additions had been made to the free list by the tariff act of the 14th of July, 1832, and the rate of duties on imports so far reduced, that the sources of emolument to collectors would not yield sufficient to give them an adequate compensation. To supply that deficiency, those additional compensation acts were passed. Much reliance is placed by the counsel of the defendant upon the last proviso, which appears in nearly the same form in several of the acts. Take, for example, the one in the act of the 7th of July, 1838, which is the act that was subsequently made permanent. It provides that no collector shall receive more than \$4,000. That sum is the maximum rate of compensation allowed to collectors of the enumerated ports in the act of the 7th of May, 1822; and inasmuch as the limit of \$3,000, therein prescribed as applicable to the non-enumerated ports, was not reproduced in the new provision, it is insisted it was repealed, so that every collector, whether of the enumerated or non-enumerated ports, may now claim to receive an annual compensation of \$6,000 from the sources of emolument recognized by that act, provided his office yields that amount, after deducting the necessary expenses incident to the office. To that proposition we cannot assent. On the contrary, when we look at the language of the new provision, in connection with that of the prior law, and consider the mischief that existed, the remedy provided, and the true reason of the remedy, we are necessarily led to a different conclusion. Commercial ports, where the revenue is collected, were divided by the prior law, so far as respects the compensation of collectors, into two classes, enumerated and non-enumerated. Collectors of the seven enumerated ports might receive an annual compensation of \$4,000, provided their respective offices produced that amount, after deducting the necessary expenses incident to the offices, from all the sources of emolument recognized and prescribed by the existing laws.

On the same principles, and subject to the same conditions, the collectors of the non-enumerated ports might receive an annual compensation of \$3,000. No one could receive more than that sum, and his lawful claim might be much less. Ten years' experience under that law, prior to the passage of the tariff act of the 14th of July, 1832, had witnessed but few complaints respecting the classification of the ports, or the standard of compensation to collectors of customs, and had called for no important alteration in the laws upon that subject. Throughout that period, the rates of duties on imports were high, and nearly every article of consumption imported from other countries was taxed. Change of policy in that behalf, as carried out in the legislation of the succeeding year, affected the emoluments of collectors, and reduced the amount of net income from the sources of their emolument below the standard of a reasonable compensation. To remedy that mischief, and restore their compensation to what it would have been if no change had taken place, was the purpose for which those additional compensation acts were passed. They had the effect to change the basis of computation, so as to augment the estimated net income

from the authorized sources of emolument to what it would have been if the tariff act had not passed; but they were not intended to make any change, either in the sources from which the emoluments were derived, or the maximum rate of compensation. Mention was made of the largest maximum prescribed in the prior law, not with any view to repeal or modify the other, which was applicable to the non-enumerated ports, but to exclude the conclusion that it was the intention of the provision to increase the compensation of the collectors of the principal ports beyond what it would have been if the free list had not been augmented, and there had been no diminution in the rates of duties on imports.

§ 441. *Repeal of statutes by implication not favored by the law.*

Suppose there was nothing in the language of the act to qualify the provision, and nothing in the history of the legislation upon the subject to aid in the exposition; still we would not think it so clearly inconsistent with the prior law as to operate as a repeal. Repeal by implication, upon the ground that the subsequent provision upon the same subject is repugnant to the prior law, is not favored in any case; but where such repeal would operate to reopen accounts at the treasury department long since settled and closed, the supposed repugnancy ought to be clear and controlling before it can be held to have that effect. Such was the doctrine substantially laid down by this court in *Wood v. United States*, 16 Pet., 363; and we have no hesitation in reaffirming it as applicable to the present case. *Aldridge v. Williams*, 3 How., 23; *U. S. v. Packages of Dry Goods*, 17 How., 93; 2 Darriss on Stat., 533.

All of these additional compensation acts are *in puri materia* with the several acts prescribing the sources of emolument, and the whole must be construed together. When they are so considered, there is no such repugnancy as is supposed by the defendant. Collectors, as before, were still required to render an account; and the new provision expressly provides that no officer shall receive under that law a greater annual salary or compensation than was paid to him for the year the before-mentioned tariff act was passed.

§ 442. *To the compensation derived from other sources the collector is entitled in addition to rent from storage not exceeding \$2,000.*

2. Having disposed of the proposition chiefly relied on by the defendant, we come now to consider the second question presented for decision. That question cannot be understood without referring to the previous legislation upon the subject, and the practice that had grown up under it. Importers were allowed by the act of the 14th of July, 1832, to place certain goods in the public stores, under bond, at their own risk, without paying the duties. Duties on goods so stored were required to be paid one-half in three months, and the other half in six months; but while the goods remained in the public stores, they were subject to customary storage and charges, and to the payment of interest at the rate of six per cent. Goods thus deposited might be withdrawn at any time in whole or in part by paying the duties on what were so recalled, together with customary storage and charges and the interest. Public stores were accordingly rented; and as the business increased, the storage received by the collector from the importers exceeded the amount paid to the owner of the stores, and there was no law requiring collectors to account for the excess, which was retained by the collectors to their own use, and went to swell the amount of their compensation.

To correct that supposed abuse, the act of the 3d of March, 1841, was passed. By that act, every collector was required to render a quarter-yearly

account in addition to the account previously required by law. That additional account, as prescribed in the act, was to include all sums collected or received from fines, penalties, or forfeitures, or for seizure of goods, wares and merchandise, or upon compromises made upon seizures, or on account of suits instituted for frauds against the revenue, or for rent and storage of goods, wares and merchandise, which were stored in the public stores, and for which a rent was paid beyond the rents paid by the collector. As originally framed, the provision required the collector, in case the sums received by him from all those sources exceeded \$2,000, to pay the excess into the treasury as part and parcel of the public money. After it was introduced, however, it was so amended and changed in its passage, that while it still directs the account to be rendered, it requires no part of the money derived from those sources to be paid into the treasury, except what is received for rent and storage as aforesaid, and for "fees and emoluments." Every collector was required to account for fees and emoluments by previous laws; and as the account to be rendered under this act is expressly declared to be one "in addition to the account now required," there is nothing left for that part of the section directing the payment of the excess into the treasury to operate upon, except the sums received for rent and storage.

By the true construction of the act, therefore, every collector is required to include in his quarter-yearly account, as directed in the first part of the section, all sums received by him for rent and storage of goods, wares and merchandise, stored in the public stores, for which rent is paid beyond the rents paid by him as collector; and if, from such accounting, the aggregate sums received from that source exceed \$2,000, he is directed and required to pay the excess into the treasury, as part and parcel of the public money. When the sums so received from that source in any year do not in the aggregate exceed \$2,000, he may retain the whole to his own use; and in no case is he obliged to pay into the treasury anything but the excess beyond the \$2,000.

It is insisted, in one of the printed arguments filed in this case, that the act now under consideration has the effect to repeal the maximum prescribed in the prior act, and that every collector, under this act, is entitled to \$6,000 as an annual compensation, provided the office yields that sum from all the sources of emolument, including rent and storage. Collectors of the enumerated ports undoubtedly may receive \$4,000 from the sources of emolument recognized in the act of the 7th of May, 1822, and they may also receive \$2,000 from rents and storage. Those two sums are equal to the new maximum rate created by the act under consideration, which provides that no collector, under any pretense whatever, shall receive, hold or retain more than \$6,000 per year, including all commissions for duties and all fees for storage, or fees or emoluments, or any other commissions or salaries which are now allowed and directed by law. But it is quite clear that there is nothing in the act having the slightest tendency to show that the prior act is repealed, so far as it is applicable to the collectors of the non-enumerated ports. No new maximum is fixed to their compensation, and there is not a word in the new provision inconsistent with the tenth section of the prior act.

To suppose that the new maximum applies to the collectors of the non-enumerated ports would be to impute an absurdity to the act, for the reason that under no possible state of things can such collectors lawfully retain, hold or receive more than \$5,000 as their annual salary or compensation, from all the sources of emolument recognized and prescribed by the two acts. It may

be \$5,000, or it may be much less than \$3,000, according to the state of the importations and the amount received from rent and storage.

3. It only remains to apply the principles already ascertained, in order to determine the third question presented for decision. Collectors of the non-enumerated ports may receive, as an annual compensation for their services, the sum of \$3,000 from the sources of emolument recognized and prescribed by the act of the 7th of May, 1822, provided their respective offices yield that amount from those sources, after deducting the necessary expenses incident to the office, and not otherwise; and in addition thereto, they are also entitled to whatever sum or sums they may receive for rent and storage, provided the amount does not exceed \$2,000; but the excess beyond that sum they are expressly required to pay into the treasury, as part and parcel of the public money.

Charges against the defendant for rent and storage must be settled in accordance with these principles. It follows, that the instruction given by the presiding justice was erroneous; and we also think that the first, second and fourth prayers for instruction ought to have been given to the jury.

Suits were also instituted against the sureties of the defendant. Judgment was entered in the court below for the respective defendants in those suits, and the causes were removed into this court by writs of error, sued out by the plaintiffs. Those causes were submitted at the same time with the one just decided. They depend upon the same principles, and must be disposed of in the same way.

The judgment of the circuit court is therefore reversed in each of the three cases, and the respective cases are remanded, with directions to issue new venire.

DONOVAN v. UNITED STATES.

(23 Wallace, 383-405. 1874.)

ERROR to U. S. Circuit Court, Eastern District of Missouri.

The facts are stated in the opinion.

Opinion by MR. JUSTICE CLIFFORD.

Officers of the customs derive their compensation chiefly from certain enumerated fees, commissions and allowances, to which is added, for the benefit of the collector of the port, a prescribed sum, called salary, which is very much less than the compensation to which the officer is entitled. Provision for such fees, commissions and allowances was first made by the act of the 31st of July, 1789, which also allowed to collectors certain proportions of fines, penalties and forfeitures. 1 Stat. at Large, 64.

Changes have been made in the rates of fees, commissions and allowances for such purposes at different periods to graduate the compensation of such officers to the nature and extent of the services imposed, but the theory and outline of the system have been preserved since the first acts were passed levying import and tonnage duties. Examples of such changes are found in the act of the 18th of February, 1793, for enrolling and licensing ships and vessels, and in the act of 2d of March, 1799, to regulate the collection of duties on imports and tonnage, and in the act usually called the compensation act, passed on the same day. 1 Stat. at Large, 171, 316, 695, 706.

Regulations of a permanent character were made by those several acts that certain fees and commissions should be paid to the collectors of the customs,

together with a certain proportion of the sums paid to them for fines, penalties and forfeitures collected from persons found guilty of violating the penal prohibitions of the revenue laws. Such fees, commissions and allowances it was provided should be paid to the respective collectors, and the requirement was that they should keep an accurate account of the same and of all expenses for rent, fuel, stationery and clerk hire, and that they should annually transmit such accounts to the comptroller of the treasury, but they were allowed by those laws to retain the whole amount of the emoluments derived from those sources beyond the expenses of the office, without any limitation whatever. Expenses for rent, fuel, stationery and clerk hire were to be deducted from the gross receipts, but they were allowed to retain the whole of the net balance as official emoluments for their services.

Business revived and importations increased, and with such increase the compensation of the collectors at certain ports became excessive, which called for new legislation; and by the act of the 30th of April, 1802, congress prescribed a maximum rate of compensation without making any reduction of the fees or commissions required to be paid to the collectors, but the provisions of the act did not extend to fines, penalties and forfeitures. 2 Stat. at Large, 172.

By that act it was provided that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amount to more than \$5,000, the surplus shall be accounted for and paid into the treasury.

§ 443. *Surveyors of ports, acting also as collectors, except those enumerated in section 5 of the act of May 7, 1822, are entitled to no greater salary than \$5,000 (including emoluments for rents and storage), even though such ports be established subsequent to said act, said act extending to ports so subsequently established.*

Twenty years' experience under that act showed that it needed revision, as it applied without any discrimination whatever as well to the large ports where the principal importations were made as to those of comparatively little importance. Collection districts were accordingly divided by the act of the 7th of May, 1822, into two classes, usually denominated the enumerated and the non-enumerated ports. 3 Stat. at Large, 693.

Under the provisions of that act the emoluments of collectors of the enumerated ports might reach the sum of \$4,000, but the ninth section of the act provided that whenever the emoluments of the office shall exceed that sum, in any one year, the collector, after deducting the necessary expenses incident to his office, shall pay the excess into the treasury for the use of the United States. But the maximum rate of compensation allowed to collectors of the non-enumerated ports under the provisions of that act, from all the sources of emolument therein recognized and prescribed, is \$3,000, and the tenth section of the act contains a provision similar to that found in the ninth section, requiring the collectors of the non-enumerated ports to account for, and pay the excess, beyond the amount allowed as the maximum rate of compensation, into the public treasury. *Hoyt v. United States*, 10 How., 135.

Collectors under those provisions may receive the maximum rate of their offices if the office, after deducting the necessary expenses incident to the same, produces that amount from all the sources of emolument recognized and prescribed by the laws in operation. No one can receive more than the maximum rate, and his lawful claim may be much less, according to the amount of business transacted in the office. *United States v. Macdonald*, 2 Cliff., 281.

From that time until the passage of the act of the 3d of March, 1841, the

laws providing for compensation of collectors remained without material change. Every such officer is required by the fifth section of that act to include in his quarter-yearly account, among other things, all sums received by him for rent and storage of goods, wares and merchandise stored in the public storehouses for which a rent is collected beyond what is paid for the same by such officer. Moneys received from that source, it is contended, may be retained by a collector of a non-enumerated port sufficient to make his annual compensation \$6,000, the claim being that the maximum limit prescribed to the non-enumerated ports is repealed by the subsequent legislation, but this court held otherwise and decided that the collector under that act could in no case retain more than \$2,000, and that he was bound to pay the excess beyond that amount into the treasury as part and parcel of the public money. *United States v. Walker*, 22 How., 313 (§§ 439-42, *supra*).

Consequently the conclusion was that the compensation of a collector of one of the *enumerated* ports may be \$6,000, but the compensation allowed to the collector of one of the non-enumerated ports cannot exceed \$5,000, according to the amount of fees and commissions collected and the amount received from rent and storage. Officers of the kind may receive the maximum rate of their office allowed by the prior law from the sources of emolument recognized and prescribed by that act, provided the office, after deducting the necessary expenses incident to the same, yields that amount from those sources; and in addition thereto he is entitled to whatever sum or sums he may receive from rent and storage, provided the amount does not exceed \$2,000, but the excess beyond that sum, and the excess, if any, beyond the maximum rate of his office as fixed under the prior law, he is required to pay into the treasury as part and parcel of the public money. *United States v. Walker*, 22 How., 313.

Attempt was subsequently made by the United States to limit the operations of the storage act, as a source of compensation to collectors, to such storage *only* as is received for stores *leased* by the treasury department, for which rents are paid by the importers of goods beyond the rent paid on behalf of the United States; but the court refused to adopt that narrow construction, and held that all sums received for storage, whether the goods imported were deposited in the public stores or the "other stores" named in the acts of congress, are required to be included in the quarter-yearly account of the collector, which he is directed to render to the secretary of the treasury, and that the yearly aggregates of such sums constitute the basis of computation in ascertaining what amount, if anything, the collector is entitled to receive as compensation from that source of emolument, and what amount, if anything, he is required to pay over from that source, as excess beyond the \$2,000, into the public treasury. *United States v. Macdonald*, 5 Wall., 656 (§ 444, *infra*); *S. C.*, 2 Cliff., 283; *Clark v. Peasely*, Circuit Court, Massachusetts District, October Term, 1862.

None of these propositions are controverted by the defendant, nor does he contend that any of those provisions have been superseded by any express repeal, but he insists that surveyors performing the duties of collectors, under the fifth section of the act of the 2d of March, 1831, are entitled to the same compensation as the collectors of the *enumerated* ports. Merchandise imported from a foreign port and consigned to merchants at St. Louis was required, if the importation was subject to custom duties, to be entered at the custom-house in New Orleans in the same manner as required in case of the entry of goods imported for consumption, and the officers of the customs at

that port are required to proceed to assess the custom duties in the same way as if the merchandise had been destined for sale or consumption in that market.

Payment of the duties, however, is not required to be made at that port, but the importer is required to give a bond, called a transportation bond, conditioned that the packages described in the invoice shall, within a specified time, be delivered to the surveyor and acting collector of the port of St. Louis. Due notice of the proceedings is then given by the collector of the port where the duties were ascertained and assessed to the acting collector of the port to which the merchandise is destined. Such proceedings being had, the vessel may proceed on her voyage, and when she arrives at the port of destination the packages are placed in the custody of the acting collector of that port, who receives the duties, giving notice of that fact to the collector of the port where they were ascertained and assessed, and the collector of the latter port is authorized to cancel the transportation bond given by the importer. 4 Stat. at Large, 482; *Belcher v. Linn*, 24 How., 516.

Compensation was claimed by the defendant at the rate of \$6,000 per annum, and it is admitted that he retained that amount of the moneys collected by him in pursuance of that claim, \$2,000 of which accrued from rent and storage, and the other \$4,000 accrued from fees, commissions and allowances recognized and prescribed by the prior compensation act. 3 Stat. at Large, 895.

Four thousand dollars may be received as compensation under that act by the collector of each of the seven ports named in the ninth section of that act, and the provisions of a more recent act give the same compensation to the collector of the port of Portland, Maine; but the tenth section of the said compensation act provides that whenever the emoluments of any other collector of the customs shall exceed \$3,000, after deducting therefrom the necessary expenses incident to his office, in the same year, the excess shall in every such case be paid into the treasury for the use of the United States. 3 id., 695; 13 id., 46.

St. Louis is not one of the enumerated ports, but the defendant insists that the act of the 2d of March, 1831, which devolved upon the surveyor of that port the duties of collector, designated a third class of ports, and that the maximum compensation of such a collector is \$6,000. Nothing is contained in the act to support any such theory or to afford the slightest evidence that congress intended anything of the kind. Instead of that the act provides that the surveyor charged with such duties shall receive, in addition to his customary fees, an annual salary of \$350, which is utterly inconsistent with the theory that he is entitled by virtue of that act to the same compensation as the collector of one of the enumerated ports.

Confirmation of that view is also derived from the further provision of the same section, that no salary arising under the act shall commence until the act shall take effect and merchandise shall be imported under its authority. Prior to that time the customary fees of the surveyor of that port accruing under the compensation act of the 7th of May, 1822, could not exceed \$2,000, and it is not pretended that he could retain to his own use more than \$2,000 from rent and storage.

Apply those suggestions to the case before the court and it is clear that the compensation of the defendant, if regarded merely as a surveyor, could not exceed \$4,350, even if it be admitted that the sum called salary is an addition

to the \$4,000 to be derived from the other sources of emolument and not merely an addition to the basis of calculation in computing the maximum to be derived from fees, commissions and allowances, as provided in the tenth section of the compensation act.

Small sums called salary have always been allowed to collectors and to the surveyors of certain ports, but such allowances have uniformly been included in the basis of calculation as part of the receipts from fees, commissions and allowances in computing the maximum compensation of the officers interested. Surveyors of ports, where the officer is charged with the duties of collectors, now stand upon a different footing, as the act of the 3d of March, 1857, provides that such surveyors shall be entitled to the same compensation as is allowed to collectors for like services, in the settlement of their accounts. 11 Stat. at Large, 221.

Grant that and still it is contended by the defendant that the maximum compensation of all collectors, except those of the enumerated ports, as provided in the tenth section of the compensation act, is repealed by the act requiring collectors to include all sums received for rent and storage in their quarter-yearly accounts. Much discussion of that topic, however, is unnecessary, as the question has been twice determined adversely to the defendant by the unanimous decisions of this court. *United States v. Walker*, 22 How., 314 (§§ 439-42, *supra*); *United States v. Macdonald*, 5 Wall., 655 (§ 444, *infra*).

Such a collector cannot receive, under any circumstances, more than \$5,000, not even if the office earns a greater amount, and he may be obliged to accept much less in case the office does not earn \$3,000 net from fees, commissions and allowances, or in case the amount received from rent and storage falls short of \$2,000.

Effort is also made in argument to derive support to the proposition that the limitation contained in the tenth section of the compensation act is repealed, from the act which provides that the compensation of such a surveyor shall be the same as is allowed to collectors for like services; but it will be sufficient to say in response to that suggestion that the court is of the opinion that the proposition is destitute of any foundation whatever.

Suppose that is so, still it is insisted by the defendant that the act of the 8th of June, 1872, entitles him, as the administrator of the intestate, to retain to the use of the estate of the decedent a rate of compensation equal to \$6,000 per annum, but the court is entirely of a different opinion. 17 Stat. at Large, 336.

Stripped of certain redundant words, the body of the act is exactly the same as section 8 in the prior act. 11 *id.*, 229. Both acts provide that such a surveyor "shall be entitled to the same compensation as is allowed to collectors for like services," and neither contains a word which is repugnant to the tenth section of the compensation act. 3 Stat. at Large, 695.

Nor is the proviso in the latter act inconsistent with the prior limitation, as the maximum allowance to such a collector is \$3,000 from fees and commissions and \$2,000 from rent and storage.

Judgment affirmed. (a)

UNITED STATES v. MACDONALD.

(5 Wallace, 647-660. 1866.)

ERROR to U. S. Circuit Court, District of Maine.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Principal question presented for decision in this case is, whether a collector of the customs is entitled to retain as compensation a sum not exceeding \$2,000 per annum from his receipts as storage for the custody and safe-keeping of imported merchandise, entered for warehousing, under the acts of congress upon that subject, and stored in bonded warehouses. First named defendant was the collector of customs for the district of Portland and Falmouth, and the other defendants were his sureties. He was appointed collector prior to the 20th day of January, 1858, and between that day and the 18th day of April, 1861, he received as storage for the custody and safe-keeping of imported merchandise, subject to duty and stored in bonded warehouses, the sum of \$6,281, as appears by the pleadings. Due returns were made by the collector, but he refused to pay over the moneys so received, and the plaintiffs sued him and his sureties, declaring on his official bond.

Defendants craved oyer of the bond, and pleaded performance. Replications of the plaintiffs alleged that the statement of the collector's accounts, as adjusted and settled at the treasury department, showed that he had received that amount of the moneys of the plaintiffs, and that he had neglected and refused to pay the same into the treasury. Rejoinder of the defendants alleged that the sum specified in the replication of the plaintiffs accrued and was received, accounted for quarter-yearly, and retained by the collector in virtue of his office for storage of merchandise in bonded warehouses, from the 20th day of January, 1858, to the 16th day of April, 1861, inclusive, but not more than \$2,000 in any one year, as he lawfully might do. Plaintiffs demurred, and the defendants joined in demurrer. Parties were heard, and the circuit court overruled the demurrer and rendered judgment for the defendants, and the plaintiffs sued out this writ of error.

§ 444. *Under section 5 of the act of March 3, 1841 (5 Stats. at Large, 432), a collector of customs may retain a sum not exceeding \$2,000 per annum from his receipts as storage for the custody and safe-keeping of imported merchandise, entered for warehousing and stored in public warehouses, under the acts of congress.*

I. 1. All controversy as to the material facts of the case, so far as they are set forth and well pleaded in the rejoinder of the defendants, is closed. Applying that well-known rule to the case, it follows that the demurrer admits that the whole amount retained by the collector, as alleged in the replication, accrued and was received by that officer in virtue of his office as storage of imported merchandise in bonded warehouses, and that he never received from that source during the period embraced in this controversy more than \$2,000 in any one year. Views of the defendants are that the collector had a right, under the fifth section of the act of the 3d of March, 1841, as construed by this court, to retain to his own use all sums received from storage, not exceeding \$2,000 in any one year, as compensation for his services (5 Stat. at Large, 432). By the fifth section of that act collectors are directed to render a quarter-yearly account, *in addition to the account previously required by law,*

and to include in it all sums collected for fines, penalties and forfeitures, or from seizures of merchandise, or on account of suits for frauds against the revenue, or for rent and storage in the public storehouses, for which a rent is paid beyond the rents paid by the collector.

2. Construction of that section, as given by this court, was that collectors must include all sums received for rent and storage in the public stores beyond the rents which they paid, in their quarterly accounts, and if it appeared from such accounting that the aggregate sums so received in any one year exceeded \$2,000, they must pay the excess into the treasury, as part and parcel of the public money. Such excess, under that law as construed, belongs to the treasury, but if the sums received from that source in any one year did not exceed \$2,000, the court held that collectors might retain the whole amount to their own use as additional compensation for their services. *United States v. Walker*, 22 How., 299 (§§ 439-42, *supra*).

3. Sources of their compensation prior to that time were certain fees or emoluments, commissions and allowances, to which was added a prescribed sum, called salary, which was much less than the compensation to which such officers were at all times entitled. They were also entitled to certain proportions of fines, penalties and forfeitures, but were never before obliged to embrace such receipts in their quarterly accounts. Statement of the court in that case was, and it was undoubtedly correct, that the bill as originally reported not only required that the sums so received should be included in the quarterly accounts of collectors, but if the aggregate from all those sources, including fines, penalties and forfeitures, exceeded \$2,000 in any one year, collectors were required to pay the excess into the treasury.

Radical amendments, however, were made in the bill during its passage, essentially changing its character in that respect. Fines, penalties and forfeitures, as it passed into a law, are not required to be included in the aggregate of the accounts from which to deduct the \$2,000, in order to ascertain the excess to be paid into the treasury; and, inasmuch as fees and emoluments were previously required to be included in the quarterly accounts of collectors as the principal source of their compensation, under such previous laws, the court held, and well held, that there was nothing left for that part of the section which directed the payment of the excess into the treasury to operate upon, except the sums received from rent and storage. Conclusion of the court, therefore, was, and it was a unanimous conclusion, that collectors might, if the office earned so much, retain to their own use, as an addition to the compensation allowed to them by previous laws, the sum of \$2,000 per annum for rent and storage, but that all excess beyond that sum must be paid into the treasury as public money.

II. 1. None of these principles are controverted by the plaintiffs, nor do they contend that the fifth section of that act has been repealed. Storehouses used for the storing of imported merchandise were such, at that date, as were owned by the United States, and such as were leased by the collectors under the direction of the treasury department. Imported merchandise might, in certain cases, be stored for a limited time without the payment of duties, unless sooner withdrawn for consumption. Where the entry of merchandise was incomplete, the fifty-second section of the act of the 28th of February, 1799, required that the importation should be conveyed to some warehouse or storehouse to be designated by the collector, there to remain, with due and

reasonable care, at the expense and risk of the owner or consignee, under the care of some proper officer, until the invoice was exhibited and the value was ascertained by appraisement.

2. Goods damaged during the voyage were also required to be deposited in some warehouse or storehouse to be designated by the collector, in the same manner and subject to the same conditions as where the entry of the goods was incomplete, to be kept until the extent of the damage could be ascertained in the same way. 1 Stat. at Large, § 52, p. 665.

3. Persons importing teas also might pay or secure the duties before a permit was granted for landing the same, on the same terms as prescribed in respect to other imported merchandise, or they might, at their option, give bond, without security, to the collector of the district for the payment of the duties in two years from the date of such bond; but the teas so imported, in that event, are required to be deposited, at the expense and risk of the importer, in one or more storehouses to be agreed upon between the importer and the revenue officer of the port. 1 Stat. at Large, § 62, p. 673.

4. Wines and distilled spirits might also, under the act of the 20th of April, 1818, be warehoused "in such public or other storehouses" as might be agreed upon between the importer and surveyor, or other public officer of the revenue where the wines or other distilled spirits were landed. 3 Stat. at Large, 469.

Whether deposited in the public or "other storehouses," under either of those acts the goods imported were to be kept under the joint locks of the importer and inspector of the revenue, and no delivery of the same could be made unless the duties were first paid or secured, nor without a permit, in writing, under the hand of the collector and naval officer of the port. 1 Stat. at Large, 674; 3 id., 469.

Custody and control were the same, whether merchandise was deposited in the public or other storehouse; and, whether in the one or the other, the expenses of safe-keeping were to be paid by the importer, owner or consignee. Importer and the proper revenue officer might agree upon a store as the place of deposit other than those few warehouses then owned by the United States; but when the locks of the inspector and of the importer were affixed to the doors of the same, as required by law, and the merchandise as imported was deposited therein, under the control of the collector, it became a public storehouse for the purpose of securing the importation until the duties should be paid or secured, and the same should be withdrawn by authority of law.

5. Provision was also made in the sixth section of the act of the 14th of July, 1832, that imported wool and the manufactures of wool might, at the option of the importer, be placed in the public stores, under bond, at the risk of the importer, subject to the payment of the customary storage and charges, and to the payment of interest at the rate of six per cent. per annum while so stored. 4 Stat. at Large, 591.

Effect of that law was to diminish the compensation of collectors, as it made large additions to the free list, and to increase the demand for storehouses for public use, as it authorized the warehousing of a large class of importations never before entitled to those privileges.

Resort was had by congress to additional compensation acts, passed annually for the period of eight years, to remedy the first difficulty, and the second was overcome without legislation, by storing the merchandise, as imported, at the expense and risk of the importer, in storehouses designated by

the collector, or in such as were agreed upon between the importer and the revenue officer, or in stores owned by private persons, and leased for that purpose by the collector for limited periods. Commerce and trade revived, and the practice of leasing such storehouses at certain ports became general, and "the customary storage" collected from the importers at such offices greatly exceeded the amount paid as rent to the owner of the stores; and, as there was no law of congress requiring collectors to account for the excess, it was retained to their own use, and at some ports swelled their receipts beyond the standard of a reasonable compensation.

III. 1. Such was the state of affairs in this behalf when congress passed the act of the 3d of March, 1841, to which reference has already been made. Express provision of that act was, that no collector shall on any pretense whatsoever, hereafter receive, hold, or retain for himself, in the aggregate, more than \$6,000 per year, including all commissions for duties and all fees for storage, or fees or emoluments, or any other commissions or salaries which are allowed and limited by law. Collectors were required by the second section of the act of the 2d of March, 1799, called the compensation act, to keep accurate accounts of all fees and official emoluments by them received, and to transmit the same to the comptroller of the treasury; but they were allowed to retain to their own use the whole amount of emoluments derived from those sources. 1 Stat. at Large, 708.

2. Maximum rate of compensation was first prescribed by the act of the 30th of April, 1802, and the provision was, that whenever the annual emoluments of any collector, after deducting the expenditures incident to the office, shall amount to more than \$5,000, he shall account for the surplus, and pay the same into the treasury. 2 Stat. at Large, 172.

Districts for the collection of the customs were, by the act of the 7th of May, 1822, divided into two classes, usually denominated the enumerated and the non-enumerated ports, and the maximum rate of compensation to collectors was diminished. Emoluments of collectors for the seven enumerated ports might reach, under the provisions of that act, the sum of \$4,000, but could not exceed that amount under any circumstances.

Annual compensation allowed to the collectors of the non-enumerated ports, of which Portland was one, might amount to \$3,000; and the provision in respect to both classes was, that the excess, after deducting the expenses incident to the office, should be paid into the treasury as public money. 3 Stat. at Large, 693.

3. The contest in Walker's case was, whether or not he was entitled, as the collector of a non-enumerated port, to an annual compensation of \$6,000. He claimed that he was, because, as he insisted, the maximum rate of compensation to the collectors of those ports, as prescribed by the act of the 7th of May, 1822, was repealed, and, consequently, that he was entitled to \$4,000 under the ninth section of that act, and \$2,000 from the receipts of his office for storage, as allowed by the fifth section of the act under consideration. But this court held that the maximum rate prescribed in the prior law allowed to the collectors of the non-enumerated ports was not repealed, but was in full force as to all emoluments of collectors prescribed or recognized in that act.

Unanimous conclusion of the court, therefore, was that collectors of the non-enumerated ports might receive, as the annual compensation for their services, the sum of \$3,000, from the sources of emoluments prescribed and recognized

in that act; and, in addition thereto, might retain whatever sums came to their hands within the year from rent and storage, provided the storage did not exceed \$2,000. Plaintiffs concede that such was the decision of this court in that case, and they do not deny that it was correct; but they contend that it does not control the present case, because, as they insist, the storage received in that case was storage in stores leased to the government, for which rents were paid beyond the rent paid by the collector.

4. Amount retained by the collector in this case accrued and was received for storage of imported merchandise in bonded warehouses; and the plaintiffs contend that bonded warehouses are not public storehouses within the meaning of that act. They are mistaken, however, in supposing that the amount retained by the collector in that case was wholly received for storage of goods stored in the public storehouses for which rents were received beyond the rent paid by the collector. On the contrary, the bond of the collector in that suit was dated the 7th of September, 1850, more than four years after the act of the 6th of August, 1846, establishing the warehouse system, was passed.

Date of the writ in that case was the 21st day of November, 1856, more than seven years after the treasury regulations of the 17th of February, 1849, making provision for bonded warehouses, were adopted and promulgated.

IV. 1. Importations of every kind might be entered for warehousing under the first section of the act establishing the warehouse system, and when so entered the requirement was that the goods "shall be taken possession of by the collector" and be deposited in "the public stores or other stores," to be agreed on by the collector and the importer, owner or consignee. Public stores, as well as the "other stores," are required to be under the joint locks of the importer and the proper revenue officer, as provided in the act respecting the deposit of wines and distilled spirits, and the "other stores," as well as the public stores, so called, are expressly recognized *in the same section* as public storehouses, because it is there provided that if the goods so deposited shall remain "IN PUBLIC STORE *beyond one year*, without payment of the duties and charges thereon, then the goods" shall be appraised and sold by the collector at public auction. 9 Stat. at Large, 53.

Such goods are not only required to go into the possession of the collector, and be thus deposited under his control, but they are also required to be kept by him in the place of deposit, at the charge and risk of the importer, owner or consignee. Every provision of the section assumes that the goods, whether deposited in the public stores or the other stores therein mentioned, are in the possession and under the control of the collector, and they cannot be withdrawn for consumption without paying the duties, nor for transportation or exportation without paying the appropriate expenses.

2. Authority to make rules and regulations was conferred upon the secretary of the treasury by the fifth section of that act. Pursuant to that authority, he promulgated the regulations of the 17th of February, 1849, and from that time it was the policy of the department to discontinue leased stores as far as possible, and substitute bonded warehouses in their place. Bonded warehouses, under those regulations, were divided into three classes:

First. Public stores and stores leased by the department prior to the date of the regulations.

Second. Stores in the possession and sole occupancy of the importer, and placed under a customs lock and that of the importer, *to be used only for the purpose of storing his own importations.* Such importers furnished their own

stores, and, of course, paid no rent, but they were required, as importers, to pay a sum equivalent to the salary of an inspector, or *half-storage* to the collector.

Third. Stores in the occupation of persons desirous of engaging in the business of storing dutiable merchandise. Importers storing goods in such stores paid rent to the owner, but they also were required to pay a sum equivalent to the salary of an inspector, or half-storage to the collector, as in the other class of stores.

Both of those classes are called private bonded warehouses, because they were the property of their owners, and were not formally leased to the United States; but no store could be constituted such a warehouse unless it was a first-class fire-proof store, according to the classification of insurance offices, and was first proved to be such to the satisfaction of the secretary of the treasury, and was by him *authorized to be used* for the storage of dutiable merchandise. Until so selected by the secretary of the treasury, and the bond given by the owner as required, no store of a private owner could be used for the storing of dutiable importations; and when so selected and bonded, and placed under the customs locks, the store was under the control of the collector, and was as much a public storehouse as one owned or formally leased by the United States. *Clark v. Peaslee*, Massachusetts District, October Term, 1862; Treas. Cir. and Dec. by Ogden, p. 118.

3. Same regulations provide that all moneys received by collectors from owners or occupants of private bonded stores in payment *for half-storage*, or for the attendance of an inspector at the premises, will be accounted for *as receipts for storage* in their accounts with the department. Evidence is not wanting to show that the department has constantly recognized the subsisting operation of the provision under consideration in relation to storage. Throughout the period since its passage the department has required collectors to include the sums received from storage in their quarterly accounts, and if the provision is in force for that purpose, it is difficult to see why it is not also in force as authorizing the allowance to collectors.

Express recognition of its subsisting operation is also found in one of the adjudications of the department, in which it was decided that where "goods are stored under bond in a private store the importer shall either make monthly payment of a sum equivalent to the pay of an inspector placed in charge of the same, or *one-half the amount* which would *accrue as storage* on the goods so stored if placed in public store." Cir. No. 4, 1857.

Implied recognition of the rule, as here laid down, is found in the daily transactions of the department with the collectors of the seven enumerated ports. They are not only required to return all sums received as storage, but they are allowed \$6,000 per annum as compensation for their services, which is exactly \$2,000 beyond what they are entitled to receive, unless the latter sum can properly be allowed from the amount which annually accrues, and is collected and returned by them as storage.

4. Direct decision of this court in the case of Walker was that they were not entitled to but \$1,000 under previous laws, and there has been no legislation upon the subject since that time, except that the fortieth section of the act of the 18th of July, 1866, provided that all moneys received by collectors for the custody of goods, wares and merchandise in bonded warehouses shall be accounted for as storage, under the provisions of the act which is the foundation of the collector's claim in this case.

Sums received for storage not exceeding \$2,000 in any one year, if duly included in their quarterly accounts, are as much due to the collectors of the non-enumerated ports as to the incumbents of the larger offices, and their right to the same rests on the same foundation. Purpose of the act establishing the warehouse system, and of the regulations which followed that enactment, was to discontinue leased stores, and to substitute bonded warehouses in their place, and the leases of such stores were accordingly required to be canceled, by the subsequent act extending the system, at the shortest period of their termination, and the making of new leases was expressly forbidden at ports where there were private bonded warehouses. 10 Stat. at Large, 272.

5. Necessity has always existed, since the treasury department was established, for more storehouses for the deposit and safe-keeping of imported merchandise than the government owned, and it cannot be doubted that all such as have been placed under the control of the collectors, and put under the customs locks, and used for that purpose in conformity to law and the regulations of the treasury department, were, during the period they were so controlled, used and occupied, public storehouses within the meaning of the provision requiring collectors to include receipts for storage in their quarterly accounts, and allowing them to retain out of the same a sum not exceeding \$2,000 in any one year.

Judgment affirmed. (a)

UNITED STATES v. COLLIER.

(Circuit Court for New York: 3 Blatchford, 325-355. 1855.)

STATEMENT OF FACTS.—This was an action against the collector of revenue for Upper California on his official bond. The defense was the general issue, with notice of set-offs exceeding the amount demanded, the set-offs being credits which had been disallowed by the treasury department. There was a special verdict, and the case came on to be heard on it and the evidence and various exceptions. Further facts appear in the opinion of the court.

Opinion by BERRS, J.

We do not consider it necessary to go out of or beyond the facts found by the special verdict and the documents adopted by it in stating the reasons for our judgment in this case.

The jury find that the treasury department made up and stated the account of the defendant five several times, to wit: on the 7th of June, 1851, in which they claimed a balance of \$791,065.31; on the 24th of September, 1851, in which they claimed a balance of \$789,925.35; on the 26th of December, 1851, in which they claimed a balance of \$750,932.80; on the 7th of March, 1853, in which the commissioner of customs made up the balance at \$216,712.43, and the auditor stated it at \$181,797; and fifthly, on the 22d of September, 1853, in which a balance was claimed against the defendant of \$241,329.47. Each of those five several balances, as thus stated, the defendant, by letter from the treasury department accompanying the statement of account, was required to pay to or deposit with an assistant treasurer of the United States. The account of September 22, 1853, contained no credit for the sum of \$118,546.05, paid on the 16th of September, 1853.

This disaccord in the treasury statements of the defendant's account does not result from the admission or rejection of items on the exhibition of new

(a) *Affirming United States v. Macdonald*,* 2 Cliff., 270.

evidence, but is owing chiefly to changes in the principle upon which charges and credits are inserted or withdrawn or modified on the various reconsiderations of those statements. We shall, therefore, limit our observations to the particulars charged by the plaintiffs and objected to by the defendant, or submitted and claimed by him and disallowed at the treasury department, without undertaking to readjust the account and determine the result. That will be more conveniently and accurately done at the department when it is possessed of our decision.

The disputed particulars consist substantially of five items, four of which take the form of claims of credit on the part of the defendant, the other being a direct debit charged against him by the plaintiffs. Still, the largest item, and that which has been the main subject of contestation between the parties, is of a compound character. It relates to the compensation the defendant is entitled to receive, and is brought forward in a double aspect, partly by the plaintiffs, in the way of charges against the defendant for official fees and commissions received and retained by him exceeding a certain maximum, and directly by the defendant, as an entire credit to which he is entitled.

The finding of the jury embracing the particulars of compensation is, that the statement made up at the treasury department on the 7th of March, 1853, gave no credit to the defendant for his compensation, except the sum of \$1,745.56 for salary, and no credit for any of his claims for commissions; that he officiated as collector of the district of Upper California, from the 3d of April, 1849, to the 14th of January, 1851, and during that period collected and received for duties on imports and tonnage \$2,108,365; that of that sum he received, after the passage of the joint resolution of congress of February 14, 1850 (9 U. S. Stat. at Large, 560), and before the passage of the act of September 28, 1850 (9 id., 508), \$1,027,719.33, and, after the passage of the last mentioned act, \$625,656.27; that the defendant was credited in the account of September 22, 1853, with the sum of \$30,831.58, as a commission of three per cent. on the sum received between the passage of the said joint resolution and of the said act, and also with the sum of \$2,524.83, for his salary, at the rate of \$10,000 per annum after September 28, 1850, and, on account of his compensation prior to February 14, 1850, with the sum of \$1,300; that neither of those sums had been previously credited; and that, in any event, he is entitled to those allowances, in the account to be stated pursuant to the verdict. The jury further find that, previous to the passage of the said joint resolution, the defendant received, as emoluments of his office (exclusive of the commissions aforesaid), the following sums, to wit: Between the date of his entering upon said office and the passage of said joint resolution, the sum of \$4,500; between the passage of said joint resolution and the passage of the said act of September 28, 1850, the sum of \$11,250; and after the passage of the last mentioned act, the sum of \$5,250. And the United States claim that the defendant is bound to account for and pay over to the United States all the excess of the emoluments received by him beyond an amount sufficient to make his maximum compensation \$3,000 per annum, except during the period between the passage of the said joint resolution and of the said act. The special verdict also declares, that inasmuch as the allowances or disallowances of the items in dispute between the parties depend upon questions of law which are proper to be submitted to and decided by the court, it is agreed that the verdict and finding of the jury shall be entered in the case after the decision of the court, and conformably to such decision. The defendant, on

his part, claims that he should be credited, on his compensation account, with a fixed salary, at the rate of \$1,500 per annum, during the whole period he served in the office, and with all the fees and commissions allowed by law which were collected by him. The seeming incongruity in the special verdict, in finding that, in any event, the defendant is entitled to certain specified particulars of allowances, and yet declaring that the allowances and disallowances in controversy in the account depend upon questions of law which are submitted to the decision of the court, is not, in our judgment, to be so construed as to restrict the authority of the court, or place any impediment in its way, in passing upon the whole subject-matter, including those specified items.

§ 445. *Construction of act of congress of March 3, 1849, establishing a collection district in Upper California.*

The solution of the point in question depends upon the true meaning and effect of the act of congress of March 3, 1849, entitled "An act to extend the revenue laws of the United States over the territory and waters of Upper California, and to create a collection district therein." 9 U. S. Stat. at Large, 400.

The treasury department, in stating the defendant's account, have considered his compensation to be subject to the limitations of the tenth section of the act of May 7, 1822 (3 U. S. Stat. at Large, 695), by which it is provided, that whenever the emoluments of any collector of the customs (other than those particularly excepted) shall exceed \$3,000, after deducting therefrom the necessary expenses incident to his office in the same year, the excess shall be paid into the treasury, for the use of the United States. The defendant claims that the compensation allowed to him by the act of March 3, 1849, is independent of all previous limitation, and is to be determined conformably to the meaning and effect of that act.

It is enacted by that law (§ 1) that the revenue laws of the United States be, and they are hereby, extended to and over the main land and waters of all that portion of territory ceded to the United States, heretofore designated and known as Upper California; that (§ 2) all the ports, harbors, bays, rivers and waters of the main land of the territory of Upper California shall constitute a collection district, by the name of Upper California, and a port of entry shall be and is hereby established for said district, at San Francisco, on the bay of San Francisco, and a collector of customs shall be appointed by the president of the United States, by and with the advice and consent of the senate, to reside at said port of entry; that (§ 3) ports of delivery shall be established in the collection district aforesaid, at San Diego, Monterey, etc., and the collector of the said district of California is hereby authorized to appoint, with the approbation of the secretary of the treasury, three deputy collectors, to be stationed at the ports of delivery aforesaid; and that (§ 4) the collector of said district shall be allowed a compensation of \$1,500 per annum, and the fees and commissions allowed by law, and the said deputy collectors shall each be allowed a compensation of \$1,000 per annum, and the fees and commissions allowed by law.

If the defendant's compensation is subject to limitation by any antecedent statute, we perceive no legal reason why the act of May 7, 1822, should be applied to the case, and the posterior act of March 3, 1841 (5 U. S. Stat. at Large, 432), should be disregarded. The fifth section of the latter act provides that no collector of customs "shall, on any pretense whatsoever, hereafter receive, hold, or retain for himself, in the aggregate, more than \$6,000 per

year, including all commissions or duties, and all fees for storage, or fees, or emoluments, or any other commissions, or salaries, which are now allowed and limited by law." It is manifest that collectors whose compensation had been restricted by the prior statute to \$3,000 a year, would, after the passage of the act of March 3, 1841, be relieved from that limitation, and be entitled to retain from their receipts a compensation of \$6,000 annually; and the defendant can be placed in a no more disadvantageous position by a constructive limitation implied under the act of March 3, 1849, than was incident to the office by the positive provisions of law in force when that act went into operation. In our opinion, therefore, if the defendant is restrained to a specified amount of compensation, under the laws in force when the act of 1849 was enacted, it would be to the latter and larger sum, and not to that first appointed, the act of 1841 being the latest expression of the legislative will on the subject. The condition in which the defendant is placed in this respect depends, therefore, upon the purport and scope of the act of 1849; and we shall proceed to state concisely our views of its true construction and effect.

§ 446. *Rule for construing statutes. Cases cited.*

Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter; and its language is to be understood according to its natural and ordinary import. 1 Kent's Comm., 7th ed., 462, 463. The intention which forms the governing principle of the law is to be extracted from the entire enactment (*Strode v. The Stafford Justices*, 1 Brock., 162; *APPEALS*, §§ 1335-36); and, to ascertain the legislative will, courts not only search all the provisions of the particular statute, but may look out of that to others *in pari materia*, or of a similar purport, especially in respect to revenue laws, which, although made up of independent enactments, are regarded as one system (*Wood v. The United States*, 16 Pet., 342, 363), in which the construction of any separate act may be aided by the examination of other parts and provisions which compose the system. This doctrine is in furtherance of the general principle that the statute itself must furnish, primarily and essentially, the indications of the will of the legislature; and, should the provisions in respect to the compensation of the collector be found to be obscure, the interpretation most favorable to him should be adopted. *United States v. Morse*, 3 Story, 87.

The act of March 3, 1849, creates new offices within a territory first brought by that statute under the revenue laws of the United States. The whole body of those laws is extended to and over the main land and waters of Upper California. We do not consider it necessary, in the examination of this case, to go into the inquiry whether the transfer of the revenue laws embraced also the entire legislation of congress in relation to agencies and means employed or authorized for the purpose of collecting revenue from imports, and especially in relation to incidental advantages and benefits allowed to revenue officers; for, in respect to the point in hand, the fourth section of the act of 1849 recognizes, as a part of the laws so extended, those which relate to fees and commissions to collectors.

§ 447. *Provisions of statutes regulating fees of collectors of revenue.*

The provisions appointing fees to collectors for their services under the revenue laws are contained in the thirty-fourth section of the act of February 13, 1793 (1 U. S. Stat. at Large, 316), and in the second section of the act of March 2, 1799 (1 id., 706). The particulars and amounts of the fees and com-

missions claimed to be payable under those laws are not in dispute in this action, nor is it disputed that the defendant has retained the proper sum and is entitled to credit therefor, provided the act of 1849 bestows them upon him without limitation. The question of restriction or qualification is the one in controversy between the parties. In that view the fourth section of the act of 1849 is to be read as if the fees and commissions enumerated by the acts of 1793 and 1799 had been repeated in terms in that section; and the grant of compensation would then be direct and positive, both of the fixed sum of \$1,500 per annum and of those specific fees and commissions. The general reference is equivalent to and of the same effect as the reiteration of the particulars, that being certain in law which may be reduced to a certainty; and, the tariff of fees and commissions being fixed, the collection of them would render this branch of compensation equally determinate with the other.

It is not denied that the act of 1849 means that the defendant shall take, as his own property, the fees and commissions allowed by law. It is not directed that they shall be applied in satisfaction of his salary. The act guarantees the salary, with the possible implication that, if it is not obtained from other means in his hands, it will be paid him by the treasury. The question raised is, whether such direct devotement of fees and commissions is charged with the condition applied to antecedent grants of compensation to collectors, that salary and perquisites conjointly shall not exceed \$6,000 per year. That limitation is supposed to be imparted by extending the revenue laws to California. We do not enter into that discussion; for, if such restriction might be implied, in the absence of any expression of the intent of congress, we think that the language of the fourth section of the act, establishing the compensation, indicates plainly that no limitation was meant to be applied in this case.

§ 448. *Unless otherwise expressed the fees of collectors of customs are in addition to their salaries.*

The act creates Upper California a collection district, and establishes a port of entry at San Francisco. It also establishes three other ports of delivery, and authorizes the appointment of a deputy collector to be stationed at each. It then declares that the collector of said district shall be allowed a compensation of \$1,500 per annum and the fees and commissions allowed by law, and that the said deputy collectors shall each be allowed a compensation of \$1,000 per annum and the fees and commissions allowed by law. The same language is used in each of these paragraphs, and they are reasonably to be supposed to have been employed in a common sense. There is certainly no ground for an inference that congress designed to make a provision for the deputy collectors more advantageous to them than that applicable to the collector. The grant to them is not only affirmative and positive, but was an original one — that class of officers not being entitled, under the then existing revenue laws, to fees or commissions, or coming within the restrictive clauses of the acts of 1822 and 1841. The enactment must, accordingly, be understood as conferring on them absolutely, in addition to their salaries, the fees and commissions they collect as making up their compensation, irrespective of whether the total produced be \$6,000, or ten times that amount. The latter clause of the section thus manifesting plainly the purpose of congress to give to deputy collectors their salaries, together with all fees and commissions, the same expressions used simultaneously in defining the compensation of the collector must carry

the same signification, unless restrained or extended by other language in the act. *The United States v. Freeman*, 3 How., 556.

This construction deduced from the natural force of the enactment may be considered as being corroborated by the particulars contained in the case, showing the facts and circumstances which led to and surrounded the passage of the act. Documents were laid before congress showing the exorbitant expenses to which the officers in charge of the revenue service in California would be subjected, and the necessity of immediate legislation extending the revenue laws to that territory. Executive Documents, 30th Congress, Second Session. Ineffectual efforts had been made by congress to organize the territory, and, at the close of the session, the act in question was pressed to its passage at the last hour of that congress as being of urgent emergency, and was framed in general terms to avoid the hazard of specific enactments and amendments. House Journal, 30th Congress, Second Session, p. 514; Senate Journal, id., p. 338; Congressional Globe, id., pp. 691, 692. The act was adopted only as a provisional measure, to be displaced at the next session by one adapted to the state of the country and its commercial business. No evidence was furnished at the time showing the extent of income to be expected from that collection district, or that all the fees and commissions received by the collector would afford him an unreasonable compensation; and it is fair presumption that congress intended, in leaving the collector to the chance of receiving no more than \$1,500 a year, to give him the advantage of the contingency of the whole emolument of fees and commissions which might be collected.

This presumption is justified by contemporaneous, antecedent and subsequent enactments on the same subject-matter, in which congress has cautiously avoided, by positive provisions, leaving the subject of compensation open to hypothetical augmentations or diminutions. In acts approved the same day with the one in question, congress excludes, by explicit language, all implication on the subject of compensation, and signifies its design to make the limitation in plain words, when one is to accompany the grant of pay. In the second section of the "act to establish the collection district of Brazos de Santiago, and for other purposes," approved March 3, 1849 (9 U. S. Stat. at Large, 409), it is provided that the collector shall be entitled to a salary not exceeding \$1,750 *per annum*, including in that sum the fees allowed by law, and that the amount he shall collect in any one year for fees exceeding the sum of \$1,750, shall be accounted for and paid into the treasury of the United States. And in relation to the deputy collector, it is provided by the sixth section of the same act (id., 410), "that the compensation of the said deputy collector shall be the usual fees of office, and nothing more." So in the second section of the act declaring Fort Covington in the state of New York a port of delivery and authorizing the appointment of a deputy collector to reside at Chesapeake City, in the state of Maryland, approved March 3, 1849 (id., 414), it is provided "that the compensation of the said deputy collector shall be the usual fees of office, and nothing more." The omission of those qualifications in the California act becomes more significant, in connection with the fact that two of the last cited enactments were passed in the senate on the same day with the act in question, and the other one on the day preceding. Senate Journal, 30th Congress, Second Session, pp. 315, 327, 297, 305.

The presumption referred to is forcibly strengthened by the third section of the act of September 28, 1850 (9 U. S. Stat. at Large, 509), which makes

applicable to the collection districts in California the provisions of law in relation to the payment of expenses incidental to the collection of the revenue from customs, existing prior to the act of March 3, 1849 (id., 398), entitled "An act requiring all moneys receivable from customs and from all other sources to be paid immediately into the treasury, without abatement or reduction, and for other purposes." This manifestly imports that congress did not consider the mere extension of the revenue laws to California as carrying with it the restrictions or directions of the prior act of March 3, 1849; for it would be supererogatory and tautological to re-enact a provision already in force. And that such was the judgment of congress is also inferable from the fact that the act of September 28, 1850, does not renew the extension of the revenue laws to the state, but they are treated as in force there by virtue of the act of 1849 making that extension.

So, also, in acts passed prior to 1849, it seems to have been assumed that an appointment of salary or fees, or of the two together, to revenue officers, would operate without limitation of amount, unless restricted by the express language of the enactment, notwithstanding the existing acts of 1822 and 1841; and accordingly, congress, in repeated instances, declared such limitation in positive terms.

The second section of the act to establish a port of entry at Saluria and for other purposes, approved March 3, 1847 (9 U. S. Stat. at Large, 182), gives to the collector of Saluria a salary not exceeding \$1,250, including in that sum the fees allowed by law, and requires the excess collected above that sum to be accounted for and paid into the treasury. The third section appoints specific salaries to several surveyors; and to the deputy collector at Aransas, the legal fees on the business he may transact, and no more. The fifth section gives to the collector at Galveston a salary not exceeding \$1,750, including in that sum the fees allowed by law, and directs the amount of fees collected exceeding that sum to be paid into the treasury.

This series of legislative acts appears to us to be a plain recognition by congress of the principle that every appointment of compensation to revenue officers will have effect according to the terms of the enactment; and that limitations or restrictions as to amount are not to be presumed, but on the contrary, to take effect, must be expressed in direct terms, or be connected with the grant by necessary implication.

We think, also, that the act subsequently passed creating additional collection districts in California, approved September 28, 1850 (9 U. S. Stat. at Large, 508), rests upon the assumption that, to restrain the right of the collector of that district to retain all the fees and commissions collected by him, there must be a different disposition of those emoluments by positive law. The second section gives to the collector and other officers resident at San Francisco, salaries not exceeding a specified sum; and to the other collectors in the state definite salaries, with an additional maximum compensation of \$2,000 each, should their official emoluments and fees provided by existing laws amount to that sum. The sixth section gives the collector of Mackinac a salary, together with such commissions and fees as are authorized by existing laws. The eighth section provides a salary to the collector of Minnesota, with the declaration that he shall not receive any other compensation whatever, in the shape of extra allowance or fees of any description whatever.

So, also, the provisions of the act to create additional collection districts in the territory of Oregon, approved February 14, 1851 (9 U. S. Stat. at Large,

566), are drawn up in view of the same import of a general grant of fees. The second section grants to various collectors \$1,000 each per annum, with an additional maximum compensation of \$2,000 each per annum, should their emoluments and fees provided by existing laws amount to that sum; and allows to various surveyors, in addition to the fees authorized by existing laws, a compensation of \$1,000 each per annum. The third section directs the appointment of several surveyors, whose compensations, in addition to the fees authorized by existing laws, shall not exceed \$1,000 each per annum.

This course of enactments at periods before, and after, and concurrently with the act in question, denotes, in our judgment, that congress contemplated that a grant of fees, emoluments or commissions in positive terms was free from the limitations and restrictions of the acts of 1822 and 1841, unless brought within those qualifications by other plain provisions in the law. We also think that the joint resolution of congress adopted February 14, 1850 (9 U. S. Stat. at Large, 560), if it has a bearing upon this case, is declaratory of the understanding of congress that the act of March 3, 1849, would be executed in that sense at the treasury.

§ 449. *Rule as to implied repeal of statute by subsequent statute.*

The act of March 3, 1849, being the last statute applicable to the case of the defendant, we consider it to be the expression of the legislative will as to the amount and mode of the defendant's compensation in that service, and are of opinion that it is to be carried into effect conformably with its terms.

It is insisted, for the plaintiffs, that that act was superseded by the act of September 28, 1850, and that the defendant can claim for his services thereafter, until the time he was displaced in 1851, no compensation that is not authorized by the last-mentioned statute. The position is not taken, in terms, that the prior act is abrogated by the later one, but such is the legal import of the objection; and, no doubt, on general principles, the last enactment goes into immediate operation and thus annuls and repeals all preceding ones inconsistent with it. *Matthews v. Zane*, 7 Wheat., 164; 1 Kent's Comm., 7th ed., 455.

It might, perhaps, be an open question, as respects third persons, whether the defendant could perform any official acts after the passage of the last-mentioned act or maintain a claim at law for his compensation. But we do not think that the plaintiffs in this action can avail themselves of that objection; and we are not called upon to consider what effect that act may have upon the rights of other parties than the United States in their claims upon or dealings with the defendant. The plaintiffs, in adjusting his accounts at the treasury and also in this action, proceed upon the assumption that he was clothed with the authority and responsibility of collector in respect to the government, so long as he continued to act in that capacity, without notice that his authority was rescinded. In exacting from him, up to that period, the services and responsibilities of collector, under the law authorizing his appointment, the plaintiffs must be held chargeable to him for all the rights and recompenses secured to him by that law until he became apprised that his powers had ceased. The plaintiffs, by adopting the acts of the defendant between September 28, 1850, and January 14, 1851, as official and as within his legal competency, have sanctioned them and rendered them valid, in so far as the claims arising therefrom in favor of the defendant and against the United States are concerned. In that point of view it may probably be deemed that the first organization of the collection districts in California, and the appoint-

ment of the defendant as collector, remained in force until the act of September 28, 1850, was put into execution. The act of March 3, 1849, extended the revenue laws of the United States over the territory of Upper California. The object and effect of that law have not been abrogated or suspended by express legislation; and it is not to be presumed that an interregnum in the administration of it was contemplated by congress in the enactment of the act of 1850—otherwise there must have been a period in which no law for the imposition and collection of duties in that territory or state existed. The reasonable intendment would probably be that the existing law was to remain in force until the new system or authority was put into operation in its place; and, in our opinion, the case of *Cross v. Harrison*, 16 How., 164, recognizes and applies a like principle to facts essentially analogous to that feature of the present case. But, whether this be so or not, we think that, in a transaction between the government and the collector, touching the adjustment of his accounts, the plaintiffs, by continuing an account with him as an officer duly acting under the law of 1849, have ratified those acts, and are concluded from denying his claim for a proper compensation therefor; and that the provisions of that act, being the one under which his services were rendered, afford a certain and appropriate measure of that compensation.

It is to be observed that the act of September 28, 1850, makes no different provision for the compensation of services rendered under the act of March 3, 1849, and cannot, accordingly, be construed as withdrawing the former provision, and substituting a new one for the compensation of those services. If it be apposite to the subject, it takes away all allowances in that respect, for it transmutes the single collection district created by the act of 1849 into six districts, each having all the officers and authority of an independent collection district, to each collector in which is appointed a specific compensation. There is no language in the act of 1850 indicating that any one of those allowances affords a rule for determining the pay to which the defendant would be entitled for performing duties over the entire state; and, if the provisions of that act were in any way applicable to this case, the reason of the thing would seem to require that the whole amount allotted to the six collectors for the same territory over which the authority of the defendant was exercised, should be allowed to him, rather than either of the separate sums designated. We do not, however, propose to discuss this point, because we place our decision on one of a broader bearing, and which renders this special topic unimportant.

The defendant was placed in charge of an important service, in a remote section of the Union, and where notice of the cessation of his office was not and probably could not be made known to him before January 14, 1851. A public necessity accordingly existed for the continuance of his functions up to that period. In performing those duties, he received and disbursed moneys, and charged and credited them to the plaintiffs in the capacity of collector. The treasury continued its accounts with him in that character. It not only debited him as collector with receipts, and credited him officially with payments, until January 14, 1851, but it carried forward the accountings in that character until September 22, 1853, when the final balance was struck against him for his official indebtedment. This action is prosecuted to recover from him moneys collected officially and retained by him to cover credits which he claims in his character of collector; and the plaintiffs, under the facts, might be held, after so dealing with him, to be concluded from denying that he was collector *de facto* and *de jure*, under the act of 1849, until the time when his

office was transferred to a new officer, on the 14th of January, 1851, and that he is entitled to compensation until that period conformably with the provisions of the act of March 3, 1849. The plaintiffs establish no legal title to the moneys demanded, except in subserviency to that principle. The treasury transcript would be nugatory as to all doings of the defendant out of office, and could afford no foundation for the recovery of a debt incurred by him after the passage of the act of September 28, 1850. The full rights of either party cannot be adjusted in this action on any footing other than the assumption that the act of 1849 virtually governed the entire transactions until that of 1850 was put in actual operation.

We think, accordingly, that the defendant is entitled, on legal considerations, to retain from the various moneys in his hands as collector, the full compensation granted to him by the act of 1849. And it matters not, to the just determination of this cause, whether the decision be placed upon the ground that that act remained in force to this end, as between these parties, or whether a proportionate part of the salary of \$1,500, together with the fees and commissions which accrued between September 28, 1850, and January 14, 1851, be adopted as measuring the *quantum meruit* of his services. We accordingly decide that the defendant is entitled to be credited on his accounting with the treasury department with his salary at the rate of \$1,500 per annum, and with the fees and commissions allowed by law during the whole period in which he continued to perform the duties of collector in California; and we direct the special verdict to be entered accordingly.

We proceed to dispose of the questions of law arising under the following finding of the special verdict: "And the jury further find, that the said James Collier, as such collector as aforesaid, during his said official term of service, seized, as forfeited to the United States, certain liquors imported into the district of Upper California contrary to the revenue laws of the United States under such circumstances; and that unless the want of a judicial proceeding to ascertain and enforce such forfeiture, or the circumstances herein or in the case to be stated, shall be deemed an impediment to such right, he, the said James Collier, by virtue of the ninety-first section of the act to regulate the collection of duties on imports and tonnage of 1799, would be entitled, as such collector, to one moiety of the said forfeitures. The jury further find, that it being impracticable, without an expenditure which would have consumed the whole value thereof in costs, to institute any regular judicial proceedings touching such forfeitures, the said James Collier caused the said seized liquors to be sold; that the proceeds of such sales were \$94,704.66; that the costs and expenses of storing, preserving and selling said liquors amounted to \$24,873.80; and that the net proceeds of said forfeited goods, which came to the hands of said James Collier, amounted to \$69,830.86, of which the said James Collier claims the one-half, being the said sum of \$34,915.43. And, whether the said James Collier is accountable to the United States for all or any part of the proceeds of said liquors, or whether he is entitled to a credit as collector for the one moiety or half part thereof, being the last-mentioned sum, is submitted to the court. In each of such seizures, the said James Collier obtained from some owner, or from the carrier, master, or consignee, or other most accessible person, acting as agent for the owner in the importation of said liquors, or having the charge and custody thereof for the owner, a certificate, consent or abandonment, similar in character to the certificates of abandonment which are inserted in the case as having been given in evidence on the trial. He gave

credit to the United States, in his periodical official returns to the treasury, for the gross sums so received on such sales, charged the said costs and expenses and returned the appropriate vouchers to the treasury department, which returns were received without objection by the treasury department, from time to time during his entire official term; and he claims to be entitled to retain to his own use a moiety of the said net proceeds. After the commencement of this suit, the secretary of the treasury, assuming to act under the first branch of the fourth section of the act first above in this finding referred to, received applications on behalf of persons claiming to be owners of the said seized liquors, for remission of the said forfeitures, and made allowances to them, not as and for the proceeds of said sales, but as and for the cost or value of such liquors before their importation. A schedule of such allowances, with a statement of the amounts awarded or allowed as aforesaid, and of the amount paid out of the treasury of the United States under such allowances, and of the amounts remaining to be paid on demand and exhibition of power to receive the same, was given in evidence, is to be inserted in the case, and is to be deemed a part of this verdict."

We do not enter into the question whether, in the condition of things and under the exigencies stated in the special verdict at the time those moneys were received and paid into the treasury by the defendant, his proceedings constituted a legal forfeiture and disposal of the liquors seized and sold, or of their proceeds, as against the lawful owners. The precise question presented by the special verdict legitimately extends only to the inquiry whether the United States have a right or title to the moiety thereof retained by the defendant, which enables them to collect from him or control that moiety. The special verdict presents considerations sufficiently direct and weighty to show that the official conduct of the defendant in the course taken by him in respect to those liquors was based upon intentions to subserve the rights and interests both of the United States and of the owners of the property, and to exonerate him from all charge of a wanton misapplication of his powers and authority; and it shows, moreover, that the treasury adopted and ratified, so far as it was competent for that department to do so, the acts of the defendant in that behalf. In this posture of the case, it is not easy to produce any rule of law or equity which will enable the plaintiffs to disavow, at an after period, their approval of those acts, and hold the defendant responsible to them for the entire avails of the property. Nor are we satisfied that the United States acquired such title to the moiety retained by the defendant as to enable them to maintain an action for its recovery against him.

We have put the decision of this point on the facts before us showing that the owners of the liquor seized, or their agents, assented to the sales by the defendant without the intervention of any court of law, and have never withdrawn or repudiated such assent, and that the treasury department, with full notice that no recourse had been had to the courts of the United States in Oregon or Louisiana, to obtain condemnation and sale of the property, received, to the use of the United States, the one-half of the proceeds of such sales, and entered the usual credits, in the accounts of the defendant, for such amount.

§ 450. *The remission of penalties or forfeitures by the treasury does not affect the moieties of collectors and others after such moieties have been received for distribution. Cases cited.*

The proceeding by the secretary of the treasury to restore those proceeds to

the owners of the liquors, after this suit was commenced, could not divest the right and title of the defendant to the one moiety which had been for a long period in his actual possession, and was received, as between him and the plaintiffs, in a manner tantamount to that of a formal distribution of the proceeds after condemnation by order of court. The authority of the secretary of the treasury to remit forfeitures under the revenue laws has been determined to embrace also the interests of the officers entitled to share in the forfeitures; and such authority to remit may be exercised after judgment of condemnation. *United States v. Morris*, 10 Wheat., 246; S. C., 1 Paine, 209. But the power ceases after the share of the forfeiture is received by the collector for distribution among his co-officers. *Ibid.* As the collector, in this instance, acted without the co-operation of a naval officer or surveyor, the entire moiety received by him was his legal share of the forfeiture, and is in his hands, with the same right on his part to the whole of it that he would have possessed to his aliquot part of it, if it had been required by law to be divided between him and other officers. In our opinion, therefore, if the award of these moneys by the secretary of the treasury to the owners of the liquors seized had been strictly in the form of a remission, under the authority of the first section of the act of March 3, 1797 (1 U. S. Stat. at Large, 506), it would be inoperative and void as to the defendant, after the moneys had publicly gone into his hands, and were held as his own property. *The Hollen and Cargo*, 1 Mason, 431.

The same principles would apply if the secretary of the treasury had acted under the fourth section of the act of September 28, 1850, and had directed the technical remission of the forfeitures; and this without respect to any question as to whether, the seizure and confiscation having been anterior to the passage of that act, it was not necessary, under the proviso to that section, to show the seizure to have been improper on the part of the collector.

Nor does it seem to us that a mere order of restoration of the proceeds of those forfeitures to the former owners, at the discretion of the secretary, without the concurrence of the defendant, or notice to him that such an order was applied for or was intended to be made, can be regarded as a remission, within the provisions either of the act of March 3, 1797, or that of September 28, 1850.

We are of opinion, accordingly, that the defendant is entitled to retain the sum of \$34,915.43, being the moiety of such proceeds, and to receive credit for the same in his accounts.

§ 451. *Where forfeitures are represented by bonds transmitted to the treasury, returned to the collector and not collected by him, the collector is not entitled to any moiety in case such forfeiture was remitted.*

The claim of the defendant to a credit of \$12,300, being the one-half of the amount of bonds received by him for certain vessels and goods seized as forfeited, was disallowed by the treasury department. The special verdict as to that claim finds "that the sum purporting to be secured by three certain bonds to the United States, set forth with the evidence in this case, taken by the said James Collier for seized vessels or goods delivered up, and which are in evidence, being the vessels or the cargoes of the *Ocean*, *Callooney* and *Lallah*, was \$24,600; that the said bonds were returned by him, said James Collier, on leaving office, into the treasury department of the United States, and have not been collected; nor have any proceedings been had or attempted by the treasury department for the purpose of collecting the same; and they

further find, that if the said last-mentioned sum had been collected and received, the said James Collier would have been entitled to the sum of \$12,300, being the one-half part of the amount of the said bonds; and the said James Collier claims a credit for that amount in his accounts, the same having been disallowed."

In our opinion the defendant is not entitled to have those bonds regarded as money actually paid into the treasury. They were not accepted by the treasury in satisfaction of the value of the property forfeited, so as to raise an equitable credit, on that footing, in favor of the defendant. He received the bonds and transmitted them to the treasury department, to be dealt with there under their authority and not under his; and, even a laches by the government, if one may be imputed to it, in not enforcing the bonds, would not authorize him to treat those securities as so much money received by the treasury. He gives no evidence that the obligors are or were responsible sureties for the amount, nor that he demanded any action on the part of the government to enforce payment of the bonds. No higher right to the value of the bonds can be claimed by the defendant than he would have possessed to the vessels or merchandise which they represent, had such property been detained, by order of the treasury department, under arrest and without adjudication; and it is plain that the collector's right to a share in seized property applies only to the proceeds obtained from its condemnation and sale, and in no way attaches to the property itself. There is no evidence before the court authorizing it to act upon those securities as money proceeds of the seized property. We are therefore of opinion, upon the finding of the jury, that this claim was properly disallowed by the department.

The special verdict finds "that of the moneys so received by the said James Collier, \$28,000 was received for the additional duties of twenty *per centum ad valorem*, prescribed to be levied, collected and paid, by the eighth section of the act reducing the duty on imports and for other purposes, passed July 30, 1846, one-half of which sum the said James Collier claims as a credit in his accounts, the same having been disallowed." We consider the case of *Ring v. Maxwell*, 17 How., 147, as determining that the sum so demanded by the defendant did not accrue from fines or penalties, but was composed of duties chargeable by law on the merchandise imported. Accordingly, the defendant has no legal claim to that sum.

The special verdict finds that "the said James Collier, in rendering his said periodical accounts, charged himself, as a part of a larger amount, with the sum of \$8,110.29 received to the use of the United States by the deputy collector at Monterey, which forms a part of the debits so claimed against him by the United States in the several stated accounts. The said sum was stolen from the said deputy collector without neglect or default on his part, or on the part of the said James Collier, and the said James Collier, in the same account in which he returned the said last-mentioned sum as a charge against himself, claimed a credit *per contra*, against the United States, for the last-named sum thus stolen."

§ 452. *What is the legal relation between a collector and a deputy collector.*

The deputy collector at Monterey was not made subject to the removal or control of the collector of the district. The collector had no other connection with his appointment than that of proposing him to the secretary of the treasury for his approbation; and the fourth section of the act of March 3, 1849, secures to the deputy a compensation independent of the collector, and

gives to him, in his section of the district, the same standing, in respect to fees and commissions, as the collector had at San Francisco. This would rather render the deputy collectors in California agents of the government than of the collector personally. Whether this be so or not, the legal relation between public officers and their sworn assistants, even when they are acting directly in connection, is generally not that of master and servant, or principal and agent; and the liability of the official superior for defaults of his assistants arises only in case of his own misconduct or neglect. *Dunlop v. Munroe*, 7 Cranch, 242; *Story on Agency*, §§ 321, 322; *Bailey v. The Mayor*, etc., of New York, 3 Hill, 531; *Wiggins v. Hathaway*, 6 Barb., 632.

§ 453. *When officials are exonerated from liability for money stolen from them. Cases cited.*

Even if the defendant stands in law responsible for the conduct and liabilities of the deputy at Monterey, and is to be regarded as the holder, for the benefit of the United States, of the funds purloined, still, it being found, by the verdict of the jury, that the money was stolen, the defendant, upon well-established principles of equity law, would be exonerated from all liability for them. *Spence's Eq. Juris.*, 437, and cases there cited.

In an action by the United States against a disbursing officer or agent or other individual, for the recovery of moneys claimed of him, the defendant is entitled, on the trial, to the allowance of all equitable demands of his against the United States, if the same have been submitted to the proper accounting officers of the government and disallowed by them. Act of March 3, 1797 (1 U. S. Stat. at Large, 515, § 4); *United States v. Wilkins*, 6 Wheat., 135; *United States v. Jones*, 8 Pet., 375; *United States v. Robeson*, 9 Pet., 319; *United States v. Hawkins*, 10 Pet., 125.

On the finding of the jury, the charge in question must be rejected from the account against the defendant. On a careful consideration of the whole case we shall order judgment to be entered therein to the following purport:

1. The defendant is entitled, under the fourth section of the act of March 3, 1849, to a credit, as compensation for his services as collector, to \$1,500 per annum, and the fees and commissions allowed by law, without limitation or restriction, from the date of his appointment under the said act, and during the continuance of his services as such collector, down to the 14th of January, 1851, when he surrendered the custom-house to T. Butler King, who then appeared and took possession of the same, and entered upon the discharge of the duties of his office as collector under the act of September 28, 1850, which organized the territory of California into six collection districts, and provided for the appointment of a collector in each district.

2. The defendant is not entitled to a credit for a moiety of the \$28,000 received as additional duties of twenty *per cent. ad valorem*, under the eighth section of the tariff act of July 30, 1846.

3. The defendant is not entitled to a credit for a moiety of the \$24,600 secured by bonds given upon the release of vessels seized for a violation of the revenue laws.

4. The defendant is not liable for the \$8,110.29 charged against him, which was received by the deputy collector at Monterey, and which was stolen from him without default on his part or that of the collector.

5. The question of interest is reserved until the account is stated between the government and the defendant conformably to the principles here settled.

Afterwards the case was heard upon the reserved question of interest.

Opinion by BERRS, J.

We are of opinion that no interest be allowed to either party, and that a balance of \$8,110.29, as due to the defendant, be certified in favor of the defendant against the United States, according to the terms of the special verdict.

In the argument before the court in support of the claim to interest, the counsel for the United States conceded that, according to the principles laid down in the opinion of the court on the case at large, the defendant had overpaid the government, unless he was chargeable with interest. The proposition maintained for the plaintiffs is, that the account should, under the decision of the court, be stated as follows:

Balance, as computed without interest, in the account made up on the 7th of March, 1853.	\$216,712 48
Deduct, by order of the court:	
One-half of net proceeds of seized liquors.	\$34,915 48
Commissions	63,250 95
Money stolen at Monterey.	8,110 29
	<hr/>
	106,276 67
	<hr/>
	\$110,485 76
Interest on this sum from January 14, 1851, to 16th September, 1853, at six per cent.	17,721 88
	<hr/>
	\$128,157 64
Deduct payment, 16th September, 1853.	118,546 05
	<hr/>
Balance	<u>\$9,611 59</u>

It is admitted that, applying the payment of \$118,546.05 to the account, the debit side, independent of interest, is satisfied, with a balance over in favor of the defendant; but it is contended that the balance of interest remaining unpaid forms, from the time of such payment, a new capital, on which interest should be computed to the time of the judgment. On that hypothesis, the plaintiffs claim to be entitled to judgment for \$9,611.59.

The jury find "that five several statements of the defendant's account were made up by the treasury department, and that the balance stated as due from the defendant to the United States in each of said five accounts was not due, a less amount, if anything, being in fact due, and that none of the said accounts, except the last, contained any claim for interest, and, in the last of said accounts, interest was claimed as therein stated." The last statement there referred to was made up September 22, 1853. This action was commenced in May, 1852, upon the indebtedness charged in the account stated June 7, 1851.

§ 454. *The treasury department acts in a judicial capacity in determining the charges to which an officer is liable. Its decision, when final.*

It is at best questionable whether the comptroller had any authority to restate and augment the debit side of the account, at any time after the first statement had been adopted and repeated in the subsequent treasury statements of September and December, 1851, and March, 1853. *Ex parte* Randolph, 2 Brock., 447, 473; *United States v. Kuhn*, 4 Cr. C. C., 401. More particularly would the right of accounting officers to change the treasury statement, by adding a claim of interest, after a payment had been received from the defendant which overpaid the principal really due upon the account as it

stood when the payment was made, be open to exception; for it is the addition of interest to the demand after the 16th of September, 1853, when the defendant paid into the treasury \$118,546.05, which produces the balance of \$9,611.59, claimed to be due on the statement of September 22, 1853. The technical objection to varying the account is, that it creates a new cause of action after suit brought; but one more vital to it on the merits is, that the treasury department acts in a judicial capacity in determining the charges to which the defendant is subject, and is not competent to vary that adjudication subsequently, to his prejudice. The decision of the department, within the rules prescribed for the exercise of its powers, is, in effect, final. *United States v. Jones*, 8 Pet., 375. We think, therefore, that the plaintiffs are not entitled to set up a charge of interest made in the restatement of the defendant's account on the 22d of September, 1853, and to renew that charge in this action.

§ 455. *Statutory provisions as to liability of officers for interest.*

But if this objection is disregarded, and the right to interest is placed upon the footing that the defendant is liable, under the direct provisions of the first section of the act of March 3, 1797 (1 U. S. Stat. at Large, 512), for the settlement of accounts between the United States and receivers of public money; or on the general principle of law, that a running account is to be deemed liquidated, so as to form a basis of liability for interest, from the time of its adjustment and statement at the treasury; or on the ground that a trustee is chargeable with interest on all sums in his hands, from the time they are received until they are paid over or applied to the use of the *cestui que trust*,—the plaintiffs, in our opinion, fail to bring this case within the purview of either of those principles.

The statute subjects a receiver of public money to the payment of interest thereon, if he "shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his account." Act of March 3, 1797, § 1 (1 U. S. Stat. at Large, 512). The imposition of interest is made by the statute dependent on the refusal of the delinquent to pay into the treasury the sum or balance reported to be due. Upon the finding of the jury by their special verdict, the sum or balance reported to be due in the five different adjustments and statements of the defendant's account, was, in no instance, due; and this verdict relieves the defendant from the obligation to pay into the treasury either sum or balance reported to be due by him. It would be oppressive to exact a deposit of \$791,065.31 in the treasury by the defendant, at the risk of his being subjected to the payment of interest upon any balance which might chance to be reserved out of a vastly surcharged account, during the indefinite period in which the subject might be kept in litigation.

§ 456. *Interest is chargeable against wilful defaulters.*

There is strong reason for understanding the provisions of the act as being directed against wilful defaulters, whose delinquency is made clear. Interest in the nature of a penal infliction may then be carried into the account and enforced against them. This is not the position in which the defendant is placed by the proofs. There was no delinquency on his part in bringing his accounts to an adjustment. The evidence is full to show that his accounts and vouchers were promptly transmitted by him to the treasury department, and that the department was beset by himself personally, by his agents, and by correspondence, from the date of his return from California, with importunate

urgency, to bring his accounts to an adjustment. The impediment to the completion of the accountings was in no respect with him. The fluctuations of balances in the successive statements, descending and ascending, between \$791,065.31 and \$181,797, and finally resting at \$216,712.43, upon which he paid into the treasury \$8,110.29 more than is found to be due to the United States, resulted from the varying views, among the accounting officers, of the proofs, which, from the beginning, had been one and the same before them. We do not wish to be understood as saying that, if the suit had been brought upon the statement of March 7, 1853, a jury might not, in passing upon the rights of parties embraced in a complicated and indeterminate state of accounts, have awarded interest on the sum paid in September, 1853, and which was found sufficient to extinguish the debt. But, in our judgment, the treasury statement so made up is not to be accepted as a liquidated adjustment; fixing an indebtedness upon the defendant, and stands in law, when in contestation, and found to be grossly erroneous, no more privileged to claim interest than running demands between parties, consisting of moneys advanced on one side and disbursements and services upon the other. We consider the accounts as open and running, in effect, until the plaintiffs and the defendant accepted the one of the 7th of March, 1853, made up during the pendency of the action, as that upon which the rights of the party were to be determined. This charge was fully satisfied and extinguished by payment, and, had it included a charge of interest, we should have considered the plaintiffs entitled to interest, from the time the balance was ascertained until its discharge. As the account contained no such charge, and no undertaking of the defendant to pay interest is proved, we place the demand on the same ground of an unliquidated account, which it previously held.

To have our conclusions distinctly apprehended, it is proper to observe that the plaintiffs gave in evidence, in support of their action, no other adjusted statement of the defendant's accounts than the one first made up, that of June, 7, 1851, and that the subsequent statements were given in evidence by the defendant.

OGDEN v. MAXWELL.

(Circuit Court for New York: 3 Blatchford, 819-824. 1855.)

STATEMENT OF FACTS.—Action by owners of a vessel to recover back illegal fees exacted by the collector of the port for landing passengers and their baggage. One permit only was issued for all the passengers, but fees were required to be paid at the rate of twenty cents for every five passengers. The money was paid without any written protest being made. There was a verdict for the plaintiff subject to the opinion of the court on a case stated.

§ 457. *A collector is liable for fees illegally exacted although he has paid them over to the government.*

Opinion by BETTS, J.

An objection is raised by the defendant, preliminarily, to the action, or rather to his personal liability, on the ground that he acted, in the matter in question, as the agent of the government, and had paid into the treasury the moneys demanded, before suit was brought. This objection was not supported by any proof; and, although the court will judicially notice that by the act of March 3, 1841 (5 U. S. Stat. at Large, 432, § 5), the defendant is entitled to retain, for his own compensation, from the fees and emoluments received in his office, no more than the sum of \$6,000 *per annum*, and that all sums beyond that are to

be accounted for and paid into the treasury, yet we cannot assume, without evidence, either that the total of his receipts from those sources exceeded that limitation in the year 1851 or the year 1852, or that the particular sums paid by the plaintiffs and sued for in this action did not constitute a part of the emolument retained by the defendant for his individual use. We are, however, inclined to the opinion, for reasons hereafter to be stated, that if those suggestions had been established by the proofs, they would have furnished no adequate defense to the action.

§ 458. *Under the act of March 3, 1799 (1 Stat. at Large, 706), a collector is not authorized to charge fees for constructive permits to land goods.*

The right of the collector to charge and collect the fees in question is justified by the defense, both upon an implied authorization by the second section of the act of congress of March 3, 1799 (1 U. S. Stat. at Large, 706), and also under a long continued usage and practice in the collector's office of this port, in executing that act in this particular. That section enacts that, "in lieu of the fees and emoluments heretofore established, there shall be allowed and paid for the use of the collectors, naval officers and surveyors appointed and to be appointed in pursuance of law, the fees following, that is to say: "to each collector, . . . for every permit to land goods, twenty cents." Section 46 of another act passed the same day (Id., 661, 662), appoints the manner in which the baggage and mechanical implements imported by passengers shall be entered, and directs that, on compliance with the conditions prescribed, "a permit shall and may be granted for landing the said articles."

The transactions at a collector's office, which are made subject to charges or fees, are enumerated in the statute, and the compensation to be collected for each act done by him is specifically stated. In the levy of these emoluments he is governed by the limitations no less than by the express directions of the statute. No equity or usage in respect to these rates of compensation can be appealed to, as a sanction for a departure from the terms of the act. It does not admit of question that a charge of \$61.40 would be illegal and extortionate, if no more than the personal baggage and implements of trade of two passengers were to be entered and landed as such, under two permits given by a collector, whatever might be the number or value of those articles. This would be so, because congress has required a definite service to be done by the collector, and has granted, for the performance of that service, a specific compensation. The statute gives no reward except for doing the individual act named; and no consideration of convenience to either or both of the parties, or saving of expense, by substituting another practice in place of that directed by law, will authorize a collector, *colore officii*, to charge and receive compensation for a service differing from that appointed by positive law.

§ 459. *Where fees are fixed by law no greater sum can be exacted by officers of the government. It can be recovered back, and if corruptly taken is extortion, and indictable.*

Numerous adjudications in the courts of the United States in this district have declared that, when a rate of fees to an officer of court is established by statute for a particular service, it is illegal in the officer to charge or accept a greater fee for that service. The rule is equally stringent in the state courts. An action of *assumpsit* will lie by the party making payment, against the officer, to recover back the overcharge. *McIntyre v. Trumbull*, 7 Johns., 35. And, if the act be done corruptly, it is extortion, and subjects the officer to indictment. *The People v. Whaley*, 6 Cowen, 661.

The custom or usage alleged to prevail at this port, to make constructive charges for granting permits, whatever may be its notoriety or continuance, is void, both because it contravenes the spirit of the statute, and also because there is no warrant of law, except under the statute, for imposing any charge or fee for that official act. The defendant would, without the aid of the statute, be guilty of extortion in levying fees of any kind for his official services.

§ 460. *Collectors are responsible for the illegal acts of their deputies in exacting illegal fees. Cases cited.*

The high character of the collector takes away every color of suspicion that, in these cases, he was actuated by any wrongful motives. He administered the office as he found his predecessors had done, and most probably these special details of duty were performed by his assistants, and his assent thereto, if ever given, was merely formal. The principle, however, is not affected, if these presumptions are admitted as facts. The collector is personally liable for the illegal acts of his deputy, in exacting a compensation not authorized by law. *McIntyre v. Trumbull*, 7 Johns., 35. And it is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected, that any turpitude should be proved against the officer. The suit in no way rests on any illegal purpose of the defendant in exacting the payment. It is well sustained, if his official power was exercised in the collection, without warrant of law. *Maxwell v. Griswold*, 10 How., 242. The payment was compulsorily obtained from the plaintiffs in this instance, and they are entitled to charge the collector with the amount, notwithstanding he received it for and paid it to the government. *Ripley v. Gelston*, 9 Johns., 201. Any charges or costs illegally exacted by an officer *colore officii* may be recovered back from him by the common law action of *indebitatus assumpsit*. *Clinton v. Strong*, 9 Johns., 370.

We do not consider the objection that the action should be in the names of the individual passengers, and not in that of the ship-owners, as sustainable. In the absence of proof upon this point, the implication would be, that the passage money was all that the ship-owners could claim from passengers for their transportation to and delivery at the port of discharge. This presumption is fortified by the fact that the owners assumed the satisfaction of these demands, and also that the defendant exacted payment from them. The demands must, therefore, be regarded as charges which the owners were bound to satisfy, as a condition to the unloading of the ship. If the demands were exacted illegally, the owners would have no remedy for them against the passengers, even if the passengers were bound to pay all proper port charges here.

We do not think that the act of February 26, 1845 (5 U. S. Stat. at Large, 727), applies to exactions of this character. The terms of that act, requiring notice in writing to be given to the collector of objections made to payments exacted by him, are expressly confined to duties paid. In all other respects, the parties stand upon their common law rights and liabilities; and, under those, the action in this case well lies, although the fees collected by the defendant were paid into the treasury before suit was brought. *Ripley v. Gelston*, *ubi supra*.

In our opinion, the collector has no authority to charge for any other permits than those actually issued, at twenty cents for each permit. In the present case, he has demanded and received payment for three hundred and seven permits, amounting to \$61.40, when by law he was authorized to collect

566), are drawn up in view of the same import of a general grant of fees. The second section grants to various collectors \$1,000 each per annum, with an additional maximum compensation of \$2,000 each per annum, should their emoluments and fees provided by existing laws amount to that sum; and allows to various surveyors, in addition to the fees authorized by existing laws, a compensation of \$1,000 each per annum. The third section directs the appointment of several surveyors, whose compensations, in addition to the fees authorized by existing laws, shall not exceed \$1,000 each per annum.

This course of enactments at periods before, and after, and concurrently with the act in question, denotes, in our judgment, that congress contemplated that a grant of fees, emoluments or commissions in positive terms was free from the limitations and restrictions of the acts of 1822 and 1841, unless brought within those qualifications by other plain provisions in the law. We also think that the joint resolution of congress adopted February 14, 1850 (9 U. S. Stat. at Large, 560), if it has a bearing upon this case, is declaratory of the understanding of congress that the act of March 3, 1849, would be executed in that sense at the treasury.

§ 449. *Rule as to implied repeal of statute by subsequent statute.*

The act of March 3, 1849, being the last statute applicable to the case of the defendant, we consider it to be the expression of the legislative will as to the amount and mode of the defendant's compensation in that service, and are of opinion that it is to be carried into effect conformably with its terms.

It is insisted, for the plaintiffs, that that act was superseded by the act of September 28, 1850, and that the defendant can claim for his services thereafter, until the time he was displaced in 1851, no compensation that is not authorized by the last-mentioned statute. The position is not taken, in terms, that the prior act is abrogated by the later one, but such is the legal import of the objection; and, no doubt, on general principles, the last enactment goes into immediate operation and thus annuls and repeals all preceding ones inconsistent with it. *Matthews v. Zane*, 7 Wheat., 164; 1 Kent's Comm., 7th ed., 455.

It might, perhaps, be an open question, as respects third persons, whether the defendant could perform any official acts after the passage of the last-mentioned act or maintain a claim at law for his compensation. But we do not think that the plaintiffs in this action can avail themselves of that objection; and we are not called upon to consider what effect that act may have upon the rights of other parties than the United States in their claims upon or dealings with the defendant. The plaintiffs, in adjusting his accounts at the treasury and also in this action, proceed upon the assumption that he was clothed with the authority and responsibility of collector in respect to the government, so long as he continued to act in that capacity, without notice that his authority was rescinded. In exacting from him, up to that period, the services and responsibilities of collector, under the law authorizing his appointment, the plaintiffs must be held chargeable to him for all the rights and recompenses secured to him by that law until he became apprised that his powers had ceased. The plaintiffs, by adopting the acts of the defendant between September 28, 1850, and January 14, 1851, as official and as within his legal competency, have sanctioned them and rendered them valid, in so far as the claims arising therefrom in favor of the defendant and against the United States are concerned. In that point of view it may probably be deemed that the first organization of the collection districts in California, and the appoint-

ment of the defendant as collector, remained in force until the act of September 28, 1850, was put into execution. The act of March 3, 1849, extended the revenue laws of the United States over the territory of Upper California. The object and effect of that law have not been abrogated or suspended by express legislation; and it is not to be presumed that an interregnum in the administration of it was contemplated by congress in the enactment of the act of 1850—otherwise there must have been a period in which no law for the imposition and collection of duties in that territory or state existed. The reasonable intendment would probably be that the existing law was to remain in force until the new system or authority was put into operation in its place; and, in our opinion, the case of *Cross v. Harrison*, 16 How., 164, recognizes and applies a like principle to facts essentially analogous to that feature of the present case. But, whether this be so or not, we think that, in a transaction between the government and the collector, touching the adjustment of his accounts, the plaintiffs, by continuing an account with him as an officer duly acting under the law of 1849, have ratified those acts, and are concluded from denying his claim for a proper compensation therefor; and that the provisions of that act, being the one under which his services were rendered, afford a certain and appropriate measure of that compensation.

It is to be observed that the act of September 28, 1850, makes no different provision for the compensation of services rendered under the act of March 3, 1849, and cannot, accordingly, be construed as withdrawing the former provision, and substituting a new one for the compensation of those services. If it be apposite to the subject, it takes away all allowances in that respect, for it transmutes the single collection district created by the act of 1849 into six districts, each having all the officers and authority of an independent collection district, to each collector in which is appointed a specific compensation. There is no language in the act of 1850 indicating that any one of those allowances affords a rule for determining the pay to which the defendant would be entitled for performing duties over the entire state; and, if the provisions of that act were in any way applicable to this case, the reason of the thing would seem to require that the whole amount allotted to the six collectors for the same territory over which the authority of the defendant was exercised, should be allowed to him, rather than either of the separate sums designated. We do not, however, propose to discuss this point, because we place our decision on one of a broader bearing, and which renders this special topic unimportant.

The defendant was placed in charge of an important service, in a remote section of the Union, and where notice of the cessation of his office was not and probably could not be made known to him before January 14, 1851. A public necessity accordingly existed for the continuance of his functions up to that period. In performing those duties, he received and disbursed moneys, and charged and credited them to the plaintiffs in the capacity of collector. The treasury continued its accounts with him in that character. It not only debited him as collector with receipts, and credited him officially with payments, until January 14, 1851, but it carried forward the accountings in that character until September 22, 1853, when the final balance was struck against him for his official indebtedment. This action is prosecuted to recover from him moneys collected officially and retained by him to cover credits which he claims in his character of collector; and the plaintiffs, under the facts, might be held, after so dealing with him, to be concluded from denying that he was collector *de facto* and *de jure*, under the act of 1849, until the time when his

office was transferred to a new officer, on the 14th of January, 1851, and that he is entitled to compensation until that period conformably with the provisions of the act of March 3, 1849. The plaintiffs establish no legal title to the moneys demanded, except in subserviency to that principle. The treasury transcript would be nugatory as to all doings of the defendant out of office, and could afford no foundation for the recovery of a debt incurred by him after the passage of the act of September 28, 1850. The full rights of either party cannot be adjusted in this action on any footing other than the assumption that the act of 1849 virtually governed the entire transactions until that of 1850 was put in actual operation.

We think, accordingly, that the defendant is entitled, on legal considerations, to retain from the various moneys in his hands as collector, the full compensation granted to him by the act of 1849. And it matters not, to the just determination of this cause, whether the decision be placed upon the ground that that act remained in force to this end, as between these parties, or whether a proportionate part of the salary of \$1,500, together with the fees and commissions which accrued between September 28, 1850, and January 14, 1851, be adopted as measuring the *quantum meruit* of his services. We accordingly decide that the defendant is entitled to be credited on his accounting with the treasury department with his salary at the rate of \$1,500 per annum, and with the fees and commissions allowed by law during the whole period in which he continued to perform the duties of collector in California; and we direct the special verdict to be entered accordingly.

We proceed to dispose of the questions of law arising under the following finding of the special verdict: "And the jury further find, that the said James Collier, as such collector as aforesaid, during his said official term of service, seized, as forfeited to the United States, certain liquors imported into the district of Upper California contrary to the revenue laws of the United States under such circumstances; and that unless the want of a judicial proceeding to ascertain and enforce such forfeiture, or the circumstances herein or in the case to be stated, shall be deemed an impediment to such right, he, the said James Collier, by virtue of the ninety-first section of the act to regulate the collection of duties on imports and tonnage of 1790, would be entitled, as such collector, to one moiety of the said forfeitures. The jury further find, that it being impracticable, without an expenditure which would have consumed the whole value thereof in costs, to institute any regular judicial proceedings touching such forfeitures, the said James Collier caused the said seized liquors to be sold; that the proceeds of such sales were \$94,704.66; that the costs and expenses of storing, preserving and selling said liquors amounted to \$24,873.80; and that the net proceeds of said forfeited goods, which came to the hands of said James Collier, amounted to \$69,830.86, of which the said James Collier claims the one-half, being the said sum of \$34,915.43. And, whether the said James Collier is accountable to the United States for all or any part of the proceeds of said liquors, or whether he is entitled to a credit as collector for the one moiety or half part thereof, being the last-mentioned sum, is submitted to the court. In each of such seizures, the said James Collier obtained from some owner, or from the carrier, master, or consignee, or other most accessible person, acting as agent for the owner in the importation of said liquors, or having the charge and custody thereof for the owner, a certificate, consent or abandonment, similar in character to the certificates of abandonment which are inserted in the case as having been given in evidence on the trial. He gave

credit to the United States, in his periodical official returns to the treasury, for the gross sums so received on such sales, charged the said costs and expenses and returned the appropriate vouchers to the treasury department, which returns were received without objection by the treasury department, from time to time during his entire official term; and he claims to be entitled to retain to his own use a moiety of the said net proceeds. After the commencement of this suit, the secretary of the treasury, assuming to act under the first branch of the fourth section of the act first above in this finding referred to, received applications on behalf of persons claiming to be owners of the said seized liquors, for remission of the said forfeitures, and made allowances to them, not as and for the proceeds of said sales, but as and for the cost or value of such liquors before their importation. A schedule of such allowances, with a statement of the amounts awarded or allowed as aforesaid, and of the amount paid out of the treasury of the United States under such allowances, and of the amounts remaining to be paid on demand and exhibition of power to receive the same, was given in evidence, is to be inserted in the case, and is to be deemed a part of this verdict."

We do not enter into the question whether, in the condition of things and under the exigencies stated in the special verdict at the time those moneys were received and paid into the treasury by the defendant, his proceedings constituted a legal forfeiture and disposal of the liquors seized and sold, or of their proceeds, as against the lawful owners. The precise question presented by the special verdict legitimately extends only to the inquiry whether the United States have a right or title to the moiety thereof retained by the defendant, which enables them to collect from him or control that moiety. The special verdict presents considerations sufficiently direct and weighty to show that the official conduct of the defendant in the course taken by him in respect to those liquors was based upon intentions to subserve the rights and interests both of the United States and of the owners of the property, and to exonerate him from all charge of a wanton misapplication of his powers and authority; and it shows, moreover, that the treasury adopted and ratified, so far as it was competent for that department to do so, the acts of the defendant in that behalf. In this posture of the case, it is not easy to produce any rule of law or equity which will enable the plaintiffs to disavow, at an after period, their approval of those acts, and hold the defendant responsible to them for the entire avails of the property. Nor are we satisfied that the United States acquired such title to the moiety retained by the defendant as to enable them to maintain an action for its recovery against him.

We have put the decision of this point on the facts before us showing that the owners of the liquor seized, or their agents, assented to the sales by the defendant without the intervention of any court of law, and have never withdrawn or repudiated such assent, and that the treasury department, with full notice that no recourse had been had to the courts of the United States in Oregon or Louisiana, to obtain condemnation and sale of the property, received, to the use of the United States, the one-half of the proceeds of such sales, and entered the usual credits, in the accounts of the defendant, for such amount.

§ 450. *The remission of penalties or forfeitures by the treasury does not affect the moieties of collectors and others after such moieties have been received for distribution. Cases cited.*

The proceeding by the secretary of the treasury to restore those proceeds to

the owners of the liquors, after this suit was commenced, could not divest the right and title of the defendant to the one moiety which had been for a long period in his actual possession, and was received, as between him and the plaintiffs, in a manner tantamount to that of a formal distribution of the proceeds after condemnation by order of court. The authority of the secretary of the treasury to remit forfeitures under the revenue laws has been determined to embrace also the interests of the officers entitled to share in the forfeitures; and such authority to remit may be exercised after judgment of condemnation. *United States v. Morris*, 10 Wheat., 246; S. C., 1 Paine, 209. But the power ceases after the share of the forfeiture is received by the collector for distribution among his co-officers. *Ibid.* As the collector, in this instance, acted without the co-operation of a naval officer or surveyor, the entire moiety received by him was his legal share of the forfeiture, and is in his hands, with the same right on his part to the whole of it that he would have possessed to his aliquot part of it, if it had been required by law to be divided between him and other officers. In our opinion, therefore, if the award of these moneys by the secretary of the treasury to the owners of the liquors seized had been strictly in the form of a remission, under the authority of the first section of the act of March 3, 1797 (1 U. S. Stat. at Large, 506), it would be inoperative and void as to the defendant, after the moneys had publicly gone into his hands, and were held as his own property. *The Hollen and Cargo*, 1 Mason, 431.

The same principles would apply if the secretary of the treasury had acted under the fourth section of the act of September 28, 1850, and had directed the technical remission of the forfeitures; and this without respect to any question as to whether, the seizure and confiscation having been anterior to the passage of that act, it was not necessary, under the proviso to that section, to show the seizure to have been improper on the part of the collector.

Nor does it seem to us that a mere order of restoration of the proceeds of those forfeitures to the former owners, at the discretion of the secretary, without the concurrence of the defendant, or notice to him that such an order was applied for or was intended to be made, can be regarded as a remission, within the provisions either of the act of March 3, 1797, or that of September 28, 1850.

We are of opinion, accordingly, that the defendant is entitled to retain the sum of \$34,915.43, being the moiety of such proceeds, and to receive credit for the same in his accounts.

§ 451. *Where forfeitures are represented by bonds transmitted to the treasury, returned to the collector and not collected by him, the collector is not entitled to any moiety in case such forfeiture was remitted.*

The claim of the defendant to a credit of \$12,300, being the one-half of the amount of bonds received by him for certain vessels and goods seized as forfeited, was disallowed by the treasury department. The special verdict as to that claim finds "that the sum purporting to be secured by three certain bonds to the United States, set forth with the evidence in this case, taken by the said James Collier for seized vessels or goods delivered up, and which are in evidence, being the vessels or the cargoes of the *Ocean*, *Callooney* and *Lallah*, was \$24,600; that the said bonds were returned by him, said James Collier, on leaving office, into the treasury department of the United States, and have not been collected, nor have any proceedings been had or attempted by the treasury department for the purpose of collecting the same; and they

further find, that if the said last-mentioned sum had been collected and received, the said James Collier would have been entitled to the sum of \$12,300, being the one-half part of the amount of the said bonds; and the said James Collier claims a credit for that amount in his accounts, the same having been disallowed."

In our opinion the defendant is not entitled to have those bonds regarded as money actually paid into the treasury. They were not accepted by the treasury in satisfaction of the value of the property forfeited, so as to raise an equitable credit, on that footing, in favor of the defendant. He received the bonds and transmitted them to the treasury department, to be dealt with there under their authority and not under his; and, even a laches by the government, if one may be imputed to it, in not enforcing the bonds, would not authorize him to treat those securities as so much money received by the treasury. He gives no evidence that the obligors are or were responsible sureties for the amount, nor that he demanded any action on the part of the government to enforce payment of the bonds. No higher right to the value of the bonds can be claimed by the defendant than he would have possessed to the vessels or merchandise which they represent had such property been detained, by order of the treasury department, under arrest and without adjudication; and it is plain that the collector's right to a share in seized property applies only to the proceeds obtained from its condemnation and sale, and in no way attaches to the property itself. There is no evidence before the court authorizing it to act upon those securities as money proceeds of the seized property. We are therefore of opinion, upon the finding of the jury, that this claim was properly disallowed by the department.

The special verdict finds "that of the moneys so received by the said James Collier, \$28,000 was received for the additional duties of twenty *per centum ad valorem*, prescribed to be levied, collected and paid, by the eighth section of the act reducing the duty on imports and for other purposes, passed July 30, 1846, one-half of which sum the said James Collier claims as a credit in his accounts, the same having been disallowed." We consider the case of *Ring v. Maxwell*, 17 How., 147, as determining that the sum so demanded by the defendant did not accrue from fines or penalties, but was composed of duties chargeable by law on the merchandise imported. Accordingly, the defendant has no legal claim to that sum.

The special verdict finds that "the said James Collier, in rendering his said periodical accounts, charged himself, as a part of a larger amount, with the sum of \$8,110.29 received to the use of the United States by the deputy collector at Monterey, which forms a part of the debits so claimed against him by the United States in the several stated accounts. The said sum was stolen from the said deputy collector without neglect or default on his part, or on the part of the said James Collier, and the said James Collier, in the same account in which he returned the said last-mentioned sum as a charge against himself, claimed a credit *per contra*, against the United States, for the last-named sum thus stolen."

§ 452. *What is the legal relation between a collector and a deputy collector.*

The deputy collector at Monterey was not made subject to the removal or control of the collector of the district. The collector had no other connection with his appointment than that of proposing him to the secretary of the treasury for his approbation; and the fourth section of the act of March 3, 1849, secures to the deputy a compensation independent of the collector, and

gives to him, in his section of the district, the same standing, in respect to fees and commissions, as the collector had at San Francisco. This would rather render the deputy collectors in California agents of the government than of the collector personally. Whether this be so or not, the legal relation between public officers and their sworn assistants, even when they are acting directly in connection, is generally not that of master and servant, or principal and agent; and the liability of the official superior for defaults of his assistants arises only in case of his own misconduct or neglect. *Dunlop v. Munroe*, 7 Cranch, 242; *Story on Agency*, §§ 321, 322; *Bailey v. The Mayor*, etc., of New York, 3 Hill, 531; *Wiggins v. Hathaway*, 6 Barb., 632.

§ 453. *When officials are exonerated from liability for money stolen from them. Cases cited.*

Even if the defendant stands in law responsible for the conduct and liabilities of the deputy at Monterey, and is to be regarded as the holder, for the benefit of the United States, of the funds purloined, still, it being found, by the verdict of the jury, that the money was stolen, the defendant, upon well-established principles of equity law, would be exonerated from all liability for them. *Spence's Eq. Juris.*, 437, and cases there cited.

In an action by the United States against a disbursing officer or agent or other individual, for the recovery of moneys claimed of him, the defendant is entitled, on the trial, to the allowance of all equitable demands of his against the United States, if the same have been submitted to the proper accounting officers of the government and disallowed by them. *Act of March 3, 1797* (1 U. S. Stat. at Large, 515, § 4); *United States v. Wilkins*, 6 Wheat., 135; *United States v. Jones*, 8 Pet., 375; *United States v. Robeson*, 9 Pet., 319; *United States v. Hawkins*, 10 Pet., 125.

On the finding of the jury, the charge in question must be rejected from the account against the defendant. On a careful consideration of the whole case we shall order judgment to be entered therein to the following purport:

1. The defendant is entitled, under the fourth section of the act of March 3, 1849, to a credit, as compensation for his services as collector, to \$1,500 per annum, and the fees and commissions allowed by law, without limitation or restriction, from the date of his appointment under the said act, and during the continuance of his services as such collector, down to the 14th of January, 1851, when he surrendered the custom-house to T. Butler King, who then appeared and took possession of the same, and entered upon the discharge of the duties of his office as collector under the act of September 28, 1850, which organized the territory of California into six collection districts, and provided for the appointment of a collector in each district.

2. The defendant is not entitled to a credit for a moiety of the \$28,000 received as additional duties of twenty *per cent. ad valorem*, under the eighth section of the tariff act of July 30, 1846.

3. The defendant is not entitled to a credit for a moiety of the \$24,600 secured by bonds given upon the release of vessels seized for a violation of the revenue laws.

4. The defendant is not liable for the \$8,110.29 charged against him, which was received by the deputy collector at Monterey, and which was stolen from him without default on his part or that of the collector.

5. The question of interest is reserved until the account is stated between the government and the defendant conformably to the principles here settled.

Afterwards the case was heard upon the reserved question of interest.

Opinion by BETTS, J.

We are of opinion that no interest be allowed to either party, and that a balance of \$8,110.29, as due to the defendant, be certified in favor of the defendant against the United States, according to the terms of the special verdict.

In the argument before the court in support of the claim to interest, the counsel for the United States conceded that, according to the principles laid down in the opinion of the court on the case at large, the defendant had overpaid the government, unless he was chargeable with interest. The proposition maintained for the plaintiffs is, that the account should, under the decision of the court, be stated as follows:

Balance, as computed without interest, in the account made up on the 7th of March, 1853.....	\$216,712 43
Deduct, by order of the court:	
One-half of net proceeds of seized liquors.....	\$84,915 48
Commissions.....	63,250 95
Money stolen at Monterey.....	8,110 29
	<hr/>
	106,276 67
	<hr/>
	\$110,435 76
Interest on this sum from January 14, 1851, to 16th September, 1853, at six per cent.....	17,721 88
	<hr/>
	\$128,157 64
Deduct payment, 16th September, 1853.....	118,546 05
	<hr/>
Balance	<u>\$9,611 59</u>

It is admitted that, applying the payment of \$118,546.05 to the account, the debit side, independent of interest, is satisfied, with a balance over in favor of the defendant; but it is contended that the balance of interest remaining unpaid forms, from the time of such payment, a new capital, on which interest should be computed to the time of the judgment. On that hypothesis, the plaintiffs claim to be entitled to judgment for \$9,611.59.

The jury find "that five several statements of the defendant's account were made up by the treasury department, and that the balance stated as due from the defendant to the United States in each of said five accounts was not due, a less amount, if anything, being in fact due, and that none of the said accounts, except the last, contained any claim for interest, and, in the last of said accounts, interest was claimed as therein stated." The last statement there referred to was made up September 22, 1853. This action was commenced in May, 1852, upon the indebtedness charged in the account stated June 7, 1851.

§ 454. *The treasury department acts in a judicial capacity in determining the charges to which an officer is liable. Its decision, when final.*

It is at best questionable whether the comptroller had any authority to restate and augment the debit side of the account, at any time after the first statement had been adopted and repeated in the subsequent treasury statements of September and December, 1851, and March, 1853. *Ex parte* Randolph, 2 Brock., 447, 473; *United States v. Kuhn*, 4 Cr. C. C., 401. More particularly would the right of accounting officers to change the treasury statement, by adding a claim of interest, after a payment had been received from the defendant which overpaid the principal really due upon the account as it

stood when the payment was made, be open to exception; for it is the addition of interest to the demand after the 16th of September, 1853, when the defendant paid into the treasury \$118,546.05, which produces the balance of \$9,611.59, claimed to be due on the statement of September 22, 1853. The technical objection to varying the account is, that it creates a new cause of action after suit brought; but one more vital to it on the merits is, that the treasury department acts in a judicial capacity in determining the charges to which the defendant is subject, and is not competent to vary that adjudication subsequently, to his prejudice. The decision of the department, within the rules prescribed for the exercise of its powers, is, in effect, final. *United States v. Jones*, 8 Pet., 375. We think, therefore, that the plaintiffs are not entitled to set up a charge of interest made in the restatement of the defendant's account on the 22d of September, 1853, and to renew that charge in this action.

§ 455. *Statutory provisions as to liability of officers for interest.*

But if this objection is disregarded, and the right to interest is placed upon the footing that the defendant is liable, under the direct provisions of the first section of the act of March 3, 1797 (1 U. S. Stat. at Large, 512), for the settlement of accounts between the United States and receivers of public money; or on the general principle of law, that a running account is to be deemed liquidated, so as to form a basis of liability for interest, from the time of its adjustment and statement at the treasury; or on the ground that a trustee is chargeable with interest on all sums in his hands, from the time they are received until they are paid over or applied to the use of the *cestui que trust*,—the plaintiffs, in our opinion, fail to bring this case within the purview of either of those principles.

The statute subjects a receiver of public money to the payment of interest thereon, if he "shall neglect or refuse to pay into the treasury the sum or balance reported to be due to the United States upon the adjustment of his account." Act of March 3, 1797, § 1 (1 U. S. Stat. at Large, 512). The imposition of interest is made by the statute dependent on the refusal of the delinquent to pay into the treasury the sum or balance reported to be due. Upon the finding of the jury by their special verdict, the sum or balance reported to be due in the five different adjustments and statements of the defendant's account, was, in no instance, due; and this verdict relieves the defendant from the obligation to pay into the treasury either sum or balance reported to be due by him. It would be oppressive to exact a deposit of \$791,065.31 in the treasury by the defendant, at the risk of his being subjected to the payment of interest upon any balance which might chance to be reserved out of a vastly surcharged account, during the indefinite period in which the subject might be kept in litigation.

§ 456. *Interest is chargeable against wilful defaulters.*

There is strong reason for understanding the provisions of the act as being directed against wilful defaulters, whose delinquency is made clear. Interest in the nature of a penal infliction may then be carried into the account and enforced against them. This is not the position in which the defendant is placed by the proofs. There was no delinquency on his part in bringing his accounts to an adjustment. The evidence is full to show that his accounts and vouchers were promptly transmitted by him to the treasury department, and that the department was beset by himself personally, by his agents, and by correspondence, from the date of his return from California, with importunate

urgency, to bring his accounts to an adjustment. The impediment to the completion of the accountings was in no respect with him. The fluctuations of balances in the successive statements, descending and ascending, between \$791,065.31 and \$181,797, and finally resting at \$216,712.43, upon which he paid into the treasury \$8,110.29 more than is found to be due to the United States, resulted from the varying views, among the accounting officers, of the proofs, which, from the beginning, had been one and the same before them. We do not wish to be understood as saying that, if the suit had been brought upon the statement of March 7, 1853, a jury might not, in passing upon the rights of parties embraced in a complicated and indeterminate state of accounts, have awarded interest on the sum paid in September, 1853, and which was found sufficient to extinguish the debt. But, in our judgment, the treasury statement so made up is not to be accepted as a liquidated adjustment, fixing an indebtedness upon the defendant, and stands in law, when in contestation, and found to be grossly erroneous, no more privileged to claim interest than running demands between parties, consisting of moneys advanced on one side and disbursements and services upon the other. We consider the accounts as open and running, in effect, until the plaintiffs and the defendant accepted the one of the 7th of March, 1853, made up during the pendency of the action, as that upon which the rights of the party were to be determined. This charge was fully satisfied and extinguished by payment, and, had it included a charge of interest, we should have considered the plaintiffs entitled to interest, from the time the balance was ascertained until its discharge. As the account contained no such charge, and no undertaking of the defendant to pay interest is proved, we place the demand on the same ground of an unliquidated account, which it previously held.

To have our conclusions distinctly apprehended, it is proper to observe that the plaintiffs gave in evidence, in support of their action, no other adjusted statement of the defendant's accounts than the one first made up, that of June, 7, 1851, and that the subsequent statements were given in evidence by the defendant.

OGDEN v. MAXWELL.

(Circuit Court for New York: 3 Blatchford, 319-324. 1855.)

STATEMENT OF FACTS.—Action by owners of a vessel to recover back illegal fees exacted by the collector of the port for landing passengers and their baggage. One permit only was issued for all the passengers, but fees were required to be paid at the rate of twenty cents for every five passengers. The money was paid without any written protest being made. There was a verdict for the plaintiff subject to the opinion of the court on a case stated.

§ 457. *A collector is liable for fees illegally exacted although he has paid them over to the government.*

Opinion by BETTS, J.

An objection is raised by the defendant, preliminarily, to the action, or rather to his personal liability, on the ground that he acted, in the matter in question, as the agent of the government, and had paid into the treasury the moneys demanded, before suit was brought. This objection was not supported by any proof; and, although the court will judicially notice that by the act of March 3, 1841 (5 U. S. Stat. at Large, 432, § 5), the defendant is entitled to retain, for his own compensation, from the fees and emoluments received in his office, no more than the sum of \$6,000 *per annum*, and that all sums beyond that are to

be accounted for and paid into the treasury, yet we cannot assume, without evidence, either that the total of his receipts from those sources exceeded that limitation in the year 1851 or the year 1852, or that the particular sums paid by the plaintiffs and sued for in this action did not constitute a part of the emolument retained by the defendant for his individual use. We are, however, inclined to the opinion, for reasons hereafter to be stated, that if those suggestions had been established by the proofs, they would have furnished no adequate defense to the action.

§ 458. *Under the act of March 3, 1799 (1 Stat. at Large, 706), a collector is not authorized to charge fees for constructive permits to land goods.*

The right of the collector to charge and collect the fees in question is justified by the defense, both upon an implied authorization by the second section of the act of congress of March 3, 1799 (1 U. S. Stat. at Large, 706), and also under a long continued usage and practice in the collector's office of this port, in executing that act in this particular. That section enacts that, "in lieu of the fees and emoluments heretofore established, there shall be allowed and paid for the use of the collectors, naval officers and surveyors appointed and to be appointed in pursuance of law, the fees following; that is to say: "to each collector, . . . for every permit to land goods, twenty cents." Section 46 of another act passed the same day (Id., 661, 662), appoints the manner in which the baggage and mechanical implements imported by passengers shall be entered, and directs that, on compliance with the conditions prescribed, "a permit shall and may be granted for landing the said articles."

The transactions at a collector's office, which are made subject to charges or fees, are enumerated in the statute, and the compensation to be collected for each act done by him is specifically stated. In the levy of these emoluments he is governed by the limitations no less than by the express directions of the statute. No equity or usage in respect to these rates of compensation can be appealed to, as a sanction for a departure from the terms of the act. It does not admit of question that a charge of \$61.40 would be illegal and extortionate, if no more than the personal baggage and implements of trade of two passengers were to be entered and landed as such, under two permits given by a collector, whatever might be the number or value of those articles. This would be so, because congress has required a definite service to be done by the collector, and has granted, for the performance of that service, a specific compensation. The statute gives no reward except for doing the individual act named; and no consideration of convenience to either or both of the parties, or saving of expense, by substituting another practice in place of that directed by law, will authorize a collector, *colore officii*, to charge and receive compensation for a service differing from that appointed by positive law.

§ 459. *Where fees are fixed by law no greater sum can be exacted by officers of the government. It can be recovered back, and if corruptly taken is extortion, and indictable.*

Numerous adjudications in the courts of the United States in this district have declared that, when a rate of fees to an officer of court is established by statute for a particular service, it is illegal in the officer to charge or accept a greater fee for that service. The rule is equally stringent in the state courts. An action of *assumpsit* will lie by the party making payment, against the officer, to recover back the overcharge. *McIntyre v. Trumbull*, 7 Johns., 35. And, if the act be done corruptly, it is extortion, and subjects the officer to indictment. *The People v. Whaley*, 6 Cowen, 661.

The custom or usage alleged to prevail at this port, to make constructive charges for granting permits, whatever may be its notoriety or continuance, is void, both because it contravenes the spirit of the statute, and also because there is no warrant of law, except under the statute, for imposing any charge or fee for that official act. The defendant would, without the aid of the statute, be guilty of extortion in levying fees of any kind for his official services.

§ 460. *Collectors are responsible for the illegal acts of their deputies in exacting illegal fees. Cases cited.*

The high character of the collector takes away every color of suspicion that, in these cases, he was actuated by any wrongful motives. He administered the office as he found his predecessors had done, and most probably these special details of duty were performed by his assistants, and his assent thereto, if ever given, was merely formal. The principle, however, is not affected, if these presumptions are admitted as facts. The collector is personally liable for the illegal acts of his deputy, in exacting a compensation not authorized by law. *McIntyre v. Trumbull*, 7 Johns., 35. And it is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected, that any turpitude should be proved against the officer. The suit in no way rests on any illegal purpose of the defendant in exacting the payment. It is well sustained, if his official power was exercised in the collection, without warrant of law. *Maxwell v. Griswold*, 10 How., 242. The payment was compulsorily obtained from the plaintiffs in this instance, and they are entitled to charge the collector with the amount, notwithstanding he received it for and paid it to the government. *Ripley v. Gelston*, 9 Johns., 201. Any charges or costs illegally exacted by an officer *colore officii* may be recovered back from him by the common law action of *indebitatus assumpsit*. *Clinton v. Strong*, 9 Johns., 370.

We do not consider the objection that the action should be in the names of the individual passengers, and not in that of the ship-owners, as sustainable. In the absence of proof upon this point, the implication would be, that the passage money was all that the ship-owners could claim from passengers for their transportation to and delivery at the port of discharge. This presumption is fortified by the fact that the owners assumed the satisfaction of these demands, and also that the defendant exacted payment from them. The demands must, therefore, be regarded as charges which the owners were bound to satisfy, as a condition to the unloading of the ship. If the demands were exacted illegally, the owners would have no remedy for them against the passengers, even if the passengers were bound to pay all proper port charges here.

We do not think that the act of February 26, 1845 (5 U. S. Stat. at Large, 727), applies to exactions of this character. The terms of that act, requiring notice in writing to be given to the collector of objections made to payments exacted by him, are expressly confined to duties paid. In all other respects, the parties stand upon their common law rights and liabilities; and, under those, the action in this case well lies, although the fees collected by the defendant were paid into the treasury before suit was brought. *Ripley v. Gelston*, *ubi supra*.

In our opinion, the collector has no authority to charge for any other permits than those actually issued, at twenty cents for each permit. In the present case, he has demanded and received payment for three hundred and seven permits, amounting to \$61.40, when by law he was authorized to collect

no more than forty cents, being twenty cents each for the two actually granted by him. Judgment must be entered for the plaintiffs, for the above excess, with interest.

§ 461. In general.—The collector of Ipswich was held not to be entitled to a commission on drafts drawn by him on the collector at Boston, on payment of bounties due fishermen under the act of 1813. *Andrews v. United States*,* 2 Story, 203.

§ 462. Held, that a collector is not entitled to any compensation for performing the duties of surveyor; as he is required by section 21 of the act of 1799 to perform the duties of a surveyor where there is no surveyor assigned by law for a particular port. *Ibid.*

§ 463. The office rent, clerk hire, fuel and stationery expenses of a collector are proper credits against the United States, and a failure to keep and transmit yearly accounts of such, as required by the act of 1799, will not affect his right to claim the same. *Ibid.*

§ 464. Where a collector is removed from office before the expiration of the year, he is entitled, under the act of 1822, to retain his salary of \$3,000 out of the emoluments of the office collected by him. *United States v. Pearce*,* 2 Sumn., 575.

§ 465. The moneys of the United States in the hands of United States collectors are not specifically appropriated for the payment of fees allowed to employees of the government in their collection, so as to create a lien for their payment in favor of such employees. *Champney v. Bancroft*,* 1 Story, 423.

§ 466. And it seems, if the collector does not pay the employees the fees to which they are entitled, before giving up his position, the claim remains valid against the government, and the new collector is at liberty to pay them. *Ibid.*

§ 467. The fourth section of the act of March 2, 1799, chapter 129, providing, in cases of death or resignation of collectors, for the equal division between the predecessor or his representative, and the successors of commissioners allowed by that act on moneys by them respectively received "on account of the duties arising on goods imported into the United States," furnishes an equitable rule for the equal division of such commissions between a collector who actually received the money upon bonds for duties, and his predecessor in the same office, who took such bonds but was removed from office before the receipt of the moneys thereon by virtue of the act of 1820, chapter 102, limiting his term of office to four years. *Bates v. Drury*,* 4 Mason, 118.

§ 468. Sections 73 and 74 of the act of July 28, 1868 (15 Stat., 157), substituting export bonded warehouse for internal bonded warehouses, did not change the rule of allowance of commissions to collectors of internal revenue upon taxes collected by them for articles removed from one district to a bonded warehouse in another district. *United States v. Wilcox*,* 5 Otto, 661.

§ 469. The duty of preparing and furnishing inspection certificates of distilled spirits, teas and wines, devolved by section 7 of the act of April 6, 1802, from the revenue supervisors to the collectors, is one properly related to the duties of a collector, and he is limited in his charges for such services to the charges allowed him by the statute devolving the duties upon him, and cannot charge for them as extra services. *United States v. Austin*,* 2 Cliff., 325.

§ 470. Hoyt was collector of the port of New York from March, 1838, to March, 1841. The compensation of the collector of the port of New York was derived from three sources; 1, fees allowed for certain services by the compensation act of 2d of March, 1799; 2, commissions on duties received; and 3, a share of the fines, penalties and forfeitures. By amendments to the act of 1799, April 30, 1802, and March 7, 1822, it was provided that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, shall amount to more than \$4,000, the excess shall be paid into the treasury. This provision was not to extend to fines, forfeitures and penalties. An act of 7th July, 1838 (5 Stat. at Large, 264), and "An act for the relief of Castelain and Ponvert, and for other purposes," passed 21st July, 1840, required the collector to account to the secretary of the treasury for all the fees and emoluments received by him, and limited his annual compensation, as in the act of 1822, to an amount not exceeding \$4,000. Held, that the limitation applied as well to the fees received under the act of 1799 as to the commissions or emoluments of office derived from any other source. *Hoyt v. United States*, 10 How., 109.

§ 471. Section 91 of the revenue act of 2d of March, 1799, provides that after deducting costs and expenses, all fines, penalties and forfeitures recovered by virtue of this act shall be divided as follows: One moiety shall be paid into the treasury for the use of the United States, and the other equally divided between the collector, the naval officer and the surveyor of the port. Section 89 of the same act provides that the claimant, after the seizure of the vessel and merchandise, may procure the same to be redelivered to him on the execution of a bond with sureties for the payment of the appraised value, together with the payment or security of the duties, the same as if the vessel and goods had been legally entered at the customs; if judg-

ment pass against the claimant, he shall pay into court the amount of the appraised value of the vessel and goods. The collector of the port of New York having received his share of the appraised value of the vessels and goods forfeited now claims a moiety of the duties paid by the claimants on giving bonds for the redelivery of vessels and goods seized, said vessels and goods having afterwards been condemned. *Held*, that the duties thus paid constitute no part of the forfeiture, and the claim of the collector must be rejected. *Ibid*.

§ 472. Under the act of congress of May 7, 1822, collectors of the customs receive their pay from the following sources: Fees, commissions, salaries, and penalties and forfeitures. Exclusive of the necessary expenses incident to the offices, the annual emoluments of the collectors of the seven ports enumerated in said act are limited to \$4,000 per year, those of all other collectors to \$2,500; and it seems that, even since the act of February 11, 1846, penalties and forfeitures are not included in this limit. In addition to the above, each collector is entitled, under the act of March 3, 1841, to rents and storage, not to exceed in any one year \$2,000. And those collectors whose annual compensation does not exceed \$2,500 are entitled to a commission on expenditures for marine hospitals, for revenue cutters, and for light-houses, not to exceed \$400 per annum. Compensation of Collectors of Customs,* 8 Op. Att'y Gen'l, 46.

§ 473. The collector of the port of New York entered upon the duties of his office on the 29th of March, 1838, and claimed compensation for the whole year. *Held*, that the collector could only claim compensation for that portion of the year in which he held the office. *Hoyt v. United States*, 10 How., 109.

§ 474. Collectors of the customs are required, by act of congress of 1799, to transmit to the comptroller of the treasury, within forty days after the last of December, a verified account of their expenditures for rent, fuel, stationery and clerk hire; and for failure to comply with the law a forfeiture, not exceeding \$500, is provided. *Held*, that to fail to render the account within forty days after the last of December would not subject a collector to a forfeiture of all the said expenditures, but only to a sum not exceeding \$500. *Andrews v. United States*, 2 Story, 202.

IX. CLERKS OF COURTS.

SUMMARY—*Money deposited in bank*, § 475.—*Money paid directly to parties*, § 476.—*Filing papers*, §§ 477-479.—*Entitled to pay for services according to schedule*, § 480.—*Search for judgments, etc.*, § 481.

§ 475. Money deposited in bank by order of the court is "money deposited in court" within the meaning of the act giving the clerk of the district court, in admiralty cases, one and one-quarter per cent. on "all money deposited in court." *Ex parte Prescott*, § 482.

§ 476. Under the Revised Statutes of the United States (§ 828), a clerk of the court is entitled to a commission "for receiving, keeping, and paying out money, in pursuance of any statute or order of court;" and where money was ordered to be paid into court, but was in fact paid directly to the attorneys of record of the parties entitled to receive it, it was held that the clerk was not entitled to commissions thereon. *In re Goodrich*, § 483.

§ 477. Under the provision allowing ten cents to the clerk "for filing and entering every declaration, plea, or other paper," the clerk cannot charge ten cents for each of two thousand interest coupons introduced in evidence in a suit upon certain bonds, such coupons not constituting a part of the files proper, nor directed by the court to be filed and entered as such, and marked accordingly. *Amey & Co. v. Shelby County*, § 484.

§ 478. The court intimated, however, that if there had been any need of an indorsement of "recorded and filed" on each coupon, and if the clerk had actually so indorsed them, the court would have been disposed to have allowed the claim. *Ibid*.

§ 479. Under the provision allowing the clerk, "for making any record certificate, return or report, for each folio fifteen cents," a clerk is entitled to a fee of fifteen cents for each indorsement made by order of the court on each of two thousand interest coupons sued on, the indorsement being in effect a certificate of cancellation, and within the meaning of the words "record certificate" in the provision cited. *Ibid*.

§ 480. Whenever the government requires of a clerk of the court services that come legitimately within the terms of his schedule of fees in section 828, Revised Statutes United States, whether the same be ordered by a departmental official or imposed by a statute, those services must be paid for according to that schedule. *In re Clerk's Charges*, § 485.

§ 481. Where a clerk made a claim for fees under section 828, Revised Statutes United States, which reads: "For every search for any particular mortgage, judgment or other lien, fifteen cents." it was held that an adjudication of bankruptcy is not a decree in the nature of a "lien" so as to entitle him to his fees. *Ibid*.

[NOTES.—See §§ 486-505.]

EX PARTE PRESCOTT.

(Circuit Court for New Hampshire: 2 Gallison, 145-152. 1814.)

STATEMENT OF FACTS.—A vessel and cargo were condemned as prize, and, on appeal by the claimants to the supreme court, were ordered to be sold, and the proceeds deposited in certain banks, subject to the order of the court. Sale was made accordingly, and on a confirmation of the decree the money was delivered to the prize agents. The clerk claims a commission of one and one-fourth per cent. on the proceeds.

Opinion by STORY, J.

The act of the 1st of March, 1793 (ch. 20, sec. 2), revived by the act of 28th of February, 1799 (ch. 125, sec. 3), provides that in all cases of admiralty jurisdiction, the clerk of the district court shall, among other fees, be entitled to one and one-quarter per cent. on "all money deposited in court." The single question presented for decision is, whether the proceeds of the St. Lawrence and cargo were, within the meaning of this clause, "deposited in court;" If so, then the clerk is entitled to his commission; if otherwise, then his application must be dismissed.

§ 482. *Money deposited in a bank by virtue of a decree of a court, and subject to its order, is "money deposited in court" within act of 1793, chapter 20, section 2, and the clerk is entitled to commissions on such money.*

It is argued by the counsel for the prize agents that the money in this case never was deposited in court, because it never was brought into court, nor actually or constructively in the hands or possession of the clerk; that the commissions in the statute were intended as a remuneration to the clerk for the custody of the money, and for labor and care in its receipt and payment; and therefore that the present case falls neither within the letter nor spirit of the provision.

It is highly probable, when we consider the few banks existing at the passage of this statute, that the legislature contemplated the case of an actual custody by the clerk of money deposited in court. But it by no means follows, even admitting this argument to be correct, that this was the sole or governing motive for the fees allowed him. Other important considerations might well have weighed with a wise legislature, not only to provide a sufficient salary for its ministerial officers, but also a recompense for collateral services, *pro opere et labore* in business incident to the disposal of the money of the court. Independent of the custody of money, the interlocutory orders touching its receipt, deposit and distribution, may, and in fact do, in admiralty proceedings, often involve considerable detail and responsibility. The very case before the court is a proof of it; and if the captors, instead of a payment to the general agents, or to a few private agents, had required a distribution of their individual shares separately and singly from the court, as they well might, the compensation now sought would not have been so extravagant a reward as it is now urged to be.

Be these considerations as they may, it is not by conjecture, but upon legislative intentions apparent in the statute, that the words are to be construed. Where the language of an act is plain and clear, cases are not to be excepted from the generality of the expressions, unless such exceptions are fairly implied or necessarily drawn from the purview. The statute does not speak of money coming into the hands or possession of the clerk, and to engraft such a qualification upon the language would be legislation, and not

judicial construction. "Money deposited in court" cannot mean money brought in and deposited *sedente curia*, in the actual manual possession of the court. Such a construction would be against all practice, as well as all legal reasoning. It must therefore mean money which is deposited subject to the order of the court, be it in whose actual possession it may, whether of a bank or of an officer of the court. In such a case the bank or officer acts as the mere fiduciary, or depositary of the court, and in legal contemplation the money is in the custody of the court. It would be a contempt of the court for any other person to intermeddle therewith. It is a mere substitute for the original property seized under the process of the court, and as much under its sole and exclusive direction as the property itself. It is emphatically (what all property seized under admiralty process is) in the custody of the law. In this respect it differs widely from the case of property delivered regularly and *bona fide* on bail. The latter is no longer subject to the control or custody of the court; and the parties to the stipulation are not the depositaries but the debtors of the court.

On the whole, I am of the opinion that the money in the present case was, in legal intendment, deposited in court; and consequently the clerk was and is entitled to the fees prescribed by law. This construction is, in my judgment, fully supported by the more recent acts applicable to this subject; I mean the acts of 18th of April, 1814, chapter 121 and chapter 138. It is conceded, however, by the parties, that no more than one-half per cent. can now be claimed from the prize agents, and with that the clerk is content. I shall therefore decree the money admitted to be in the hands of the prize agents to be brought into court, and paid over to the clerk.

IN RE GOODRICH.

(Circuit Court for Arkansas: 4 Dillon, 280-283. 1878.)

STATEMENT OF FACTS.—The question in this case is whether the clerk of the court is entitled to commissions on money ordered to be paid into court, but which was in fact paid directly to the parties entitled to receive it, or their attorneys of record.

§ 483. *A clerk is not entitled to commissions on money not actually paid to him.*

Opinion by DILLON, J.

"For receiving, keeping, and paying out money, in pursuance of any statute or order of court," the clerk is entitled to "one per centum on the amount so received, kept and paid." Rev. Stats., sec. 828.

The one per cent. thus allowed is for compensation to the clerk for the trouble and responsibility of actually receiving, keeping and paying out money.

On the facts submitted, I am of opinion that the clerk is not entitled to a commission on moneys which, although ordered to be, were not, in fact, paid to him under the writs of *mandamus*.

If a party adjudged to pay money, instead of paying it to the party entitled or his attorney of record, elects to pay the same to the clerk, *he* does the act which entitles the clerk to his commission for receiving, keeping and paying out the money, and he must pay the commission allowed to the clerk therefor, and the same cannot be taxed against the other party, as was held by Mr. Justice Miller in *Upton v. Triplecock*. That case, in principle, covers the case

submitted to me. The claim of the clerk is disallowed. There are no equitable circumstances presented in this case to vary the general rule.

Ordered accordingly.

AMY & CO. v. SHELBY COUNTY.

(Circuit Court for Tennessee: 1 Flippin, 104-107. 1872.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.—Two thousand coupons, being for interest on certain bonds of Shelby county, were introduced in evidence by the plaintiff, and judgment was rendered in his favor for the amount of all the coupons and interest.

The clerk charged as fees ten cents for filing each coupon — \$200; also for making certificate on each of the fact that judgment was rendered thereon, — fifteen cents — \$300; the court, for greater security against any improper use of such obligations, having ordered such certificates to be canceled.

The ex-clerk rendered the services, and the taxation was by the present clerk. From his taxation defendant appeals. By agreement the appeal is submitted to me, as the cause was tried while I was on the bench discharging the duties of the district judge of Tennessee, who was necessarily absent in the eastern district.

§ 484. *Costs. Proper and legal fees for receiving and filing papers.*

I have carefully examined the question presented, and am of opinion that the taxed bill of clerk's fees should be reformed. The fee-bill gives the clerk "for filing and entering every declaration, plea or other paper, ten cents." This relates to papers in the cause which constitute a part of the files proper, and embraces such only as when filed cannot be withdrawn of right by either party. Thus, a promissory note or bond, upon which suit is brought, introduced in evidence, is not a paper to be filed in the cause. It belongs to the party producing it, and, when it has subserved its purpose as evidence, has no necessary place in the files; is not to be indorsed "received and filed," nor is it to be entered in the court calendar. It is true that such papers are usually left with the files, but strictly a note or bond used merely as evidence is no part of the files proper, any more than is a deed used for a like purpose.

The duty of the clerk is to indorse on such note or bond, where it constitutes the subject-matter of the suit, a certificate of the fact that judgment has been rendered thereon. This is done to guard against any subsequent assertion of a claim thereon, or other improper use thereof. For such certificate the clerk is entitled to a fee of fifteen cents. If for any reason the court directs such paper to be filed, the clerk would be entitled to a fee of ten cents "for filing and entering." The coupons were used merely as items of evidence; they are not necessarily to be "filed and entered," and constitute in no proper sense a part of the files in the cause, unless the court ordered them to be filed.

No such order was made, but the court did order that each coupon be indorsed by the clerk with a certificate that judgment was rendered thereon, in order that no improper use could be made of them thereafter. This was done by the clerk, but none are indorsed "received and filed," etc., and I do not see how the clerk can claim under the fee-bill ten cents each for filing papers which have never been filed. The clerk argues that when the coupons are placed in the files of the case, they are filed. I regard this a mistaken view.

No paper is filed unless it has the proper indorsement thereon. The fee of ten cents is given for making such indorsement, and, when necessary, entering a note on the calendar of the paper and date of filing.

The accounting officer of the proper department of the government allows ten cents for filing each paper, and fifteen cents additional for entering in the calendar a note of the filing; holding, I suppose, that such entry is a "record" entitling the clerk to a fee of fifteen cents a folio. When the number of words is less than one hundred they are counted a folio, and inasmuch as such entry is in fact a record, I am inclined to regard the departmental construction the proper one, which gives the clerk ten cents for filing a paper and fifteen cents for the record entry in the calendar.

Again, the fee-bill (and it is under this claim, as I understand, that the department gives the fifteen cents for entering in the calendar a paper regarding it a record) provides, "for making any record certificate, return or report, for each folio fifteen cents." In reference to the coupons in question, the court directed, as before stated, the clerk to indorse on each of the two thousand coupons a certificate that judgment was rendered thereon, with date, number of cause and court. This was done, and for this service the clerk has charged a fee of fifteen cents each for two thousand certificates of one folio each, regarding such indorsement as a certificate. In this I think the clerk is correct. While it is not a "record," it is a "certificate" of the fact that each coupon had gone into judgment, and a most important one for the defendant, Shelby county. It is a certificate of cancellation for which the county can well afford to pay, and is, I think, strictly within the terms of the fee-bill last referred to, a "certificate." The fee of fifteen cents per folio, counting each certificate one folio, amounts to \$300. This I allow.

I remark that had the clerk, in fact, under the circumstances, actually indorsed on each coupon, "recorded and filed," etc., I should be disposed to allow the fee of ten cents for filing. This not having been done, and not being necessary, I do not allow it. The ex-clerk's fees, as taxed by the present clerk, amount to \$841.22. I disallow the item of \$200 for "filing two thousand other papers in cause, ten cents each," and tax the clerk's cost under this bill at \$641.22.

IN RE CLERK'S CHARGES.

(District Court for Delaware: 5 Federal Reporter, 440-442. 1881.)

§ 485. *A clerk of a federal court is entitled to pay for all services rendered by him pursuant to law or the orders of competent authority.*

Opinion by BRADFORD, J.

With regard to the first point, it may be observed that the clerk is the only federal officer of court not paid in part by an annual salary from the government. His compensation is limited and fixed by the fee-bill of 1852, now section 828, United States Revised Statutes. There is no provision to be found therein requiring the clerk to perform gratuitous services on behalf of the government, nor would it be just that he should be required to do so, unless a small annual salary were given him, as in the marshal's and district attorney's cases. His relations with the government in this respect, therefore, are exactly the same as with individuals. Whatever services it requires of him, if they come legitimately within the terms of his schedule of fees in section 828, United States Revised Statutes, and, whether ordered by a departmental official or imposed by a statute, must be paid for

according to that schedule. The inquiry here, then, is, Does section 643, United States Revised Statutes, require the performance of such duties and services by the clerk? We think, unquestionably, it does. It requires, when the proper petition and certificate has been filed, alleging that a criminal prosecution has been commenced in a state court against the petitioner for acts done by him while in the discharge of his duty as special deputy marshal, duly appointed and qualified to act as such at an election for a representative in congress, as in this case, or while in the discharge of this duty as a revenue officer, that the clerk shall file said petition and "shall enter" the cause upon the docket of the circuit court as pending, and "shall issue" duplicate writs of *habeas corpus*, etc. The language is imperative and mandatory, and no discretion is left to the clerk to refuse to perform the services, unless the fees for the same be paid by the petitioner. We think the United States is clearly responsible for the payment of these charges. We are further informed that in twelve cases lately settled in our own circuit court, Nos. 1 to 12, June term, A. D. 1874, being suits at law by certain proprietors and masters of coal barges against William D. Nolen and others, the collector of this port and other revenue officials, for damages on account of alleged illegal seizure by said officials while acting in the discharge of their duties, judgment for costs was confessed by the district attorney on behalf of said defendants, and the costs were paid by the government under the instructions of the secretary of the treasury. We cannot see the difference between the responsibility of the government for mandatory and necessary costs incurred in the defense of cases against special deputy marshals, acting in discharge of their duties under provisions of section 643 aforesaid, and the thus admitted responsibility of the United States for costs incurred in defense of revenue officials under the same section. The clerk's account for this service is therefore approved.

With regard to the other point, section 19, act of June 22, 1874, does undoubtedly require, under heavy penalties, the clerk to report to the attorney-general "the number of all such cases [bankruptcy] disposed of," and "the disposition of all such cases." This requisition makes it imperative upon the clerk to examine and search all pending cases in bankruptcy for decrees of bankrupt's adjudication, of bankrupt's discharge, and of the assignee's discharge, in order to make up the report required, and if such search came within the literal terms of the fee-bill, section 828, United States Revised Statutes, the claim would unquestionably be valid. The words of the section upon which the claim is made are as follows: "For every search for any particular mortgage, judgment or other lien, fifteen cents."

It is true that an adjudication of bankruptcy is a "decree," and the fee for the search for a decree is fifteen cents, and if the act stopped here the clerk would be entitled; but it goes further: the language is, "decree or other lien." An adjudication of bankruptcy is not a decree establishing or constituting a lien. It is generally of an opposite character, and operates to prevent the acquisition of liens. The services, therefore, are not technically and literally within the terms of the act, and although doubtless much more troublesome and difficult to make than an ordinary search, the charge for the same must be disallowed. The accounts will therefore be passed upon the necessary alterations being made.

§ 486. In general.— Under section 3 of the act of 1799, where the clerk performs any duty for which the laws of the state make no provision, the court in which such service may be performed shall make a reasonable compensation therefor. Clerk's Fees, * Taney, 453.

§ 487. No fees can be taxed against a party to a suit that are not specified in the fee-bill enacted February 26, 1853. The clerk's fee-bill should specify the items, but if no specification was demanded the charge must be considered as acquiesced in, and the clerk will be allowed the fees demanded if they may be embraced in the specifications in said act. *Dedekam v. Vose*, 3 Blatch., 153.

§ 488. A claimant in a suit in admiralty is liable to the clerk for services performed for him as claimant, though the libel be dismissed without costs to either party. *In re Stover*, 1 Curt., 201.

§ 489. Making up costs.—A charge of fifteen cents by the clerk for "making up the costs" on the bonding was a correct one. *The Schooner F. Merwin*,* 10 Ben., 403.

§ 490. Administering oath.—Where a charge of "five oaths at ten cents, and five jurats at fifteen cents," was objected to because the fee of ten cents for administering an oath includes the service of the clerk in making the certificate of administration of the oaths, the objection was overruled, as the two services were distinct, and had both been rendered. *Ibid.*

§ 491. Clerk of two courts.—By act of May, 1842, it is permissible for the same person to hold the office of clerk of both the district court at an annual salary of \$3,500, and of the circuit court at an annual salary of \$2,500. *United States v. Bassett*,* 2 Story, 389.

§ 492. Where one holding the office of clerk of both district and circuit courts, in claiming his semi-annual compensation failed to distinguish between the fees belonging to him in his separate capacities, and placed them in one aggregate sum, it was held to be an error. *Ibid.*

§ 493. Docketing.—On appeals in admiralty, where a note of issue is handed to the clerk with a view to his docketing the case for trial at a particular term, he is entitled to a fee of \$1, which is to be paid by the losing party. *The Alice Tainter*,* 14 Blatch., 225.

§ 494. He is also entitled to a fee for including the evidence in the record. *Ibid.*

§ 495. Expenses.—Clerk of district court not allowed, as necessary expenses of his office, for moneys expended by him while attending court away from the place where he is required to keep his office. *United States v. Gorham*,* 6 Blatch., 530.

§ 496. Filing papers.—The fee-bill, section 828, Revised Statutes United States, allows to a clerk of the court ten cents for "filing and entering every paper;" in this case the clerk in his taxation charged twenty-five cents each for filing and entering "claim," "answer," "appearance" and "consent." *Held*, that the additional charge of fifteen cents, apparently made under that clause of the fee-bill which allows a clerk fifteen cents a folio for "making any record," but where there was no record which is not fully and aptly described under the terms "filing and entering," must be disallowed. *The Schooner F. Merwin*,* 10 Ben., 403.

§ 497. Distribution of fund.—A seizure of goods having been made on land, for a breach of the revenue laws, and the goods having been condemned and the proceeds of the sale brought into court to be distributed, a question arose as to a portion of the clerk's costs. *Held*, that the fees allowed in the case of a seizure in a river or creek furnished the true rule of compensation. *Clerk's Fees*,* Taney, 453.

§ 498. An estate which was the subject of litigation in the federal court remained in the hands of the administrator appointed by state authority. *Held*, by the federal court, that, while the fund was subject to its decree, it was not moneys "deposited" in court, or moneys "received, kept and to be paid out by the clerk;" and that the claim of the clerk for payment to him out of the fund of one per cent. upon the whole distributable fund could not be allowed. *Ex parte Plitt*, 2 Wall. Jr., 453.

§ 499. Fees of clerk in North Carolina for keeping and paying out moneys under an execution. *Kitchen v. Woodfin*,* 1 Hughes, 340.

§ 500. The clerk of the court is entitled to a commission, under the act of congress of February 28, 1799, on moneys arising from the sale of prize property under an interlocutory decree and paid into court by the marshal. *The Avery*, 2 Gall., 808.

§ 501. Cases consolidated.—Two writs of *mandamus* issued at the instance of different relators, directed to the same board of supervisors. Attachment for contempt against the supervisors, for failure to obey the writs of *mandamus*, issued by the United States court, but without instructions as to the manner of issuing. The clerk, in accordance with what he believed to be his duty, issued a separate writ in each case, for each individual supervisor. The cases were consolidated into one. *Held*, that the clerk and the marshal were entitled, respectively, to their fees earned in each case before the consolidation, but after the consolidation they were entitled only to the fees of one case. *Durant v. Supervisors of Washington County*, Woolw., 377.

§ 502. Continuances.—The clerk of the United States circuit court in Virginia is entitled in an equity case to fees for continuances at the rules, after the cause was set for a hearing as to the resident defendants, and common order of publication as to absent defendants, and before the order of publication was executed. *Ex parte Lee*, 4 Cr. C. C., 197.

§ 503. Copy of record.—If either party obtains a copy of the record he must pay the clerk for it; though the suit be dismissed with costs at his motion. *Caldwell v. Jackson*, 7 Cr., 276.

§ 504. Searching records.—Where the clerk, in searching for petition in bankruptcy, claimed a fee of ten cents a year for each name searched against for ten years, it was held that as his compensation for such service was not provided for by section 828, Revised Statutes United States, and as he admitted that the time and labor required for making such search were no greater than that required in making search for judgments and decrees, the fee allowed for the latter service was reasonable compensation for searching for petitions in bankruptcy. *In re Vermeule*,* 10 Ben., 1.

§ 505. Where the clerk searches the records of the court for judgments, decrees, etc., constituting a general lien on real estate, he may retain the requisition delivered to him, giving a certificate of the result of his search on a separate piece of paper, and may charge the following fees: 1. Ten cents for filing the requisition. 2. Fifteen cents for each person against whom search is required to be made. 3. Fifteen cents a folio for making the certificate. 4. He can make no charge for affixing the seal to his certificate, unless he is required to affix it. *In re Woodbury*,* 17 Blatch., 517.

X. DISTRICT ATTORNEYS.

SUMMARY—*Compromise; taxation of costs after dismissal of information*, § 506.—*Compensation under act of 1863 in case of moneys realized*, §§ 507, 508; *in case of a warrant of remission*, §§ 509, 510.

§ 506. Parties whose goods were threatened for violation of revenue laws effected a compromise with the secretary of the treasury by paying in a certain sum, one of the conditions of the compromise being that the percentage legally due the district attorney for his services in the matter should be paid by the treasury. Upon this compromise the treasury dismissed the information against the parties. On reference by the treasury of the question of the district attorney's fees to the district court, upon motion by the district attorney to include his claim as an item in the taxation of costs, an objection by the counsel appointed to represent the treasury, that the court had no power to amend the taxation of costs after dismissal of the information by order of the treasury department, was held invalid under the circumstances of the compromise. *United States v. Five Hundred Barrels of Whisky*, §§ 511, 512.

§ 507. The compensation given to district attorneys by section 11 of the act of March 3, 1863 (12 Stat. at Large, 741), being by the language of said section allowed upon moneys realized in any proceeding conducted by him under the revenue laws in which the United States is a party, is not confined to cases arising under that act, but is general in its scope, and applies to moneys realized in cases arising out of the internal revenue laws. *Ibid*.

§ 508. Five hundred barrels of whisky were seized by the district attorney for the violation of the revenue laws. This seizure led to the discovery of other great frauds outside that district by the owners, who were forced to pay \$130,000 into the treasury at Washington, by way of compromise. Upon the question of what fees should be allowed the attorney of the district in which the five hundred barrels were seized, under the section allowing him a percentage on amounts realized in cases conducted by him, it was held (1) that the district attorney was not entitled to a percentage upon the \$130,000 paid into the treasury, but that (2) he was entitled to his percentage on the proportion which the market value of the five hundred barrels seized bore to the entire penalty paid by the owners for violating the revenue laws (in this case \$52,260), although the barrels seized had not been sold as forfeited, but returned to the owners under the compromise. *Ibid*.

§ 509. Where a steamship was seized and libeled, and subsequently a decree of forfeiture was pronounced against her, but ultimately the claimants procured a warrant of remission upon condition that they pay all costs of the court, it was held, as to the fee of the district attorney, that he was not entitled to the "two per centum upon all moneys collected or realized in any suit . . . arising under the revenue laws conducted by them, in which the United States is a party," given by section 11 of the act of March 3, 1863. *The Pacific*, §§ 513, 514.

§ 510. A warrant of remission was procured by the claimants of a forfeited vessel on condition that they pay such a *per diem* fee to the United States district attorney for his actual attendance at the summary examination as the court might direct; held, that the court was not bound in its judgment by the *per diem* fixed by the act of 1853. *Ibid*.

[NOTES.—See §§ 515-581.]

UNITED STATES v. FIVE HUNDRED BARRELS OF WHISKY.

(District Court for Ohio: 2 Bond, 7-18. 1866.)

Opinion of the COURT.

STATEMENT OF FACTS.—This case is now before the court on the application of R. M. Corwine, attorney for the United States in this district, for a retaxation of costs. The facts necessary to be noticed, in deciding the question before the court, are, substantially, that in September, 1865, five hundred barrels of whisky were shipped from Nashville, Tennessee, by the firm of Stephens & Stone, distillers of spirits in that city, consigned to H. L. Styles & Co., of the city of Cincinnati. After the arrival of the whisky here, it was ascertained by an inspector that the barrels containing the whisky were not branded as required by the internal revenue law, and that there was reason to believe the whole amount of duties chargeable on the whisky had not been paid at Nashville, and that it had been shipped from that place in violation of law, and was therefore liable to forfeiture. The inspector made complaint in due form and the whisky was seized, and an information filed in this court praying for its condemnation.

It is not necessary, in considering the question, to notice all the intermediate proceedings in relation to the whisky thus seized. Notwithstanding the certificate of the collector of internal revenue at Nashville, to the effect that the duties had been fully paid by the manufacturers, and that they had not been guilty of any violation of the law in regard to the whisky, such facts were presented to the commissioner of internal revenue at Washington as to induce the suspicion that the manufacturers had practiced a fraud upon the government; and for the ascertainment of the facts in relation to their transactions, Mr. Spooner, the collector for the first congressional district, and Mr. Kimber, an inspector for the same district, were appointed special commissioners by the head of the bureau of internal revenue at Washington, with authority to proceed to Nashville, and institute a thorough investigation of the doings of the firm of Stephens & Stone in connection with their business as distillers, and report the result to the department at Washington. This duty was promptly discharged by those gentlemen, who reported, after full investigation, that said firm had failed to make a full and fair report of the quantity of whisky manufactured by them, and consequently had subjected themselves to heavy penalties, and the forfeiture of all spirits owned by them, as well as their entire manufacturing establishment at Nashville. By this report, it appears that Stephens & Stone were in default in the payment of duties chargeable on the whisky made by them to the large sum of \$77,740, and were liable, under the statute, to the payment of \$52,260 on penalties incurred by them; making in the aggregate upward of \$130,000.

Upon this development these parties repaired to Washington, and effected a compromise with the secretary of the treasury by the payment of the said sum of \$130,000; and an order was therefore made for the discontinuance of the proceedings in this court against the five hundred barrels of whisky, and for the restoration of the same to Styles & Co., on the payment of accrued costs. As one of the conditions of the compromise, it was provided that the percentage due to the district attorney by law, for his services in filing and prosecuting the information in this court, should be paid by the treasury department at Washington. An order was therefore made for the discontinuance

of the proceedings in this court, and for the delivery of the five hundred barrels of liquor to the said Styles & Co.

On the presentation of his claim by the district attorney to the secretary of the treasury, he doubted his authority to pay it, and referred the question to the attorney-general for his opinion. That officer decided, in substance, that the question was one involving the legal taxation of costs; was judicial in its character, and to be decided by the court in which the proceeding was brought. The secretary of the treasury thereupon declined to authorize the payment of the claim until there should be a judicial decision as to its legality. In this state of the case, the district attorney has very properly presented the question for the action of this court, on a motion to include his claim as an item in the taxation of costs. He claims, as legally taxable for his services in the case, two per cent. on \$130,000, the sum paid into the treasury by Stephens & Stone under the compromise that has been referred to, amounting to \$2,600.

This taxation is opposed by the learned counsel who has been retained by the collector for the first internal revenue district, probably with the sanction and approval of the secretary of the treasury. The first position in his argument is, that it is not in the competency of the court to reform or amend the taxation of costs, after the dismissal of the information by order of the treasury department, and the payment of the costs taxed in the case by Stephens & Stone, according to the terms of the compromise. This point would be well taken, if the item now sought to be taxed, if allowed, would be chargeable to them. But, as they have fully complied with the conditions upon which the case was compromised, they are clearly not liable for any additional item in the taxation. It is now a question between the district attorney and the government. If the claim of the district attorney, in whole or in part, is allowed as a proper item of taxation, the government will be liable to pay it, and is willing to pay it if it is adjudged to be legal. Indeed, it is within the spirit, if not within the letter, of the terms on which the secretary of the treasury ordered the dismissal of the information. And if the district attorney has not this remedy, there is no other course by which he can obtain compensation for his services.

In addition to the point suggested, the counsel resisting this taxation insists: 1. That there is no statutory provision under which compensation for the services of the district attorney can be included in the taxation of costs in this proceeding. 2. That if the district attorney's per centum is properly taxable, it can be estimated only on the proceeds of the whisky seized at Cincinnati, and within the jurisdiction of this court for adjudication, and not upon the whole amount paid into the treasury by Stephens & Stone, as due from them for unpaid duties and the penalties resulting from their violation of the law.

§ 511. *Under the act of March 3, 1863, section 11 (12 Stat. at Large, 741), the district attorney is entitled to two per cent. on all internal revenue collected through his efforts.*

As to the first of the propositions, the court entertains no doubt that the district attorney is entitled to compensation in this case under section 11 of the act of March 3, 1863. 12 Stat. at Large, 741. That section provides that there shall be taxed and paid to district attorneys two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, conducted by them, in which the United States is a party. The words of this section are plain and intelligible. It gives to the district attorney two per cent. on all moneys collected or realized in any proceeding under the revenue laws, conducted by him. The argument of the counsel is, that this provision

was intended for, and must be limited to, revenue cases arising under that statute, and cannot be held to embrace a case arising under the internal revenue laws. But the language of the section does not require this restriction. It includes not revenue cases arising under that statute alone, but all cases arising under the revenue laws; embracing as well such as arise under the internal revenue laws as those that relate to import duties. If congress had not so intended, there would have been words used requiring the restricted interpretation contended for. It is argued that the title and subject-matter of the act impose this restriction. It is entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes." It is true the subject-matter of the act relates to external commerce, but the insertion of the words in the title, *for other purposes*, allows of provisions not immediately connected with that subject. And section 9 actually includes a subject wholly foreign to the general purposes of the act, namely, the renting of unproductive lands or other property of the United States acquired under judicial proceedings. I cannot doubt, therefore, that section 11, before quoted, was intended to include, and from its phraseology does include, all cases arising under any revenue act, whether it relates to internal revenue or to duties upon imports. And this conclusion is fortified by the fact that the internal revenue laws contain, as I think, no provision for compensation to a district attorney, in the form of taxable costs, as a per centum on moneys collected or realized in proceedings to enforce forfeitures under those laws. And it would result, that if he cannot tax the two per cent. authorized by section 11 of the act referred to, there is no provision of law for his compensation for services under the internal revenue laws, however laborious in themselves or advantageous to the government.

§ 512. — *but the fees are to be based on the amount realized by the United States as the proceeds of property seized by the process of the court and within its jurisdiction.*

As to the second point stated, namely, on what basis the percentage claimed shall be estimated, I concur with the views urged by the counsel resisting the taxation as claimed by the district attorney. The two per cent. to be taxed as his fees must be upon the moneys realized by the United States as the proceeds of the property seized by the process of this court, and within its jurisdiction. It is alleged by the district attorney that the \$130,000 paid by the Nashville distillers, for unpaid duties and penalties, was secured to the government by his vigilance and that of other government officials at Cincinnati, in seizing and retaining in the custody of the law the five hundred barrels of whisky consigned to Styles & Co. And it is doubtless true that the stupendous frauds practiced by Stephens & Stone would not have been developed except through the commendable zeal and vigilance of the district attorney and the revenue officials in this city. But I cannot see that this fact affords any legal basis for a claim to a per centum by the district attorney on the gross sum paid by the Nashville firm for unpaid duties on spirits distilled, and the penalties resulting from their violations of law, at a place not within the jurisdiction of this court, and for which no decree of forfeiture could have been entered by this court. The jurisdiction of this court in this matter results from the accidental circumstance that a portion of the whisky manufactured was brought within the southern district of Ohio and here seized by legal process. Now, it is quite obvious that no per centum can be taxed to the dis-

strict attorney except on the basis of the proceeds of the whisky seized, and for the condemnation of which the information was filed, and the penalties which, under the statute, attached to it. This will plainly appear from the consideration that if there had been no compromise between the government and the manufacturers, and the case had proceeded in this case to a decree of forfeiture, the district attorney's per centum could only have been taxed on the amount realized from the sale of the whisky. Although in this case there was no sale of the whisky, owing to the compromise made at Washington, and the consequent dismissal of the information filed in this court, yet, as the amount claimed by the government was "realized," in the language of the statute, the district attorney is clearly entitled to two per cent. on the sum for which the five hundred barrels would have been sold in this market. And he is fairly entitled to his per centum on the proportion which the proceeds of the five hundred barrels will bear to \$52,260, being the sum paid by the Nashville firm to the government as the penalties incurred by them for violating the law. The government has "realized" the amount of penalties which attached to all the whisky manufactured, and I cannot see any good reason why the district attorney may not claim a per centum on so much of the penalties as attaches to the five hundred barrels proceeded against in this court. I shall direct the taxation to be made on the basis indicated. To make a specific taxation on this principle, the market value of the whisky must be ascertained, as also the proportion of the penalties which attached to the five hundred barrels under the terms of the compromise. And I would suggest the propriety of a reference of this matter to a competent person to ascertain the sum on which the two per cent. shall be estimated, unless counsel can agree upon the amount.

THE PACIFIC.

(District Court for Oregon: Deady, 192-196. 1866.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—The steamship Pacific was seized and libeled in this court for a violation of section 50 of the collection act of March 2, 1799 (1 Stat., 665). The claimant, the California Steam Navigation Company, appeared and obtained the delivery of the vessel upon giving bond for its appraised value, \$225,000. Upon the return-day (March 15, 1865), the claimant having failed to answer the libel, this court pronounced in favor of the forfeiture of the vessel, and gave a decree against the sureties in the claimant's bond for the appraised value thereof; and because it appeared that the claimant had instituted proceedings to procure the remission of the forfeiture, it was then ordered that the enforcement of such decree be stayed until the further order of the court.

Now at this day, counsel for claimant moves to discharge such decree against the sureties, and in support thereof produces and reads to the court a warrant of remission from the secretary of the treasury, upon the conditions, among others, that the claimant pay all costs of court in all proceedings touching said forfeiture, and such a per diem fee to the United States district attorney for his actual attendance at the summary examination as this court may direct.

The question is made on the argument, what is included in the phrase, "all the costs of the court?" The district attorney maintains that the case falls

within the provision of section 11 of the act of March 3, 1863 (12 Stat., 741), which provides: "That there shall be taxed and paid to district attorneys two per centum upon all moneys *collected* or *realized* in any suit or proceeding arising under the revenue laws, conducted by them, in which the United States is a party;" and that such per centum shall be in lieu of all fees and costs allowed by the act regulating fees, of February 26, 1853 (10 Stat., 161). Under the latter act the compensation of the district attorney would be a docket fee of \$40, while under the former it would amount to \$4,500. The difference is a material one to both the attorney and the claimant.

§ 513. *Under section 11 of the act of March 3, 1863, as to the fees of district attorneys in suits under the revenue law, the attorney is allowed his two per centum out of sums actually collected; it is not enough that a judgment be obtained.*

The argument of the district attorney assumes that the sum for which the decree was given was *realized* by the United States, because it was adjudged that they should recover it, and that it might have been actually *collected* at any time since, but for the order of this court, made in the interest and at the instance of the claimant, staying the execution of the decree. It is also maintained that the attorney had earned this per centum when he had obtained the decree, and that the granting of the *supersedeas* during the time taken by claimant to procure a remission of the forfeiture ought not to be allowed to work to his prejudice.

However just the claim of the district attorney, I cannot assent to his construction of the act of March 3, 1863. This two per centum is only to be paid on "moneys collected or realized." Now, it is not pretended that this sum was ever "collected." But the terms "collected" and "realized" are used here as substantially synonymous. That which is *realized* by the United States is *collected* by it, and contrariwise. That which is *realized* is made certain, but it cannot be said that this money was certainly possessed or obtained by the United States before it was *collected* and while it rested in decree.

The object of the act is manifest. By offering this per centum to district attorneys, it is intended to stimulate them to make the money on judgments and decrees in favor of the United States. Prior thereto such attorneys were only paid for bringing an action or suit for the United States and pursuing it to judgment or decree. No specific compensation was allowed for attending to the matter of enforcing such judgment or decree, and the result often was, what might reasonably have been predicted — the United States was "beaten on the execution." This per centum is to be paid upon the moneys realized by the United States through the professional exertion and services of its attorney. But if for any reason no money is realized, then there is no fund upon which to compute it. It is in the nature of a fee contingent upon the collection of the money, and if the contingency does not happen, the right to the per centum never attaches, and the attorney's compensation is limited to the docket fee allowed by the act of 1853 for prosecuting the proceeding to judgment or decree.

In my judgment the district attorney is not entitled to tax this per centum against the United States in lieu of costs. If this conclusion be correct, it follows that the payment of such per centum cannot be exacted from the claimant under this warrant as a condition of the remission, because the phrase therein, "all costs of court," only includes such costs as the United States are liable for. The costs made by the claimant are paid by it in any

event. True, it was in the power of the secretary to impose upon the claimant more favorable terms for the district attorney, but he has not seen proper to do so, and this court has no power to revise his action in this respect.

§ 514. *Fees of district attorney for attending an examination to obtain a remission of a forfeiture.*

I next consider the fee to be allowed the district attorney for his services in connection with the proceedings to obtain a remission of the forfeiture. The extent and nature of these services are within my personal knowledge. The cause was an important one to the government and the claimant. The amount involved was large, and the labor and responsibility devolved upon the district attorney, by reason of the power and influence of the claimant, was arduous and extraordinary. The claimant has had the influence to procure a remission of a forfeiture produced by a wilful, if not a corrupt, violation of law by its agents, the master and mate of the Pacific, upon the single ground that *it*—a corporation without body or soul—was not expressly consenting to such violation, and without other terms than the payment of this fee to the attorney—such a *per diem* fee as the court may direct. Counsel for the claimant suggest that the per diem of district attorneys is fixed by the act of 1853, and that, if this court is not bound by that act in this instance, it ought to take it as a guide in fixing the amount to be allowed. But the warrant remits the amount of the per diem to the judgment of this court. Now the per diem allowed by the act of 1853 is in addition to the fees earned by the attorney during the progress of the same, while in this case the per diem to be allowed by the court is the whole compensation of the district attorney for the labor performed in the proceeding to obtain a remission. For prosecuting the suit for forfeiture to a decree, he is allowed the paltry fee of \$40 in currency, and that is all the compensation he obtains in this whole matter, aside from that which the court is about to allow him.

Of course the court ought not to exercise this power so as in effect to forfeit the vessel or any very considerable portion of its value to the district attorney, and thereby nullify the action of the secretary in making the remission. But at the same time, all the circumstances of the case considered, I prefer, within reasonable limits, to err in favor of the district attorney rather than the claimant, and therefore fix his per diem allowance at the sum of \$200.

Order, that the claimant pay the costs of court, and pay the district attorney the sum of \$200 within ten days from the entry hereof, and that thereupon, and upon the filing of the warrant of remission from the secretary of the treasury herein, the decree against the claimant and his sureties for the appraised value of said vessel be discharged and held for naught; and that in default thereof, execution issue to enforce such decree, notwithstanding such warrant of remission. (a)

§ 515. *Agent of attorney.*—One who was never *de facto* district attorney, but merely acted as the agent of a district attorney in certain informations, can interpose no claim to the taxable costs allowed in these cases, which belong *de jure* to the district attorney. *Ex parte Robbins*,* 2 Gall., 319.

§ 516. *Loss of money by marshal.*—As a general principle the district attorney is not liable for moneys lost through the frauds, neglects or inattentions of the marshal. *United States v. Ingersoll*,* Crabbe, 135.

§ 517. *Substitutes.*—When a district attorney, under the authority of the act of congress of August 16, 1856, appoints a substitute, and both he and his substitute are necessarily employed

(a) Same rulings in *The Orizaba*,* Deady, 196.

in different courts or tribunals the same day, each is entitled to a *per diem* allowance of \$5. Substitute for a District Attorney,* 9 Op. Att'y Gen'l, 526.

§ 518. The allowance by the judge of fees taxed, allowed and credited to the district attorney, but unpaid, is but evidence of the claim or right to be given to the treasury; its omission will not invalidate the right to the fees, and the judge may supply the omission by allowing it upon a trial before him of the account, between such district attorney and the treasury. *United States v. Ingersoll*,* Crabbe, 135.

§ 519. Prize cases.—The act of congress of March 25, 1862, directs that costs shall be allowed by the court to the district attorney in prize proceedings without regard to antecedent limitations of his compensation, but the power is vested in the departments to enforce, on its disbursement, the restrictions on his compensation contained in the act of February 26, 1853. *The Anna*, Bl. Pr. Cas., 887.

§ 520. Argument in supreme court.—A district attorney is not in duty bound to argue cases in which the United States are interested before the supreme court, but if he does so, and especially if the United States are the recipients of moneys through such efforts on his part, he is entitled to compensation. *United States v. Ingersoll*,* Crabbe, 135.

§ 521. Mileage.—The words "place of his abode," in the act of February 26, 1853, providing for the mileage of the district attorney "from the place of his abode," means the place of his permanent residence, and not some other place where he may be temporarily on business; and it is conclusively presumed, in his favor, in all cases of lawful attendance on court, that he comes from his place of residence and returns to it. Mileage of District Attorneys,* 9 Op. Att'y Gen'l, 411.

§ 522. *Per diem*.—A district attorney is entitled to his *per diem* for services in making examinations before a United States commissioner *de facto*; neither he nor the accounting officers can inquire into the legality of the commissioner's appointment. Fees of District Attorneys,* 9 Op. Att'y Gen'l, 251.

§ 523. Under the act of February 26, 1853, a district attorney is entitled to but one *per diem* on the same day, though he attend upon the circuit or district court and before a United States commissioner on the examination of a person charged with crime. Fees of District Attorneys,* 9 Op. Att'y Gen'l, 292.

§ 524. A district attorney is entitled, under the fee bill of 1853, to \$5 per day for the time necessarily employed in the preliminary proceeding of a criminal prosecution, both before and after the arrest. Fees of District Attorneys,* 9 Op. Att'y Gen'l, 170.

§ 525. The services of a district attorney in the examination of persons charged with crime are, under the act of February 26, 1853, paid by the day, and not by the case. A fair construction of the fee bill entitles him to his *per diem*, \$5, whether the examination be before a judge, United States commissioner, or other competent magistrate. Fees of District Attorneys,* 9 Op. Att'y Gen'l, 242.

§ 526. Miscellaneous.—A marshal, in presenting his accounts to the treasury, included a charge against the government for the taxed and allowed fees of the district attorney. The treasury required vouchers or receipts from the district attorney's hands, to be given to the marshal, in order to enable it to pay the marshal the money due the district attorney. This was done, but in settling the marshal's account the government virtually applied the district attorney's fees to the extinguishment of the marshal's debt, by crediting him with the district attorney's fees on his account, instead of paying the fees into the marshal's hands for delivery to the district attorney. *Held*, that the district attorney could set off the amount so misapplied by the government against the balance due on his accounts. *United States v. Ingersoll*,* Crabbe, 135.

§ 527. In a case in which the treasury, through the comptroller, wrote that it had allowed \$300 as a sufficient compensation to a district attorney in several forfeiture cases, and subsequently the collector allowed said attorney the sum of \$1,000, the treasury finally assenting thereto, it was held that the fact of the district attorney's making no reply to the comptroller's letters tended to show that he was satisfied with the \$200 additional received from the collector, and tended to make against his claim that the amount received was for but one of the forfeiture cases. *Ibid*.

§ 528. A reply by the secretary of the treasury to a letter of the district attorney, claiming fees for services in certain cases, which does not dispute the claim, but on the contrary requests the services of such attorney in other suits, is such a letter from which an acquiescence in such charges may be inferred. *Ibid*.

§ 529. No district attorney is entitled to compensation in addition to the fees enumerated in the act of congress of February 26, 1853, for the preparation of, and attention to, cases coming within the scope of his official duty; and the secretary of the interior has no power to allow him compensation for such services. Fees of District Attorney,* 10 Op. Att'y Gen'l, 351.

§ 530. Section 3 of the fee bill of February 26, 1853, declares that no district attorney

"shall receive any other or greater compensation for any services rendered by him than is provided by this act." *Held*, that the district attorney for the southern district of New York was not entitled to compensation, other than that provided by said act, for obtaining an injunction restraining a party from interfering with the rights of the United States at the Brooklyn navy-yard. *Rosevelt's Claim*,* 10 Op. Att'y Gen'l, 489.

§ 531. The act of 1853, regulating fees of district attorneys, provides that, "For services of counsel rendered at the request of any head of department, such sum as may be agreed on." *Held*, that for defending collectors, at the request of the department, the district attorney was entitled to such sum as was agreed upon, but that, under the act of August 16, 1856, whatever he earns, whether under the fee bill, or by agreement with the head of the department, for services which he would not otherwise be required to perform, or both, more than \$6,000 per annum and the aggregate expenses of his office, he must pay into the treasury. *Fees of District Attorney*,* 9 Op. Att'y Gen'l, 140.

XI. MASTER IN CHANCERY.

SUMMARY — *Docket fees*, § 532. — *Rate of compensation*, §§ 533-535.

§ 532. Where a master took proofs and made a report, disposing of a motion for an injunction *pendente lite*, it was held that this was neither such a trial or final hearing as to justify the taxing of the docket fees allowed by the act of February 26, 1853 (10 U. S. Stat. at Large, 161). *Doughty v. The West, Bradley & Cary Mfg. Co.*, §§ 537, 538.

§ 533. The supreme court having provided that "the compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion," the clerk has no power under this rule to fix the compensation to be allowed. *Ibid*.

§ 534. It was held as a general rule that masters in the United States circuit court for New York should be allowed the same compensation as that given by the state law to referees. *Ibid*.

§ 535. A master in chancery having performed a special service of a highly responsible nature, it was held that he was entitled to be compensated by a special allowance. *Erie Railway Co. v. Heath*, § 539.

§ 536. And in determining what would be a reasonable allowance, it seems that the court will be guided by the allowance made by federal and state laws to other officers for similar services. *Ibid*.

DOUGHTY v. THE WEST, BRADLEY & CARY MANUFACTURING COMPANY.

(Circuit Court for New York: 8 Blatchford, 107-112; 4 Fisher's Patent Cases, 318. 1870.)

The facts will appear in the opinion.

Opinion by WOODRUFF, J.

(1) The act of February 26, 1853 (10 U. S. Stat. at Large, 161), declares that the fees or compensation prescribed therein shall be taxed and allowed to attorneys, solicitors and proctors in the district and circuit courts, United States district attorneys, clerks, marshals, witnesses, jurors, commissioners and printers, and that no other compensation shall be taxed and allowed. The act then allows to attorneys, solicitors and proctors, among other fees, as follows: "In a trial before a jury in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of \$20." No other provision of the act can be claimed to warrant the charge of docket fees in the bill of costs taxed herein.

§ 537. *A docket fee cannot be allowed a master upon an interlocutory reference.*

It will be noticed that, in the language quoted, there is no mention of any hearing before a master of this court in equity, for any purpose, and, I think, for the reason that there is no practice, in equity, sending a case to a master for a final hearing. And if, within the fair intent of the statute, a matter re-

ferred to a master might be said to be heard before him as a referee, using that term in its broadest sense and not as meaning a person technically so called, in distinction from a recognized officer of the court, still, the hearing before him on such a reference is neither a trial nor a final hearing within the meaning of the act. Trial and final hearing have well known definite meanings in the law and they are used in this statute in that well known sense. "Trial" is used to describe the process of determining the issues in an action at law; and "final hearing," the submission of the case for a determination thereof, upon the pleadings, or pleadings and proofs, or otherwise, so that the case may be finally disposed of. No such trial or final hearing was had before the master, in this case, whether he be regarded as master, or, in a general sense, as a referee. The proofs taken before him and the report he was required to make were for a provisional and interlocutory purpose, namely, to dispose of a motion for an injunction *pendente lite*. This was neither a trial nor a final hearing.

The two sums taxed as docket fees should, therefore, have been disallowed and must be struck out.

§ 538. *The fees allowed a master, not being prescribed by statute, must be assimilated to those allowed referees under the state practice.*

(2) It is a little remarkable that, while the statute often speaks of causes in equity, and prescribes the fees of solicitors, marshals and clerks for services in suits in equity, the statute nowhere mentions fees of masters. But, in prescribing the fees of commissioners, it does allow (p. 167), "for attending to a reference, in a litigated matter in a civil cause at law, in equity or in admiralty in pursuance of an order of court, \$3 per day." The supreme court, by rule 82 of the rules in equity, have assumed to authorize the circuit courts, or perhaps to declare the general power of the circuit courts, in equity, to appoint standing masters in chancery in their respective districts; and have provided that "the compensation to be allowed to every master in chancery, for his services in any particular case, shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof." The clerk has no power, under this rule, to fix the compensation to be allowed; and his taxation was, therefore, inoperative. This appeal may, however, be regarded as an application to the court to fix the compensation to be taxed, and it was substantially so treated by the counsel who appeared and argued the question.

It is not obvious that, in like cases, the fees allowed to a master for attending to a reference, in a litigated matter, should be greater than the fees to which a commissioner attending to such a reference is entitled by statute. The question, however, under the rule of the supreme court, is, what in the discretion of the court ought to be allowed the master, in this case. Obviously, this question can be best answered by ascertaining, if possible, what is a proper compensation to be in general allowed — what, in ordinary cases, of no peculiar or special difficulty and involving no extraordinary labor.

The importance of some general rule for the government of ordinary cases, at least, is not only apparent, but it has been the ground of specific legislation as to nearly all the fees which are permitted to be taxed; and, although the rule of the supreme court has left these particular fees in the discretion of the court, it is, nevertheless, important, even here, that some general rule should govern the subject. The rule of this court in relation to references in admiralty, under the forty-fourth rule of the supreme court in admiralty, was adopted to fix the fees to be allowed to commissioners under that rule,

and the consideration that some general rule or rate of fees was important may be assumed to have largely influenced the court in the matter, lest abuses should arise out of an unsettled and indefinite appeal to discretion. Indeed, it would not be doing great violence to the action of this court last referred to, if I were to say, that, although this court could not, by rule, deprive a party of his right to appeal to the discretion of the court secured to him by the rule of the supreme court, still, this court can determine what is a proper compensation in ordinary cases, and did so, on the 28th of May, 1859, when the rule of this court was adopted. 4 Blatch., 515. It therefore appears, that, by statute, the fees of commissioners, on a litigated reference, in a civil cause, are \$3 a day; and that their fees on a reference in admiralty, under the forty-fourth of the rules of the supreme court, were fixed, in 1859, by rule of the circuit court, at the rates allowed by the court of chancery, and established in 1844, upon the general principle that the services rendered by officers of this court should be compensated at the rates allowed for similar services in the courts of the state. In general, this will be found just and reasonable, though, since 1859, the changes in the relative value of money and the means of subsistence have been so great that the specific rates then deemed reasonable may now be inadequate in some cases.

There are now no masters in chancery, under the state laws. The services formerly performed by them are now rendered by referees appointed for each case; and I think it quite reasonable that masters of this court should be allowed, as the general rule, the compensation allowed by the state law to such referees, \$3 per day, or at the rate fixed for services under the above named forty-fourth rule, where, at that rate, the services would amount to more than \$3 per day. But cases of peculiar importance and difficulty sometimes come before a master or a referee, in which that compensation would be inadequate.

The state law recognizes this, by providing that the parties may agree to allow the referee a greater compensation, in which case the rate agreed to may be taxed. Without affirming or adopting this latter practice as controlling the court in the exercise of the discretion given by rule 88 in equity, above referred to, I am of opinion that such special cases ought to be made exceptions to the general rule on the subject.

In the present case, the counsel for both parties agree, and it is shown by affidavit, that peculiar and unusual labor and difficulty was thrown upon the master, and that even the adjournments involved a great loss of time, which might have been and would have been devoted to other business actually pending before him. I therefore — while, as the general rule, I approve the rates prescribed for referees under the state law, and do not design to make this special case a precedent for others — deem it just and reasonable to fix the compensation to be allowed to the master, for hearings at which testimony was taken, argument heard, or other actual service in the case rendered, at \$10 per day, and for attending when the reference was adjourned, without any service rendered, at \$5 per day.

An order to this effect may be entered, and the costs will be adjusted according to the foregoing opinion, upon both the points submitted.

ERIE RAILWAY COMPANY v. HEATH.

(Circuit Court for New York: 10 Blatchford, 214-216. 1872.)

Opinion by BLATCHFORD, J.

STATEMENT OF FACTS.—The eighty-second of the rules in equity prescribed by the supreme court provides that “the compensation to be allowed to every master in chancery, for his services in any particular case, shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct.”

The \$6,005,600 of stock which passed through the hands of the master, in executing the decree of the court, represented, at the market value thereof at the time, about \$2,000,000 of money. Under the act of February 26, 1853 (10 U. S. Stat. at Large, 163), the clerk of the court, if that amount of money had passed through his hands, would have been entitled, for receiving it, keeping it, and paying it out, under the order of the court, to one per cent. on the amount, or \$20,000.

Receivers are allowed, usually, as commissions, a percentage on the moneys passing through their hands. By the laws of New York, the commissions of an executor or administrator, for receiving and paying out \$2,000,000, are over \$20,000. It is also made known to the court, that, according to the established usage in the city of New York, the compensation of a broker, for receiving shares of stock, is one-eighth of one per cent. on the nominal or par value of the shares, and the same for delivering them. Such compensation, at those rates, on the \$6,005,600 of stock, would be \$15,014. The fees of the master, not objected to, for services in the suit, under the decree of reference, running through a period of ten months, and exclusive of the receipt, custody, registration and delivery of the certificates for the shares of stock, amount to \$2,690.71. His disbursements, for stenographers' fees, use of safe, carriage hire and watchmen, were \$554.80.

The course which the master pursued, of receiving the certificates of stock, then causing them to be registered, and then delivering them to the defendants, was one acquiesced in by both parties. The defendants insisted upon such course, in order that the certificates should be registered while in the custody of the master, and should not be delivered to them until the registration had taken place. The Erie Railway Company insisted upon delivering the certificates to the master. The certificates were six thousand and twenty-seven in number. They were registered while in the custody of the master, and then delivered to the defendants, and the provisions of the decree were carried out by the master with fidelity and punctuality, without interruption, and to the attainment of the result expressed in the decree.

§ 539. *A special allowance is to be made to a master for executing a decree, where his duties are responsible and the amount involved is large.*

It seems to me proper that this special service in regard to the certificates should be compensated by a special allowance. It was a highly responsible service, and, independently of its nature as a trust, the circumstances which had attended the litigation in its previous stages were such as to make great caution on the part of the master necessary, in order that the certificates might not be interfered with or intercepted before their delivery to the defendants in the completed form directed by the decree. Since the discharge of this service by the master, the management of the affairs of the Erie Railway

Company has passed into the hands of new directors, who are represented by counsel who took no part in the litigation referred to. They submit the matter of the compensation of the master entirely to the discretion of the court, without suggestion as to amount, and with the expression of a desire that he shall be properly compensated, and of a willingness to pay such proper compensation.

On a review of all the facts in the case, I fix the compensation of the master at the sum of \$7,500, in addition to the \$2,690.71, allowing to him, also, the \$554.80 of disbursements, thus making the entire amount allowed to him, \$10,745.51. This amount is to be paid to him by the Erie Railway Company.

XII. VARIOUS OFFICERS AND PERSONS.

§ 540. **Shipping commissioner.**—By section 4513 of the Revised Statutes "seamen may . . . reship and sail in the same vessel on another voyage without the payment of additional fees to the shipping commissioner by either the seaman or the master." It was held that, as affecting the fees of the commissioner, the exemption applied to a reshipment for all voyages succeeding the first, and not to the one immediately following that at which the fees were paid. *Young v. Steamship Co.*,* 15 Otto, 41.

§ 541. Section 4505, title 53, of the Revised Statutes of the United States, chapter 1, while it does not authorize the shipping commissioner to appoint deputy shipping commissioners, authorizes him to appoint clerks and to depute such clerks to act for him in his official capacity. *In re The Accounts of the Shipping Commissioner of the Port of New York*,* 16 Blatch., 92.

§ 542. The court intimated that though it would not interfere with the salaries given in the past by a shipping commissioner whose accounts had been passed upon without objection taken thereto in that respect at the reference to a master, such salaries being not fixed, but flexible and depending on fees, yet the court would, if applied to, grant an order of inquiry into the number and salaries of employees and the proper arrangements to be made as to these matters. *Ibid.*

§ 543. The act of June 7, 1872, provides for the creation of the office of shipping commissioner, prescribes a large list of onerous duties, enacts a system of fees, provides for the payment of clerk hire, the purchase of desks, books, etc., "at his own proper cost," and declares that "the emoluments, salaries and fees of such officer shall in no case exceed \$5,000, and any additional fees shall be paid into the treasury of the United States." *Held*, that under a proper construction of this act and the words "at his own proper cost," the commissioner was empowered to purchase office material and clerk help out of the fees received, and, in addition, retain for his own use fees to the amount of \$5,000, the excess in fees above both of these items being alone returnable to the treasury; the intent of this act, which was for the mutual benefit of seamen and ship-owners and not for revenue purposes, being taken into consideration. *In re The Shipping Commissioner of the Port of New York*,* 18 Blatch., 339.

§ 544. An order of the district court authorizing the shipping commissioner to pay out of the fees of his office the expenses of office, consisting of office material, clerk hire, etc., empowers the commissioner to pay the deficiency thus incurred in one year out of the surplus fees of a succeeding year. *In re Accounts of the Shipping Commissioner of the Port of New York*,* 16 Blatch., 92.

§ 545. Independently of this order, the authority to charge the deficiency of one year against the receipts of a succeeding year seems to be justified by the scope of the act of June 7, 1872, creating the office of shipping commissioner, which was an act for the mutual benefit of seamen and ship-owners and not enacted for revenue purposes. More especially will this charge be allowed in the shipping commissioner's accounts when the district attorney has taken no exception to such item in four successive annual accounts. *Ibid.*

§ 546. **Surgeons.**—Revised Statutes, section 1363, provides for the pay of assistant-surgeons and passed assistant-surgeon. The salary of passed assistant-surgeon "during the first five years after date of appointment" is less than "after five years from such date." *Held*, that the phrases "after date of appointment," and "from such appointment," refer to the appointment as passed assistant-surgeon, and not the original appointment of assistant-surgeon. *United States v. Moore*, 5 Otto, 760.

§ 547. **Executors.**—The orphans' court of Washington county, District of Columbia, allowed an executor ten per cent. commission on the inventory of the deceased's estate. This

allowance was made under the testamentary law of Maryland, which declared that the commission to be allowed to an executor shall be at the discretion of the orphans' court, "not under five per cent. nor exceeding ten per cent. on the amount of the inventory." *Held*, that the commission to be allowed to an executor in Washington county was left to the discretion of the orphans' court, and the allowance by said court, within the limits prescribed by statute, was final and conclusive. *Nicholls v. Hodges*, 1 Pet., 562.

§ 548. Whether the fees allowed in the orphans' court of Alexandria county, District of Columbia, are governed by those allowed in similar courts in Maryland or Virginia, an executor may be allowed ten per cent. for paying over a specific legacy, by the orphans' court of Alexandria county. *West v. Smith*, 8 How., 402.

§ 549. Ministers and consuls.—The act of 1856 declares that a minister "shall not be absent from his post, or the performance of his duties, for a longer period than ten days without the permission, previously obtained, of the president, and no compensation shall be allowed for the time of any such absence in any case, except cases of sickness." The minister resident of the United States at Brussels obtained leave of absence on July 7, 1856; this leave was extended, from time to time, until June 11, 1857, when he tendered his resignation, which was accepted. *Held*, that the minister had not forfeited his salary, under the above act, and was entitled to it to the time when his resignation took effect. *Forfeiture of Salary*, *9 Op. Att'y Gen'l, 188.

§ 550. In 1854, after the capture of Algiers by the French, Mahoney was appointed consul of the United States at that city, and continued in office till 1859, when he resigned. Algiers is not mentioned in the acts of 1855 and 1856 regulating compensation of consuls, but the act of 1856 provided that consuls, at ports therein not enumerated, should be entitled to such fees as they should collect, for compensation for their services. In 1865, Mahoney claimed under the act of May 1, 1810, which provided for the compensation of consuls residing on the coast of Barbary, \$4,000 a year as salary. During the time that he performed the duties of consul he made no return of fees received by him, but was paid the necessary expenses of his office. *Held*, that from the time Algiers and the country of which it was the principal city became a province of France, the compensation of the consul at that city ceased to be regulated by the act of 1810, and henceforth consisted of fees collected by the consul. *Mahoney v. United States*, 10 Wall., 62.

§ 551. The act of congress of 1855 declared that from and after the 30th of June, the president and senate shall appoint "diplomatic ministers to certain countries, and consuls at certain places, who shall receive an annual compensation for their services." The construction put on the act by the executive was that a minister or consul who was in the service on the 30th of June, and who was retained in office, was in the same condition as if he had received his commission afterwards, and entitled to pay under said act. Congress made appropriations to pay ministers who were previously appointed and not recommissioned. *Held*, that the construction put on said act by the executive and by congress was the proper construction, though literally the act would give the salaries provided by it to no one who was not appointed from and after June 30, 1855. *Compensation of Diplomatic and Consular Officers*, *9 Op. Att'y Gen'l, 89.

§ 552. Prior to 1855, consuls were paid by the fees they collected. In 1855 congress passed a law providing that they should be paid a salary, therein specified, thus changing the office from fee-paid to salaried. In 1856 congress by law provided a salary different from that of 1855. *Held*, that the compensation of consuls was regulated by the law which was in force when the service was rendered, and not by that which prevailed at the date of their commissions. *Ibid*.

§ 553. A garnishee who has attended to the suit in which he was garnished is entitled to a reasonable compensation for his trouble and the amount expended in the suit. *Mattingly v. Boyd*, 20 How., 128.

§ 554. Coroner.—It was held that the fees of the coroner of Washington county, D. C., and of the jurors and witness attending inquests at his summons in said county, and allowed by act of July 8, 1838, which could not be made out of the estate of the decedent, should, as between the United States and the levy court of that county, be paid by the latter. *Levy Court v. Coroner*, *2 Wall., 501.

§ 555. Where inquests were held in Washington county, D. C., in cases not provided for by law, through mistakes of the coroner, the court decided that he was entitled to remuneration for fees advanced to jurors and witnesses who had been lawfully summoned. *Ibid*.

§ 556. Taking depositions.—The witnesses in a case were sworn before a commissioner appointed to take their depositions, and then, by consent of the proctors of the two parties, the testimony was written down, but not by or in the presence of the commissioner, but the witnesses were subsequently brought before him and sworn to the depositions, whereupon he made his certificate. *Held*, that he was entitled to his regular fees for taking and certifying the dep-

positions in the absence of an express waiver of the same. *The Schooner F. Merwin*,* 10 Ben., 403.

§ 557. Commissioners.—By act of congress of March 3, 1853, making appropriations for the next ensuing fiscal year, for, among others, the salaries of certain commissioners, added this proviso: "and provided, further, that out of the said sum herein appropriated, there shall be paid to each commissioner appointed under the act of March 3, 1851, the sum of \$8,000, in lieu of the compensation heretofore allowed." *Held*, that the proviso, increasing the salaries of the commissioners, took effect from the approval of the act by the president. *Term of Judicial Salaries*,* 7 Op. Att'y Gen'l, 303.

§ 558. The commission, constituted by the act of congress of March 3, 1851, to settle private land claims in California, is a *quasi* court; and, the law being silent on the subject, the pay of the commissioners should begin with the date of the appointment. *Ibid*.

§ 559. It was held that the respondents were entitled to an itemized bill of the commissioner's fees, showing that the same are legally chargeable under the act of July 26, 1853, and also having attached a verification of the performance and necessity of the services charged. *Beckwith v. Easton*,* 4 Ben., 357.

§ 560. Upon the filing of exceptions to a commissioner's report, no docket fee will be allowed. *Ibid*.

§ 561. Clerks of departments.—The secretary of the treasury may cause furloughs without pay to be given to the clerks of the various departments, and such furloughs do not give the persons to whom they are issued a claim for pay for the term of such furlough. *United States v. Murray*,* 10 Otto, 536.

§ 562. Registers and receivers of land offices are by the acts of congress prohibited from receiving during any one year, in the way of fees and salaries, more than \$3,000; and the proviso to the third section of the act of March 22, 1852 (10 Stat., 4), relating to the fees of registers and receivers of land offices in or out of office at the passage of the act, which declares that no register or receiver shall receive more than this maximum sum of \$3,000, is not limited in its effect to the fees of registers and receivers in or out of office at the passage of the act, but applies also to their successors. *United States v. Babbit*,* 1 Black, 55.

§ 563. Watchmen.—A proviso in an appropriation act which, under the head of "department of state," enacts that the pay of all watchmen employed in either of the departments, executive or judicial, of the government, shall be \$720 per annum and no more, is not inoperative to affect the pay of a watchman who is employed in the department of war, because said proviso is enacted under the head of "department of state," the language of the proviso being general. *United States v. Ashfield*,* 1 Otto, 317.

§ 564. A watchman of the public grounds of Washington is by virtue of the act of congress of March 2, 1867, abolishing the office of commissioner of public buildings and transferring its duties to the chief engineer of the army, an employee of the department of war, so as to come within the proviso of the appropriation act of June 30, 1870, that "the pay of . . . watchmen . . . employed in either of the departments, executive or judicial, of the government, shall be \$720 per annum and no more." *Ibid*.

§ 565. An appropriation act fixed the pay of watchmen employed in the various departments for the fiscal year ending June 30, 1870, at \$720 per annum and no more, with the proviso that the act should not have the effect of reducing the pay of a government employee below the amount allowed in the last appropriation. The last appropriation (for the fiscal year ending June 30, 1869) allowed \$5,000 for the compensation of five watchmen in reservation number 2, without fixing any rate of compensation. *Held*, that where one of the watchman of said reservation resisted his reduction in salary, he could not do so under the proviso above cited, nor by virtue of an act of 1866 (not referred to in said appropriation for the fiscal year ending June, 1870), fixing the watchmen's pay at \$900 per annum. *Ibid*.

§ 566. Laborers—Messengers.—By the ninth section of the act of congress of 3d of March, 1849, the office of the commissioner of public buildings is constituted a bureau in the department of the interior. A joint resolution of congress, approved August 8, 1856, provides that laborers employed by the government in the executive department shall receive an annual salary of \$600 each. *Held*, that a laborer in the office of the commissioner of public buildings is a laborer in the executive department and entitled to a salary of \$600 per annum. *Graham v. United States*,* 1 Ct. Cl., 380.

§ 567. Neither an "assistant messenger" nor a "laborer" comes within the exception to the act of August 26, 1842, section 11; that exception applies only to watchmen and messengers. *White v. United States*,* Dev., 47.

§ 568. The language of each of the acts of March 3, 1839, of August 23, 1842, and of August 26, 1842, is broad enough to include both an assistant messenger and a laborer. *Ibid*.

§ 569. Auctioneer.—The marshal employed an auctioneer to sell a vessel and cargo which had been condemned in the federal court, but made no contract as to compensation. *The*

auctioneer arranged the cargo into lots, labeled the lots, obtained samples of each and sent samples to merchants, prepared catalogues of the lots, and attended to their printing and distribution, and performed the ordinary duties of an auctioneer in the sale, which brought \$145,393.04. The vessel and cargo were in the possession of the marshal and the auctioneer had nothing to do with keeping the property. *Held*, that auctioneers should be allowed such a sum as would secure the services of the most skilful and responsible; that a commission of one-half of one per cent. should be allowed the auctioneer for selling the *Amy Warwick*, which brought \$145,393.04; same for the sale of two other vessels, which brought respectively \$64,018.94 and \$50,420.49; five-eighths of one per cent. for selling another which brought \$31,333.75, and one per cent. for selling another which brought \$3,392.83. *Amy Warwick*, 3 S. r., 162.

§ 570. *Bankruptcy—Fees of sheriff.*—After a plaintiff obtained judgment, defendant was adjudged a bankrupt on a petition filed before the judgment was obtained. The assignee took possession of the bankrupt's property and plaintiff obtained nothing on his judgment. The sheriff sued the assignee for his expenses in keeping the property which he had seized in the suit against defendant before he was adjudged a bankrupt. *Held*, that he could not recover his fees as sheriff, but was entitled to compensation as bailee. *Zeiber v. Hill*, 1 Saw., 268.

§ 571. *Surveyor of port.*—One appointed surveyor under the authority of an act authorizing the appointment of a surveyor "for the port of *Eastport*, in the district of *Passamaquoddy*," is entitled to the salary granted by an act, "to the surveyor at *Eastport* for the district of *Passamaquoddy*," there being no other surveyor authorized to act in the district. *Ayer v. Thacher*, * 3 Mason, 153.

§ 572. *Naval officers.*—Under the act of May 7, 1822, chapter 107, section 9, relating to the salaries of collectors and naval officers, the necessary expenses of the office are a primary charge upon the gross receipts, and the naval officer is entitled only to so much as remains after such deduction, as and for his entire compensation. *Wentworth v. United States*, * 2 Story, 432.

§ 573. *Notary.*—The fact that a notary is also a clerk of one of the proctors in a cause does not incapacitate him from acting as notary, nor disentitle him to his fees for services rendered as such. *The Schooner F. Merwin*, * 10 Ben., 403.

§ 574. *A navy agent appointed by the president and senate, whether he reside abroad or within the United States, is an officer of the United States and not an agent of the navy department: and he is entitled to one per cent. on his disbursements of moneys under the provisions of act of congress of 3d March, 1809.* *Armstrong v. United States*, Gilp., 399.

§ 575. *Distillers—Salary of storekeepers.*—The act of congress of July 20, 1868, required every distiller to provide a warehouse for the storage of spirits manufactured by him, and when approved by the commissioner of internal revenue should be a bonded warehouse of the United States, under the control of the collector of the district and in charge of the internal revenue storekeeper, who should be paid by the United States. A distiller, with sureties, executed a bond in January, 1839. The United States paid a storekeeper for taking charge of the warehouse provided by the distiller from the 4th to the 25th of March, 1839. On March 29, 1869, congress passed a joint resolution providing that, after the passage of the resolution, the proprietors of internal revenue bonded warehouses should "reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses." *Held*, that the official bond of the distillers and their sureties, made before the passage of the joint resolution, does not bind them to make reimbursement of money expended by the United States before the passage of the resolution. The decision rests on two grounds: 1st, because the joint resolution only contemplates the reimbursement of expenses and salary paid after its passage; and 2d, because the reimbursement of moneys paid by the United States to their own officers in pursuance of a law in existence when the bond was executed is not a duty so connected with the business of a distiller as to be within the reasonable contemplation of the parties to the bond at the time of its execution. *United States v. Singer*, 15 Wall., 111.

§ 576. *Certain distillers complied with the provisions of the act of July 20, 1868, requiring a bond conditioned that the principals in the bond "shall faithfully comply with all the provisions in relation to the duties and business of distillers," and the construction of warehouses, for the storage of distilled spirits of their own manufacture, which are declared to be bonded warehouses of the United States, and under the control of the collector of the district and in charge of an internal revenue storekeeper. On 29th March, 1869, after the making of a bond by the distillers, congress passed a joint resolution providing that all proprietors of internal revenue bonded warehouses shall reimburse the United States the expenses and salary of all storekeepers in charge of such warehouses. Held, that the distillers were bound to reimburse the United States under the act of 1869, both by the bond executed before and those executed after the passage of said act, for the salary and per diem wages of the storekeepers on Sunday as well as on ordinary week days.* *United States v. Powell*, 14 Wall., 493.

§ 576a. **Member of congress from a territory.**—Although a territory adopt a constitution and form a state government, and under such elect a representative to congress, yet it must await the discretion of congress, before it can exert the functions of a state; and a representative so elected is entitled to pay only from the date of admission. *Conway v. United States*, 1 Ct. Cl., 68.

§ 577. **Pension agents.**—The clear meaning of the act of April 20, 1836, was that no compensation should be made to a pension agent until congress should by law provide for it. The act of 20th of February, 1847, as to compensation of pension agents, is prospective only in its operation. Those who acted as pension agents between April 20, 1836, and February 20, 1847, must be regarded as having acted with the full knowledge that the law forbade the making of any compensation to them, and that the United States were under no legal obligation to compensate them. *Knapp v. United States*, * Dev., 132, 133.

§ 578. **Receiver of public money.**—Commissions of United States receivers of public moneys are to be calculated from the date of appointment. *United States v. Dickson*, * 15 Pet., 141.

§ 579. Where a receiver of public moneys had received an amount sufficient to entitle him to charge the whole yearly maximum of commissions, it was held no error to allow him to do so, although he resigned before the expiration of the year for which the commissions were allowed. *Ibid.*

§ 580. Under the law of April 20, 1818, allowing receivers of public moneys \$500 salary a year, and a commission of one per cent. on moneys received within the year, not to exceed \$2,500, a receiver is entitled to his entire commission allowed by the law, as soon as he receives moneys sufficient; and his commissions cannot be graduated according to the time of his service, if he receives enough moneys to entitle him to his maximum commission within the first six months of the year and resigns thereafter. *United States v. Edwards*, * 1 McL., 467.

§ 581. A receiver of public moneys at a local land office is not entitled, when sued on his official bond, to set off against the government a rejected account for unauthorized clerk hire, fuel, lights, and for transmitting money to the proper government depository. *United States v. Lowe*, 1 Dill., 585.

§ 582. The claim of a receiver of public moneys at a local land office for office rent may, under certain circumstances, be allowed as an equitable credit under the act of March 3, 1797. *Ibid.*

§ 583. **Employees of senate.**—The act of congress of March 8, 1873, provided as follows: "The pay of all the present employees of the senate whose pay has not been specifically increased by this act, holding their places by authority of the committee on contingent expenses of the senate, be increased fifteen per cent. of their present compensation on the amount actually received and payable to them, respectively, from the beginning of the present congress, or from the date of their appointment, during the present congress, and who shall be actually employed at the passage of this act." *Held*, that the act relates to the employees of the then existing congress and to their compensation for the period of that congress only; and was not intended to affect the compensation of employees of future congresses though they were actually employed at the passage of the act. *Simmons v. United States*, * 12 Ct. Cl., 430.

§ 584. **Paymaster.**—The compensation of a paymaster of the marine corps, previous to April, 1829, was that of major in the infantry. Under the joint resolution of congress of May 29, 1830, providing that the compensation of the paymaster of the marine corps should be the same as was received by him previous to April, 1829, he can claim the pay of a major in the infantry and no more; and this amount he may claim whether or not he had been receiving more than the law allowed. *United States v. Kuhn*, 4 Cr. C. C., 401.

§ 585. Plaintiff having been appointed paymaster in the army, under act of April 24, 1816 (3 Stats. at Large, 297), it was held that he was entitled to the pay and emoluments of a major of infantry only. *Wetmore v. United States*, * 10 Pet., 647.

§ 586. The acts of 1812 and 1816, fixing the pay of paymasters at the compensation of a "major," are to be interpreted so as to read "major of infantry." *United States v. Gwynne*, * 1 McL., 270.

§ 587. **Army officers.**—The act of congress of March 16, 1802, provides that the commanding officers of each separate post shall be entitled to such additional number of rations as the president shall, from time to time, direct. On the 6th of March, 1816, the war department issued a general order directing double rations to be allowed to officers commanding military departments. *Held*, that the adjutant and inspector-general of the army was not an officer in command of a military department, and was not entitled to double rations under the order of the war department of March 6, 1816. *Parker v. United States*, 1 Pet., 293.

§ 588. A second lieutenant in the veteran reserve corps was mustered out and honorably discharged from the service of the United States; on the same day that he was discharged he was appointed an officer in the service of the bureau of freedmen and abandoned lands under the fourth section of the act of July 6, 1866. *Held*, that he was entitled to an allowance

for commutation of fuel and quarters, and thirty-three and one-third per cent. additional pay under the act of congress of March 2, 1867. *Brough v. United States*,* 8 Ct. Cl., 206.

§ 589. The acts in relation to the army, although they impose an oath of office, do not declare that it shall be imposed before the party can enter on the duties of the office. The pay of military officers may properly commence from the date of their acceptance. Commencement of Pay of Military Officers,* 2 Op. Att'y Gen'l, 638.

§ 590. The law of 1827 does not alter the rations to subaltern officers, who are in the receipt of extra pay for certain duties; they are entitled to six rations per day when in command of a post, with a right to double rations. *Ibid.*

§ 591. Section 1262 of the United States Revised Statutes provides that "there shall be allowed and paid to each commissioned officer . . . ten per centum of their current yearly pay for each term of five years' service." *Held*, that the words "current yearly pay" were to be so construed that the ten per cent. should be calculated upon the regular yearly pay *plus* any previous allowance of ten per cent. earned by a previous term of five years' service. *United States v. Tyler*,* 15 Otto, 244.

§ 592. There is a distinction between being "retired from active service" and being "wholly retired from the service," persons "retired from active service" being considered as still in the military service of the government, so that the provisions of section 1262 of the United States Revised Statutes, for an allowance of ten per cent. of the current yearly pay to officers of the army for each term of five years' active service, apply also to years passed in "retirement from active service." So held in a case in which the allowance was claimed by one retired with the rank of captain from active service on account of wounds received in battle. *Ibid.*

§ 593. Petitioner is a colonel in the army and entitled to the pay, rations and clothing of two servants, or money in lieu thereof. In 1812 the rate of a servant's pay was fixed at the pay of a private soldier; the pay of a private soldier during that time has varied; and on the 8d of March, 1865, it was enacted by congress "that the measure of allowance for pay of an officer's servant is the pay of a private soldier, as fixed by law at the time." *Held*, that the amount to be allowed to the officer in lieu of the pay of each of his servants was the amount payable by law to a private soldier at the time of the allowance. *Gilmore v. United States*,* 2 Ct. Cl., 364.

FEIGNED ISSUES.

See PRACTICE.

FELONIES AND INFAMOUS CRIMES.

See CRIMES, XXIX.

FERRIES.

SUMMARY—*Subject to control by government*, § 1.—*Construction of grant*, § 2.—*Enrollment and license for coasting trade*, § 3.—*On rivers between states*, §§ 4. 6.—*State rulings recognized in federal courts*, § 5.—*Franchise is property*, § 7.—*Distinction between a ferry and a bridge*, § 8.—*Railroad ferry*, § 9.—*Validity of license*, § 10.—*Exclusive right*, § 11.

§ 1. The establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not a matter of private right, and the government may exercise its powers by contracting with individuals. *Mills v. St. Clair County*, §§ 12-14.

§ 2. When in a grant of a ferry franchise the meaning of the words is doubtful, they shall be taken most strongly against the grantee and in favor of the government. They should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. So, also, where such a grant admits of two interpretations, one of which will render it inoperative, and the other will give it force, the latter interpretation should be adopted. *Ibid.*

§ 3. While the enrollment and license of a vessel for the coasting trade gives it the right to carry goods and passengers in the regular course of business, yet it confers no authority upon

such vessel to interfere with the existing rights of others in an exclusive ferry franchise granted and existing under a state law. *Conway v. Taylor*, §§ 15-20.

§ 4. The right to grant an exclusive ferry franchise upon a navigable boundary river belongs to the individual states, and is not conferred upon the general government by the provisions of the constitution giving congress exclusive right to regulate commerce between the states. *Ibid.*

§ 5. The exclusive right of James Taylor and his successors, by virtue of his riparian ownership and grant under the authority of Kentucky, to maintain a ferry across the Ohio river from Newport, Ky., having been uniformly sustained by the highest court of Kentucky, will be recognized and upheld by the courts of the United States. *Ibid.*

§ 6. The control of a state over a ferry franchise upon a river forming the boundary between it and another state is limited to granting an exclusive right to carry passengers, etc., from the state. It cannot interfere with the right of others to maintain a ferry to its side of the river. *Ibid.*

§ 7. A ferry franchise is as much property as any other incorporeal hereditament or chatte's or realty. It is clothed with the same sanctity and entitled to the same protection. *Ibid.*

§ 8. A boat propelled backwards and forwards across a river by steam power from the shore is a ferry, and not a bridge in any sense, and the existence of such a ferry is not a violation of a bridge franchise which gave the exclusive right to maintain a bridge at that point and collect the tolls for crossing the same. *Parrott v. City of Lawrence*, §§ 21-24.

§ 9. A ferry designed for the transportation of railroad cars only is not a ferry within the meaning of the Montgomerie charter of the city of New York, which conferred the exclusive right of granting ferry franchises upon the corporation. *The Mayor, etc., v. The New England Transfer Co.*, §§ 25-27.

§ 10. Where the act of incorporation confers power on a city council to license and establish a ferry, a license signed by the mayor and approved by the council is sufficient authority to the licensee to keep such a ferry. *Fanning v. Gregoire*, §§ 28, 29.

§ 11. By an act of the legislature of Iowa, F. and his heirs were authorized to establish and keep a ferry across the Mississippi river at Dubuque for a term of years. The act also provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town. The legislature afterwards conferred on the city council of Dubuque the right to establish and license ferries, and a ferry was established pursuant to such license. *Held*, that the license to F. was not exclusive, for the reason that a grant of that nature will only be held to be exclusive when so expressed, or such intention is necessarily inferred from the language used. *Ibid.*

[NOTES.—See §§ 30-71.]

MILLS v. ST. CLAIR COUNTY.

(8 Howard, 509-530. 1849.)

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—By an act of March 2, 1839, the legislature of Illinois appointed five commissioners to locate a road and ferry-landing, three hundred feet wide, on the east bank of the River Mississippi, opposite to the city of St. Louis; the road to extend back to Cahokia creek. The road and landing were accordingly located; the distance from the river to the creek being about sixty poles. The ferry having gone into operation under the act of 1839, this bill was filed, seeking to obtain a perpetual injunction against an exercise of a ferry privilege, on the ground, among others, that Samuel Wiggins and his assignees were entitled to the exclusive ferry right at that place by contract with the state of Illinois; and that said contract was violated by the act of 1839, and the establishment of a road and ferry under and by force of its provisions. The supreme court of Illinois having decided that the state law, and the acts done pursuant thereto, did not violate the contract made with Wiggins, and that it was not opposed to the constitution of the United States, that court proceeded, by a final decree, to dissolve an injunction granted *nisi*, and to dismiss the bill. To reverse this decree, on the grounds stated, a writ of error has been prosecuted to the supreme court of Illinois from this court, under the twenty-fifth section of the judiciary act of 1789.

The contract relied on by the defendants was made with Wiggins, by two acts of the legislature of Illinois. The first act, approved March 2, 1819, authorizes Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him;" provided that said ferry should be put into actual operation within eighteen months from and after the passage of that act. And it was also provided, by the second section, that no other person should thereafter establish any ferry within one mile of that established by Wiggins, with this reservation: "That if the provisions of the second section of this act shall be made to appear to the general assembly to be injurious to the public good, that then, and in such case, the second section may be repealed." Wiggins had no land of his own on the river near the town of Illinois when the above act was passed, but within less than eighteen months he acquired an interest in a tract of land of one hundred acres, part of which lay between Illinois town and the river, and extended to a considerable distance above it, and on this tract he established his ferry.

On the 6th of February, 1821, Samuel Wiggins had another act passed in his favor by the legislature of Illinois, authorizing him to make a turnpike road, to commence on the Mississippi river, opposite to St. Louis, on lands that "may belong to him," and to run across the American bottom to the bluffs. The act further provides: "And whereas the said Samuel Wiggins, his heirs and assigns, were authorized to establish a ferry upon the waters of the Mississippi river, near the town of Illinois, in this state, and a sand-bar having been formed since that time opposite said ferry, therefore:

"Sec. 5. Be it further enacted, that the said Samuel Wiggins, his heirs and assigns, be, and they are hereby, authorized to remove said ferry on any land that may belong to him or them on the said Mississippi river, under the same privileges as were prescribed by the act entitled: 'An act to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi,' approved March 2, 1819."

By an act approved January 19, 1833, so much of the acts of 1819 and 1821 as prohibited another ferry from being established within one mile of Wiggins' ferry-landing was repealed. This restriction is, therefore, out of the case. On the 13th of July, 1822, Wiggins obtained, by purchase from Julia Jarrot, a tract of one hundred acres, lying below the tract first acquired, adjoining thereto on the south, and fronting on the river; and it is upon this tract that the new ferry and road were located under the act of 1839.

§ 12. *Where the meaning of the words are doubtful, in the grant of a ferry right, they are construed most strongly against the grantee.*

The parties respectively assume, and so the court below held, that the establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by contracting with individuals. We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law shall govern; only two general principles need be invoked in construing the acts of 1819 and 1821, which are: First, that in a grant like this, designed by the sovereign power making it to be a general benefit and accommodation to the public, the rule is that, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government, and therefore should not be extended by implication

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The contract relied on by the defendants was made with Wiggins, by two acts of the legislature of Illinois. The first act, approved March 2, 1819, authorizes Samuel Wiggins, his heirs and assigns, to establish a ferry on the east bank of the River Mississippi, near the town of Illinois, and to run the same from lands "that may belong to him;" provided that said ferry should be put into actual operation within eighteen months from and after the passage of that act. And it was also provided, by the second section, that no other person should thereafter establish any ferry within one mile of that established by Wiggins, with this reservation: "That if the provisions of the second section of this act shall be made to appear to the general assembly to be injurious to the public good, that then, and in such case, the second section may be repealed." Wiggins had no land of his own on the river near the town of Illinois when the above act was passed, but within less than eighteen months he acquired an interest in a tract of land of one hundred acres, part of which lay between Illinois town and the river, and extended to a considerable distance above it, and on this tract he established his ferry.

On the 6th of February, 1821, Samuel Wiggins had another act passed in his favor by the legislature of Illinois, authorizing him to make a turnpike road, to commence on the Mississippi river, opposite to St. Louis, on lands that "may belong to him," and to run across the American bottom to the bluffs. The act further provides: "And whereas the said Samuel Wiggins, his heirs and assigns, were authorized to establish a ferry upon the waters of the Mississippi river, near the town of Illinois, in this state, and a sand-bar having been formed since that time opposite said ferry, therefore:

"Sec. 5. Be it further enacted, that the said Samuel Wiggins, his heirs and assigns, be, and they are hereby, authorized to remove said ferry on any land that may belong to him or them on the said Mississippi river, under the same privileges as were prescribed by the act entitled: 'An act to authorize Samuel Wiggins to establish a ferry upon the waters of the Mississippi,' approved March 2, 1819."

By an act approved January 19, 1833, so much of the acts of 1819 and 1821 as prohibited another ferry from being established within one mile of Wiggins' ferry-landing was repealed. This restriction is, therefore, out of the case. On the 13th of July, 1822, Wiggins obtained, by purchase from Julia Jarrot, a tract of one hundred acres, lying below the tract first acquired, adjoining thereto on the south, and fronting on the river; and it is upon this tract that the new ferry and road were located under the act of 1839.

§ 12. *Where the meaning of the words are doubtful, in the grant of a ferry right, they are construed most strongly against the grantee.*

The parties respectively assume, and so the court below held, that the establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by contracting with individuals. We deem this general principle not open to controversy; and in regard to so much of the controversy as involves the contract itself, no material difficulty exists as to what principles of law shall govern; only two general principles need be invoked in construing the acts of 1819 and 1821, which are: First, that in a grant like this, designed by the sovereign power making it to be a general benefit and accommodation to the public, the rule is that, if the meaning of the words be doubtful, they shall be taken most strongly against the grantee, and for the government, and therefore should not be extended by implication

in favor of the grantee beyond the natural and obvious meaning of the words employed; and if these do not support the right claimed, it must fall. Such is the established doctrine of this court, as was held in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Pet., 544-547 (Constr., §§ 2058-82).

§ 13. — *rule where the grant admits of two interpretations.*

Secondly, if the grant admits of two interpretations, one of which is more extended, and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant, if in such case one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted.

Testing the contract by these rules, and what are the complainants entitled to under the acts of 1819 and 1821? By the first act, Wiggins was to establish the ferry near the town of Illinois, "and to run the same from lands at said place which may belong to him." At the time the act was passed, Wiggins owned no land near the town of Illinois, and if the grant was in the present tense, and extended only to land that was then the property of the grantee, the act of assembly had no operation, and was worthless. But we suppose the words employed were not restricted to the time when the act was passed; the grantee was allowed eighteen months to put the ferry into operation, and he was to run his boats from his own lands, that is, from lands which might belong to him at the time the running commenced; and for this there was great reason, as the opposite shore lay within another state, and there, also, a ferry-landing had to be secured. The matter was one of speculation, and lands could not, with propriety, be purchased at high prices before the privilege was secured on both banks. And this construction, as we apprehend, is the one that the legislature of Illinois put on the act of 1819 by that of 1821, by which it was admitted that a ferry had been established according to the first act, and the grantee was authorized to remove it to another point, because a sand-bar had been formed in front of the landing. We therefore feel ourselves constrained to differ from the carefully prepared and able opinion of the supreme court of Illinois, found in the record, which holds the first grant to have been inoperative.

We come next to consider the act of 1821. When it was passed, Wiggins had land fronting on the river for nearly a mile, extending both above and below Illinois town, and lying between it and the river. It was all the land he then could desire for the purposes of his ferry, and the end of his road. Indeed, it is doubtful whether, under the grant, Wiggins could have gone below his first purchased tract, and been "near the town of Illinois," because his land extended considerably below the town. As the act of 1821 recognized the fact that Wiggins had complied with his contract under the act of 1819, and had established a ferry on land that belonged to him, and that it was established "near the town of Illinois," it is fair to presume that both parties to the contract, as modified and enlarged by the act of 1821, understood what land it was that Wiggins owned at that time, and the boundaries thereof, and also the extent of his interest, being two-sevenths of the tract.

The act of 1821 was treated by the bill, and was relied on in argument, as conferring a perpetual privilege on Wiggins, and on his assigns, to remove the ferry to any land that might belong to him, or to them, at the time of the removal; and, furthermore, that the right of removal was unrestricted as respects

time, and could have been made at any time heretofore, or could be made hereafter.

That the act is somewhat obscure, in regard to the place to which the ferry could be removed, must be admitted; and in seeking its true construction, several considerations present themselves. In the first place, that the act operated in the present tense, and was a mere enlargement of the privileges conferred by the act of 1819, and must be taken as a part of the first contract, cannot be denied; secondly, when we take into consideration the fact that Wiggins had a specific tract of land at that time, at the proper place,—that is to say, lying in front of Illinois town, and extending above and below it,—a reasonable conclusion is, that some place on such tract was referred to by the act of 1821; and, thirdly, as the act of 1819 reserved authority in the legislature to repeal so much of the law as secured to Wiggins an exclusive ferry right for two miles on the river front, such reservation could only mean that rival ferries might be established at discretion by the legislature. Nor can it be assumed, with any claim to a plausible construction, that the power of removal had no limitation of time or place, as this would confer a right to remove to the same landing with a newly established ferry, set up as a rival, and drive it away; and thus the public convenience would again be reduced to a single ferry. Now, in view of these facts and consequences, and applying them to language of an ambiguous character, and seeking assistance from a settled rule of construction in case of doubt, and finding that rule of construction to be, that when two constructions are equally open to the court, the one shall be adopted most favorable to the government, the consequence must be, on this construction,* that Wiggins was confined to the tract of land partly owned by him when the act of 1821 was passed; and that when the ferry was removed to other land, lower down the river, it was an act not within the contract, nor protected by it. This disposes of the first and principal ground of relief sought by the bill.

Whether Wiggins, or those claiming under him, had the right, after he had established his new ferry, under the act of 1821, to remove it to another place on the tract of land he then owned, and whether the state of Illinois may not authorize another ferry on the same tract of land, not interfering with the operations of the one established by Wiggins, are questions which the record does not bring before us, and upon which, therefore, we express no opinion.

A second ground of relief is relied on by the bill, and was most earnestly and ably urged in argument here, and which it is incumbent on us to dispose of also. The first special prayer would seem to include an inquiry into any ground of interference by this court, other than the question arising on the acts of 1819 and 1821, standing as a contract, claimed to have been violated by the act of 1839. But the bill has also a general prayer; and on this, as well as upon the special prayer, the supreme court of Illinois ordered, "that it be certified, in this case, that there was drawn in question the validity of the statute of the state of Illinois entitled 'An act to authorize St. Clair county to establish a ferry across the Mississippi river,' approved March 2, 1839, on the ground that it was repugnant to the constitution of the United States, and that the decision of the court was in favor of the validity of said statute;" from which certificate it is manifest that the act of 1839 was upheld against each state of facts set forth by the bill; and if it was apparently repugnant to the constitution on either ground assumed, this court has jurisdiction of the cause; and having jurisdiction, the plaintiffs in error were entitled to be

heard, and are entitled to our judgment on both grounds presented, and relied on to reverse.

The bill sets forth that gross abuses were imposed on complainants by the act of 1839, and by the commissioners and their lessee, under the act; that the said three hundred feet include a wider space, and more land, than is necessary or convenient for a road, and but a small portion of it has been used and appropriated by the said county of St. Clair to that purpose, leaving a strip on either side to be used by the said county of St. Clair and its lessees, for private property, for building lots, and other private purposes; and that that portion of the said three hundred feet which is not included in said road, and which is now used for private purposes, or is left to be thus used, will yield an annual ground rent larger than the whole amount of the damages assessed as aforesaid for the whole of said three hundred feet; and furthermore, that only the condemned land was valued, and no compensation awarded or tendered for the ferry franchise and landing taken from complainants. As the bill was demurred to, and the demurrer sustained in the state courts, and in this form the case comes before us, all charges of abuse and oppression on the part of the authorities of Illinois are admitted, to the extent alleged; and the question presented here on these facts is, whether this court has power to redress the injuries complained of, under the twenty-fifth section of the judiciary act of 1789.

§ 14. *Abuse of right of eminent domain by a state not a federal question, and supreme court has no jurisdiction.*

The constitution having declared that no state shall pass any law impairing the obligation of contracts, it becomes our duty to inquire whether the state law, and the acts done under it, violate a contract. If any contract was violated under the act of 1839, it must have been a grant to land vesting the fee-simple title; and such title complainants exhibit. To the width of needful roads and ferry-landings, property can undoubtedly be taken for the purposes of such easements; and necessarily, the state authorities must decide, as a general rule, how much land the public convenience requires. That the power may be abused no one can deny; and that it is abused, when private property is taken, not for public use, but to be leased out to private occupants to the end of raising money, is too plain for reasoning to make it more so. Such an act is mere evasion, under pretense of an authorized exercise of the eminent domain; and if it be an evasion, it is void, and may be redressed by an action at law, like any other illegal trespass done under assumed authority; as, for instance, a trespass by a younger grantee on land held by an elder patent depending for support on a state law of later date than the first grant. But it is not an invasion and illegal seizure of private property on pretense of exercising the right of eminent domain, and which act is an abuse claiming the sanction of a state law, that gives this court jurisdiction; such law, and the acts done under it, are not "the violation of a contract," in the sense and meaning of the constitution. It rests with state legislatures and state courts to protect their citizens from injustice and oppression of this description. The framers of the constitution never intended that the legislative and judicial powers of the general government should extend to municipal regulations necessary to the well-being and existence of the states. Were this court to assume jurisdiction, and re-examine and revise state court decisions, on a doubtful construction that an interest in land held by patent was a contract and the owner entitled to constitutional protection by our decision in case of

abuse and trespass by an oppressive exercise of state authority, it would follow that all state laws, special and general, under whose sanction roads, ferries and bridges are established, would be subject to our supervision. A new source of jurisdiction would be opened, of endless variety and extent; as, on this assumption, all such cases could be brought here for final adjudication and settlement, of necessity, we should be called on to adjudge of fairness and abuse, to ascertain whether jurisdiction existed, and thus to decide the law and facts; in short, to do that which state courts are constantly doing, in an exercise of jurisdiction over peculiarly local matters; by which means a vast mass of municipal powers, heretofore supposed to belong exclusively to state cognizance, would be taken from the states and exercised by the general government, through the instrumentality of this court. That such a doctrine cannot be maintained here has, in effect, been decided in previous cases; and especially in that of *Charles River Bridge v. Warren Bridge*, 11 Pet., 539, 540 (Constr., §§ 2058-82), where other cases are cited and reviewed.

For the reasons above stated, it is ordered that the judgment of the supreme court of Illinois be affirmed.

MR. JUSTICE McLEAN dissented.

CONWAY v. TAYLOR.

(1 Black, 603-635. 1861.)

ERROR to the Court of Appeals of Kentucky.

Opinion by **MR. JUSTICE SWAYNE**.

STATEMENT OF FACTS.—The appellees filed their bill in equity in the circuit court of Campbell county, Kentucky, seeking thereby to enjoin the appellants from invading the ferry rights claimed by them as set forth in their bill, and also praying for an account and a decree against the appellants in respect of the moneys received by them in violation of the alleged rights of the complainants. The appellants answered, proofs were taken, and the case brought to hearing.

The circuit court of Campbell county entered a decree against the appellants. They removed the cause to the court of appeals of Kentucky. That court modified the decree of the court below, but also decreed against them. They thereupon brought the cause to this court by a writ of error under the twenty-fifth section of the judiciary act of 1789. It is now presented here for adjudication.

The case made by the pleadings and proofs is substantially as follows: On the 29th of April, 1787, James Taylor, of Virginia, received from that state a patent for fifteen hundred acres of land lying upon the Ohio and Licking rivers, at the confluence of those streams, and above the mouth of the latter. In 1792 James Taylor, the patentee, by his agent, Hubbard Taylor, laid out the town of Newport, at the confluence of the two rivers, upon a part of the tract of fifteen hundred acres. According to the map of the town as surveyed and thus laid out, the lots and streets did not extend to either of the rivers. A strip of land extending to the water-line was left between the street running parallel with and nearest to each river.

In July, 1793, John Bartle applied to the Mason county court for the grant of a ferry from his lot in Newport, on Front street, across the Ohio to Cincinnati. An order was made accordingly, but the appellate court of Kentucky

reversed and revoked it on the 15th of May, 1798, upon the ground that it did not appear that his lot extended to the Ohio river. On the 29th of January, 1794, a ferry was granted to James Taylor of Virginia, by the Mason county court, from his landing in front of Newport, across the Ohio river, with authority to receive the same fares which were allowed upon transportation from the *opposite shore*. A ferry across the Licking was also granted to him.

On the 20th of August, 1795, a resurvey and plat of the town of Newport was made, by which the eastern limits of the town were extended to "Eastern Row," and the strip of ground between the Ohio river and the northern boundary of the town and between Licking river and the western boundary of the town were indorsed, "common or *esplanade*, to remain common forever." This plat was made by Roberts. On the 14th December, 1795, an act was passed by the legislature of Kentucky incorporating the town of Newport in conformity with the resurvey and plat of Roberts.

The preamble and so much of the act as is deemed material in this case are as follows: "Whereas it is represented to the present general assembly that one hundred and eighty acres of land, the property of James Taylor, in the county of Campbell, have been laid off into convenient lots and streets, by the said James Taylor, for the purpose of a town, and distinguished by the name of Newport, and it is judged expedient to vest the said land in trustees and establish the town:

"§ 1. *Be it therefore enacted by the general assembly*, That the *land comprehending the said town*, agreeably to a plat made by John Roberts, be vested in Thomas Kennedy and others, 'who are hereby appointed trustees for the same except such parts as are hereafter excepted.'

"§ 7. *Be it further enacted*, That such part of said town as lies between the lots and rivers Ohio and Licking, as will appear by a reference to the said plat, shall forever remain for the use and benefit of said town for a common, *reserving to the said James Taylor and his heirs and assigns every advantage and privilege which he has not disposed of or which he would by law be entitled to.*"

The streets and lots exhibited by the Roberts plat of 1795, as by that of 1792, did not extend to either the Ohio or Licking river. The disputed ground between the northern boundary of Front street and the Ohio river varies in width according to the inflexions in the line bounding the margin of the river at high-water mark, from five to ten poles; and the distance from high to low-water mark varies from seventeen to two hundred yards, and was not included in the one hundred and eighty acres laid out for the town. This area is denominated "the *esplanade*."

In 1799, James Taylor, of Virginia, the patentee, conveyed to his son, James Taylor, of Kentucky, this strip of ground, between Front street and the Ohio river, together with the other land adjacent to the one hundred and eighty acres laid out in the plat of the town in 1795, and also the ferry franchise. James Taylor, of Kentucky, from the time of the conveyance by his father to him, in 1799, continued to run the ferry from the ground in front of Newport on which it was originally established.

In consequence of the passage of the act of 1806, by the legislature of Kentucky, concerning ferries, James Taylor, of Kentucky, applied to the Campbell county court in 1807 for the establishment of the ferry granted to his father; and the ferry was re-established in his name, and he executed a bond and continued to run the ferry from almost every part of the ground or *espla-*

nade, in front of the town of Newport, from that period to the time of the filing of the bill in this case. In 1830 the town of Newport applied to the Campbell county court for the grant to said town of a ferry, from the esplanade across the Ohio river to Cincinnati, which application was refused. An appeal was taken to the court of appeals, and at the June term, 1831, the order of the Campbell county court was affirmed. This case is reported in 6 J. J. Marsh., 134.

James Taylor, of Virginia, and his grantee and son, James Taylor, of Kentucky, continued, therefore, uninterruptedly to run this ferry from 1794 until the commencement of this suit. The proof shows, also, that he constantly exercised acts of ownership over the whole common in front of Newport, and did not permit even the quarrying of stone without his consent; that he was in the habit of landing his ferry-boats at various points on this common or esplanade from time to time, and that he acquiesced in its free use as a common for egress and ingress by the people of the town, but always claimed and exercised the exclusive ferry privilege.

"After the incorporation of the town of Newport as a city, the city of Newport applied, in 1850, at the February term of the Campbell county court, for the grant of a ferry across the Ohio river, to the president and common council of the city of Newport. No notice was given of the application and the ferry was granted." At the time of this application James Taylor, of Kentucky, had departed this life, leaving a will and appointing his son, James Taylor, his executor, and making a particular devise of this ferry, and requiring his executor to rent it until the taking effect of the devise as provided in the will.

As soon as the action of the Campbell county court granting a ferry to the city of Newport was known, a writ of error was sued out from the circuit court by the executor and devisees of James Taylor, of Kentucky, to reverse the order of the county court, whereby the ferry was granted. The order was reversed. The city of Newport took the case to the court of appeals of Kentucky. That court, in March, 1850, affirmed the judgment of the circuit court. This case is reported in 11 B. Mon., 361.

It appears in the proofs that the ferry-boats used by the appellees were duly enrolled, inspected and licensed under the laws of the United States. No claim is set up in the bill as to any ferry license from Ohio, or to any right of landing on the Ohio side. In 1853 the appellants built the steamer *Commodore*, and constituted themselves "The Cincinnati and Newport Packet Company," for the purpose of running that steamer as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati. They rented for five years a portion of the esplanade in front of Monmouth street, *in the city of Newport*, from the common council of that city.

The *Commodore* was a vessel of one hundred and twenty-eight tons burden, and in all respects well appointed and equipped. The appellants caused her to be enrolled on the 4th of January, 1854, at the custom-house at Cincinnati, under the act of congress for enrolling and licensing vessels to be employed in the coasting trade and fisheries, with Peter Conway as master, and obtained on the same day, from the surveyor of customs at the port of Cincinnati, a license for the employment and carrying of the coasting trade. They commenced running her as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati, on the 5th of January, 1854. Her landings were at the wharves on each side of the river, opposite to each other, the landing in

Newport being at the foot of Monmouth street. The right of the Commodore to land there, for all lawful purposes, was not contested in the court of appeals, and was not questioned in the argument here.

In January, 1854, the appellees exhibited their bill in equity against the appellants. In the same month a preliminary injunction was granted, restraining the appellants from running the Commodore as a ferry-boat between the cities of Cincinnati and Newport. In the progress of the cause, proceedings were instituted against the appellants for contempt of the court in violating this injunction. It was then made to appear that the appellants had, on the 6th of March, 1854, obtained a ferry license under the laws of Ohio. This fact appears in the record, and is adverted to in the judgment of the court of appeals.

Upon the final hearing, the Campbell circuit court decreed that an account should be taken of the ferriages received by the appellants on account of the Commodore, and that they "be and they are, each and all of them, perpetually enjoined from landing the boat called in the pleadings and proof the 'Commodore,' or any other boat or vessel, upon that part of the Kentucky shore of the Ohio river lying between the lots of the city of Newport and the Ohio river, designated upon the plat of the town of Newport as the 'esplanade,' and including the whole open space so designated for the purpose of receiving or landing either persons or property *ferried from, or to be ferried to, the opposite shore of the Ohio river.*"

"It being hereby adjudged against all the defendants to this action, that the entire privilege and franchise of ferrying persons and property to and from said part of the Kentucky shore of the Ohio river is in the plaintiffs alone; and it is hereby adjudged that the receiving of persons, animals, carriages, wagons, carts, drays or any other kind of vehicle, either loaded or empty, upon said boat or any other vessel, at said part of the Kentucky shore, for the purpose of being transported and landed upon the opposite shore of the Ohio river, and the landing of persons, animals, and the kind of property above described, which had been received upon said boat or other vessel at or from the opposite shore of the Ohio river, and transported across said river, upon said part of the Kentucky shore, is an infringement of the ferry franchise of the plaintiffs, and is hereby perpetually enjoined; and this injunction shall extend to and embrace all persons claiming under the defendants to this action."

In reviewing this adjudication, the court of appeals held: "The judgment is erroneous in the extent to which it perpetuates the injunction, and to which it restrains the Commodore and the defendants in landing upon the slip in question persons and property transported from the Ohio shore, and in adjudging, as it seems to do, the exclusive right of ferrying from both sides of the river to be in plaintiffs alone. *The transportation as carried on* was illegal and properly enjoined, and the injunction should have been perpetuated against future *transportation of a like kind*, either under color of any license obtained or to be obtained from the authorities of the United States under the existing laws, or without such license, unless authorized to transport from the Ohio shore, from a ferry established on that side under the laws of that state; and they might have been restrained or prohibited, under all or any circumstances, from transporting persons or property from this to the other side (within the interdicted distance above or below an established ferry on this side), unless authorized under the laws of this state to do so; and the ex-

clusive right of ferrying from the Kentucky side should have been declared to be in the plaintiffs.

"Wherefore the judgment perpetuating said injunction, and adjudging the exclusive right of ferrying from both sides of the river to be in the plaintiffs, is reversed, and the cause as to that is remanded with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right as above directed.

"And afterwards, to wit, on the 9th day of February, 1860, the following order was entered on the records of this court:

"City of Newport v. Taylor's Executors *et al.* Judge Campbell.

"It is ordered that the mandate be amended as follows: That the judgment perpetuating the said injunction is *reversed*, and the cause as to that is remanded with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right as above directed."

It is objected by the appellants that no such ferry franchise exists as was sought to be protected by this decree, because it was granted under the laws of Kentucky and did not embrace a landing on the Ohio shore. It is insisted that such a franchise, when confined to one shore, is a nullity, and that the concurrent action of both states is necessary to give it validity.

§ 15. *Riparian rights of defendant under Kentucky laws.*

Under the laws of Kentucky a ferry franchise is grantable only to riparian owners. The franchise in this instance was granted in pursuance of those laws. Any riparian ownership, or right of landing, or legal sanction of any kind beyond the jurisdiction of that state, is not required by her laws. The riparian rights of James Taylor, deceased, and of his executor and devisees, in respect of the Kentucky shore, have been held sufficient to sustain a ferry license by the highest legal tribunal of that state, whenever the subject has been presented. The question came under consideration and was discussed and decided in the year 1831 in 6 J. J. Marsh., 134, Trustees of Newport v. James Taylor; in 1850 in B. Mon., 361, City of Newport v. Taylor's Heirs; in 1855 in this case, 16 B. Mon., 784; and, finally, in 1858 in the City of Newport v. Air & Wallace. (Pamphlet copy of record.)

These adjudications constitute a rule of property and a rule of decision which this court is bound to recognize. Were the question an open one, and now presented for the first time for determination, we should have no hesitation in coming to the same conclusion. We do not see how it could have been decided otherwise. This point was not pressed by the counsel for the appellants. The judgments referred to exhaust the subject. We deem it unnecessary to go again over the same ground.

§ 16. *Concurrent action of states in establishing a ferry.*

The concurrent action of the two states was not necessary. "A ferry is in respect of the landing place, and not of the water. The water may be to one, and the ferry to another." 13 Viner's Ab., 208, A. In 11 Wend., 590, The People v. Babcock, this same objection was urged in respect of a license under the laws of New York for a ferry across the Niagara river. The court said: "The privilege of the license may not be as valuable to the grantee, by not extending across the river; but, as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place."

The point has been ruled in the same way in a large number of other cases: 2 McLean, 377, Bowman's Devisees and others v. Burnley and others; 3 Yer-

ger, 390, *Memphis v. Overton*; 1 Green's Iowa Rep., 498, *Phelps v. Bloomington*; 4 Zabriskie, 723, *Freeholders v. The State*; 8 How., 569 (§§ 12-14, *supra*), *Mills v. St. Clair County*; 16 How., 524 (§§ 28, 29, *infra*), *Fanning v. Gregoire*. In the case last cited (*Fanning v. Gregoire*, 16 How., 524), the arguments on file show that this objection was pressed with learning and ability. In the opinion delivered, the court seems to have assumed the validity of such a license, without in terms advertg to the question. Another question was fully discussed and expressly decided. This point does not appear in the report of the case.

Our attention has been earnestly invited to the following provisions of the ferry laws of Kentucky, under which the license of the appellees was granted:

"None but a resident of Kentucky can hold the grant of a ferry. Sec. 5, Stanton's Revised Statutes, p. 540.

"Any sale or leasing of a ferry right, or contract not to use it, made with the owner of a ferry established on the other side of the Ohio or Mississippi, shall be deemed an abandonment, for which the right shall be revoked. Sec. 12.

"Any one who shall, for reward, transport any person or thing across a water-course from or to any point within one mile of an established ferry, unless it be the owner of an established ferry on the other side of the Ohio and Mississippi rivers so transporting to such point on this side, and any owner or lessee, or servant of the owner of a ferry on the other side of either of those rivers who shall so transport from this side, without reward, shall forfeit and pay to the owner of the nearest ferry the sum of \$16 for every such offense, recoverable before a justice of the peace. Sec. 14.

"No ferry shall be established on the Ohio river within less than a mile and a half, nor upon any other stream within less than a mile of the place in a straight line, where any existing ferry was pre-established, unless it be a town or city, or where an impassable stream intervenes.

"No new ferry shall be so granted within a city or town, unless those established therein cannot properly do all the business, or unless public convenience greatly requires a new ferry at a site not within four hundred yards of that of any other." Sec. 15.

We have considered these in connection with the other provisions of those laws. Whether they are wise and liberal, or the opposite, are inquiries that lie beyond the sphere of our powers and duties. Considered altogether, they have not seemed to us to deserve the character which has been ascribed to them. While they fence about with stringent safeguards the rights of the holder of the ferry franchise, they do not leave unprotected the rights of the public. If they give the franchise only to the riparian owner and citizen of the state, they surround him with sanctions designed to secure the fulfillment of his obligations.

The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those states. It was shown in the argument at bar that similar law exists in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters.

Very few adjudged cases have been brought to our notice in which the ferry rights they authorize to be granted have been challenged; none in which they have been held to be invalid.

§ 17. *A ferry franchise is property and is entitled to the same protection as other property.*

A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property. "An estate in such a franchise and an estate in land rest upon the same principle." 3 Kent's Com., 459.

§ 18. *The enrollment and license of a vessel under the laws of the United States gives it the right to carry on the coasting trade, and to transport and land persons and property in the course of ordinary commercial navigation, but does not confer a right to encroach upon the ferry privileges of others.*

Lastly, it is urged that the Commodore, having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrollment and license gave to the appellants in respect of that trade by obstructing the free navigation of the Ohio. Here it is necessary to consider the extent of the injunction which the decree directs to be entered by the court below. The counsel for the appellants insists that, "as respects transportation from the Kentucky side, and from the Commodore's wharf at the foot of Monmouth street, that vessel is enjoined, under 'all or any circumstances, from transporting persons or property' to the opposite shore unless under the authority of the state of Kentucky."

We do not so understand the decree. If we did, we should, without hesitation, reverse it. An examination of the context leaves no doubt, in our minds, that the court intended only to enjoin the Commodore, under "all or any circumstances, from transporting persons or property" from the Kentucky shore *in violation of the ferry rights of the appellees*, which it was the purpose of the decree to protect. The bill made no case, and asked nothing, beyond this. The court could not have intended to go beyond the case before it. That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport "persons and property" from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees.

Those rights give them no monopoly, under "all circumstances," of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting the business of commerce in good faith, without the regularity or purposes of ferry trips, and seeking in nowise to interfere with the enjoyment of their franchise. To suppose that the court of appeals, in the language referred to, intended to lay down the converse of these propositions, would do that distinguished tribunal gross injustice. The Commodore was run openly and avowedly as a ferry-boat; that was her business. The injunction as to her and her business was correct.

The language of the court must be considered as limited to that subject. The zeal with which this point was pressed by the counsel for the appellants has led us thus fully to consider it. The enrollment of the Commodore ascertained her ownership, and gave her a national character. The license gave her authority to carry on the coasting trade. Together they put the appellants in a position to make the question here to be considered.

§ 19. *A state has power to grant and protect exclusive ferry privileges within its territory.*

The language of the constitution to which this objection refers is as follows: "The congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Art. 1, § 8, clause 4.

The character and extent of the power thus conferred, and the boundaries which separate that power from the powers of the states touching the same subject, came under discussion in this court, for the first time, in *Gibbons v. Ogden*, 9 Wheat., 1 (Const., §§ 1183-1201). It was argued on both sides with exhaustive learning and ability. The judgment of the court was delivered by Chief Justice Marshall. The court said: "They" (state inspection laws) "form a portion of the immense mass of legislation which embraces everything within the territory of a state *not surrendered to the general government*; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, *ferries*, etc., are parts of this mass."

The proposition thus laid down has not since been questioned in any adjudicated case. The same principle has been repeatedly affirmed in other cases, both in this and the state courts. In *Fanning v. Gregoire*, 16 How., 524 (§§ 28, 29, *infra*), before referred to, this court held: "The argument that the free navigation of the Mississippi, guarantied by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of congress, does not apply in this case. Neither of these interfere with *the police powers of a state* in granting ferry licenses. When navigable rivers within the commercial powers of the Union may be obstructed, one or both of these powers may be invoked."

§ 20. *Rights of commerce give no authority to their possessor to invade the rights of property.*

Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad, without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The moment the right becomes common, the franchise ceases to exist. We have shown that it is property, and, as such, rests upon the same principle which lies at the foundation of all other property.

Undoubtedly, the states, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. 13 How., 519, *Wheeling Bridge Case*. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the state. The authorities referred to must be considered as putting the question at rest. The ordinance of 1787 was not particularly brought to our attention in the discussion at bar. Any argument drawn from that source is sufficiently met by what has been already said.

The counsel for the appellees has invoked the authority of *Cooley v. The*

Board of Wardens of Philadelphia, 12 How., 299 (Constr., §§ 1541-47), in which a majority of this court held that, upon certain subjects affecting commerce as placed under the guardianship of the constitution of the United States, the states may pass laws which will be operative till congress shall see fit to annul them. In the view we have taken of this case, we have found it unnecessary to consider that subject.

There has been now nearly three-quarters of a century of practical interpretation of the constitution. During all that time, as before the constitution had its birth, the states have exercised the power to establish and regulate ferries; congress never. We have sought in vain for any act of congress which involves the exercise of this power. That the authority lies within the scope of "that immense mass" of undelegated powers which "are reserved to the states respectively," we think too clear to admit of doubt. We place our judgment wholly upon that ground.

There is no error in the decree of the court of appeals. It is therefore affirmed, with costs.

PARROTT v. CITY OF LAWRENCE.

(Circuit Court for Kansas: 2 Dillon, 832-839. 1872.)

The facts appear sufficiently in the opinion.

§ 21. *A ferry, as distinguished from a bridge.*

Opinion by DILLON, J.

The grant to the bridge company by its charter is "the *exclusive* right and privilege of building and maintaining a *bridge* across the Kansas river at the city of Lawrence," and "to establish and collect tolls for *crossing said bridge*." If this right has not been invaded, the complainant is not entitled to an injunction against the running of the ferry. I say the *ferry*, for, in my judgment, it is clear that the means used to cross the river by the defendant Wilson — viz., a flat-bottomed boat, connected with cables spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank — is a ferry, as distinguished from a bridge, both under the legislation of the state and according to the usual meaning of the word.

The passage over streams is generally effected in one of two ways, viz.: by bridges, which, as commonly constructed for the use of travelers and teams, are immovable structures or extensions of the highways over and across the water; and by boats, which are movable and propelled by steam-power, horse-power, the action of the current, or similar agencies. When the passage is by the latter mode it is called *ferrying*, which implies a boat that moves back and forth across the stream, from bank to bank. The legislation of Kansas everywhere recognizes this distinction between bridges and ferries. In the statutes of 1855 there are provisions for building bridges (ch. 18), and also for regulating ferries (ch. 71). At the first session of the legislature, in 1855, there were a great many special acts, some authorizing certain persons to build toll bridges, and others to establish and maintain ferries. Among these numerous acts was one giving to John Baldwin the exclusive right to keep a public ferry across the Kansas river at the town of Lawrence for the period of fifteen years. Two years afterwards the legislature incorporated the Lawrence Bridge Company, giving it the exclusive right to build and maintain a bridge across the river at the same place. Did this invade the

franchise which had been granted to Baldwin? Clearly not, for the two grants are different; the one was to keep a ferry and collect tolls or ferriage for crossing the stream by this mode—the other was to erect and maintain a bridge, etc., “to collect tolls for crossing the same.” So that during the period for which Baldwin’s ferry charter was to run there were two modes of crossing the river at Lawrence expressly authorized—the one by means of Baldwin’s ferry, the other by means of the bridge of the Lawrence Bridge Company.

§ 22. *The establishment of a ferry within the limits in which a company has the exclusive right to build and maintain a bridge is not an infringement of the company’s franchise.*

The contract of the legislature with the bridge company must be protected from subsequent invasion. But what was that contract? It was simply an exclusive right to build a bridge, and to “collect tolls for crossing the same.” It is argued that the contract with the bridge company was that the travel of a certain district, to wit, those passing the river at Lawrence, should pass over this bridge and pay tolls therefor. But it is clear that such was not the contract: 1st, because it is not so expressed, or fairly to be implied from the language used; and, 2d, because the existence of the Baldwin ferry charter, which must be presumed to have been in the mind of the legislature when it passed the bridge charter, and which, by its terms, would continue in force many years after the period fixed for the completion of the bridge, shows that the legislature did not intend to make a contract with the bridge company to the effect that all persons and property crossing at Lawrence should pass over the bridge.

§ 23. *Construction of legislative grants of exclusive privileges.*

When we consider that legislative grants creating monopolies, while they are not to be cut down by hostile or strained constructions, are nevertheless not to be enlarged beyond the fair meaning of the language used (Binghamton Bridge Case, 3 Wall., 74; Const., §§ 2093–98), this conclusion seems, to my mind, so clear as not to admit of fair doubt. It has been settled by adjudication that the exclusive right to a toll bridge is not infringed by the erection of an ordinary railroad bridge within the limits over which the exclusive right extended (Mohawk Bridge Co. v. Railroad Co., 6 Paige, 564; Bridge Proprietors v. Hoboken Co., 1 Wall., 116, 150 (Const., §§ 2087–92), and cases cited); and the reasoning upon which this conclusion rests shows that where the charter of the bridge company is silent upon the subject, its exclusive right would not be invaded by the establishment, under legislative authority, of a public ferry, although this would have the incidental effect to injure the value of the franchise of the bridge company. That this is the opinion of the presiding justice of this court is plain from an expression to that effect, by way of argument, in his opinion in the Hoboken Bridge Case, 1 Wall., 116, 149 (Const., §§ 2087–92). In that case the legislature of New Jersey, in 1790, authorized the making of a contract with certain persons for the building of a bridge over the Hackensack river, and by the same statute enacted that it should not be lawful for any person to erect “any other bridge over or across the said river for ninety-nine years;” and it was held that the railroad bridge subsequently authorized, which was so constructed as that persons or property could not pass over it except in railway cars, did not impair the legal rights of the bridge proprietors. Mr. Justice Miller, in discussing the question as to what was the meaning of the act of 1790 and the contract with the per-

sons who built the bridge, says: "There is no doubt that it was the intention of those who framed those two documents to confer on the persons now represented by the plaintiffs some exclusive privileges for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by the defendants will infringe it. In the first place, it is not an exclusive right to transport passengers and property over the Hackensack and Passaic rivers, *for there is no prohibition of ferries*, nor is it pretended that *they* would violate the contract." 1 Wall., 149.

§ 24. *A ferry-boat is not a bridge in any sense.*

In conclusion I may remark that I have considered the very ingenious argument made by the complainant's counsel to show that the mode adopted by the defendants for transporting persons and property across the river is not a ferry, but a flying bridge, or a floating bridge, and hence it is a violation of the franchise of the bridge company. But the single boat which is made to cross the river by steam power is not, in my judgment, a bridge of any kind, and certainly not a bridge within the meaning of legislation of the state of Kansas on the subject of bridges and ferries. It is argued, and perhaps with correctness, that the city of Lawrence transcended her powers in purchasing boats and in assisting Wilson to maintain his ferry under his license from the county authorities. But if this be granted, it falls far short of showing that the complainant is entitled, in consequence, to an injunction to prevent Wilson from running his ferry under his license.

Injunction dissolved.

DELAHAY, J., concurs.

**THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK v.
THE NEW ENGLAND TRANSFER COMPANY.**

(Circuit Court for New York: 14 Blatchford, 159-169. 1877.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—This is a bill in equity, which is brought by the corporation of the city of New York, to restrain the defendants from operating a ferry, without the license of the plaintiffs, from Mott Haven, on the north shore of the Harlem river, within the twenty-third ward of the city of New York, to Jersey City. The following agreed statement of facts specifies the character and uses of the boat which is employed by the defendants, the route over which the boat passes, and the object for which the said boat and route are used: "The defendants are a corporation, organized under the laws of the state of Connecticut. A certified copy of their charter may be read in evidence. They hold a contract with the United States for the carriage of certain mails. They are owners of a side-wheel steamboat, called the *Maryland*, of about one thousand ninety-three and three one-hundredths tons burthen, enrolled and licensed for the coasting trade, under the laws of the United States. The said steamboat is constructed as what is popularly called a *double ended*, i. e., with open ends for entrance upon and egress from the main deck fore and aft, and capable of being run either end foremost, having at each end a rudder controlled from the rudder wheel in the pilot house on the upper deck, but she is not adapted to or capable of the transportation of ordinary vehicles or traffic, and her sole purpose and adaptation is to the transfer of railroad cars. On the main deck two railroad tracks

are laid down, occupying the entire space on the main deck to the bulkheads on the sides of the vessel, extending from end to end of the boat, and preventing the entrance or egress of vehicles, and also of passengers, baggage or freight, except as the same may be transported in railroad cars run over the said railroad tracks, which are so adjusted as to connect with corresponding tracks on the platform or bridge at the railroad dock, or of the railroad landing place to which the boat runs. Cars containing passengers and their baggage, other freight and mails, are run upon the boat at the place of embarkation, on the arrival of trains at the terminus of the railroad at such place of embarkation, and are run off from the boat at the place of disembarkation, for further transportation by land, but no passengers, baggage, freight, goods or merchandise are taken or transported on said steamboat, except as the same may be contained in railroad cars run on and off said tracks as aforesaid. Used in this manner, the Maryland has been employed by the defendants since the 10th day of May, 1876, for the transfer of drawing-room, sleeping and ordinary passenger cars containing passengers and baggage, freight, express and mail cars containing baggage, freight, express matter and mails, from a point at a place called Mott Haven, on the north shore of the Harlem river, now within the twenty-third ward of the city of New York, but formerly the town of Morrisania, in the county of Westchester and state of New York, to a point in Jersey City in the state of New Jersey, at the dock of the Pennsylvania Railroad Company, and *vice versa*. The trips of the Maryland are dependent upon the arrival of trains connecting by railroad from places north and east of the city of New York, and arriving at Mott Haven, bound south and southwest, and upon the arrival of connecting trains by railroad from places south and southwest of Jersey City, arriving at that city and bound north and northeast, with no other delay of the journey than such as is necessary to run the cars on and off the boat. The drop platform or bridge at Mott Haven, by means of which the cars of the defendants are run upon and off from the deck of the Maryland, is so constructed and operated as to rise and fall with the tide in the Harlem river; but it does not project into the river beyond the natural line of low-water mark, sufficient artificial excavation having been made to give ample depth of water to float at any tide. The course of the Maryland on leaving the dock at Mott Haven is down the Harlem river to its junction with the East river, down the East river southward to the bay of New York, through the said bay around the Battery to the Hudson or North river, and up the Hudson river to the dock at Jersey City in the state of New Jersey, on the west shore of the Hudson river, and crossing the dividing line between the states of New York and New Jersey in the course of the trip. On the trip of the boat from Jersey City to the place of landing at Mott Haven, the course (being reversed) is over the same water. No fixed or separate toll is charged or taken by the defendants in respect to the carriage of passengers' baggage or freight upon the said steamboat, but the defendants operate their said route as a part of a continuous line for the transportation, to the place of destination, of passengers, baggage, freight, mails, and other property, on their way from places north and east of the city of New York, in the states of Massachusetts, Connecticut and New York, to places respectively south and southwest of the said city of New York, in the states of New Jersey and Pennsylvania, respectively, and *vice versa*, under arrangements made by the defendants with the New York & New England Railroad Company, the Hartford, Providence & Fishkill Rail-

road Company, the New York, New Haven & Hartford Railroad Company, the Pennsylvania Railroad Company, and the other railroad companies whose roads form a part of said continuous lines, and which are incorporated and exist under the laws of the states of Massachusetts, Rhode Island, Connecticut, New York, New Jersey and Pennsylvania, and, as part of such continuous line between Mott Haven and Jersey City, the defendants transport such passengers, baggage and freight by water, in the manner above mentioned. Neither of the railroad companies above mentioned had separately or jointly, prior to the 10th day of May, 1876, established or effected a transportation of passengers, baggage, freight or mails, by or by means of what is herein described as the continuous route between Mott Haven and Jersey City. Through coupon tickets, in the usual form, are sold to the passengers. The compensation of the defendants for the carriage by water between Mott Haven and Jersey City is included in a through rate, and collected by the railroad companies selling a through ticket to a passenger or delivering freight to a consignee, and is paid over to the defendants. The compensation of the defendants in respect to the carriage of United States mails upon the said continuous line and route, by their said steamboat, is paid to said defendants by the postmaster-general, in the manner established by law, and is fixed by and included in a contract made between the defendants and the postoffice department of the United States, for the transportation of such mails over their portion of said continuous line, from places north and east of the city of New York to places south and southwest of the said city of New York, and *vice versa*. The Pennsylvania Railroad Company own and control the dock and slip at Jersey City, and the New York, New Haven & Hartford Railroad Company own and control the dock and slip at Mott Haven, and purchased the same prior to the passage of chapter 613 of the Laws of New York, 1873, up to which time the place called Mott Haven was, as it had ever prior thereto been, a part of Westchester county. Neither the mayor, aldermen and commonalty of the city of New York, nor the common council of said city, have ever taken any action to establish any ferry between the termini of the route navigated by the said steamer Maryland, nor over any other route or line with which said Maryland competes or interferes. The maps identified by the signatures of the counsel for the respective parties, and made under the direction of Mr. G. W. Greene, Jr., engineer-in-chief of the department of docks, are admitted to be correct, and may be referred to at the hearing by either party. All charters, grants and legislative acts of the state of New York, of the United States, or of any state of the United States, material to this cause, may be referred to, on the hearing thereof, by either party."

The Montgomerie charter, granted in 1730 (4 Geo. II.), "is the charter upon the foundation of which the city of New York is at present governed." Kent's Charters, note xix, p. 212. It recited and ratified the Dongan charter, which was the first English charter granted to the city of New York, in 1686, and the Cornbury charter, granted in the 7th of Queen Anne, and conferred new and additional powers upon the corporation. By the fifteenth section of the Montgomerie charter, the crown of England granted and confirmed to the mayor, aldermen and commonalty of the city of New York, and their successors, forever, "the sole, full and whole power and authority of settling, appointing, establishing, ordering and directing . . . such and so many ferries around Manhattan's Island, *alias* New York Island, for the carrying

and transporting people, horses, cattle, goods and chattels from the said Island of Manhattan to Nussau Island, and from thence back to Manhattan's, and also from the said Island Manhattan's to any of the opposite shores all around the same island, in such and so many places as the said common council" shall think fit. The rents, issues, profits, ferriages, fees and other advantages arising from such ferries were also granted to the said corporation. By the thirty-seventh section there was also a grant of the existing ferries, "and all other ferries now and hereafter to be erected and established all round the Island of Manhattan's." The boundaries of the city were made co-extensive with Manhattan Island.

By an act of the legislature of the state of New York, passed May 6, 1874 (chapter 329 of the Laws of 1874), the towns of Morrisania, West Farms and King's Bridge, all of Westchester county, were annexed to the city of New York, and were constituted the twenty-third and twenty-fourth wards of that city. The first section of this act declared that this territory was thereafter to be a part of the city, and to be entitled to the immunities, privileges and franchises of the city, in every respect, and to the same extent, as if the annexed territory had always been included within the city. The eleventh section provided that the mayor and common council of the city of New York should thereafter exercise over the annexed territory the same powers, in like manner and to the same extent, as if said territory had always been a part of the city of New York, except as limited or excepted by the act itself.

Upon the foregoing facts three questions of law arise: 1st. Did the city of New York obtain, by the Montgomerie charter, exclusive power to establish all the ferries from the original limits of the city to any of the opposite shores? 2d. Was this exclusive franchise extended to and impressed upon the annexed territory, so that a ferry could not be established from a point within the twenty-third ward, without the license of the common council, or is the franchise limited to the establishment of ferries from Manhattan Island? 3d. Is the user, by the defendants, of the Maryland upon its route, a ferry, within the true meaning of the Montgomerie charter?

§ 25. *Whether the legislature of New York can interfere with the ferry franchise of the city of New York, quære?*

1. The grant was of an exclusive right in the corporation to establish future ferries from any part of the original territory of the city to any of the opposite shores, and to receive, for the exclusive benefit of the corporation, the ferriages arising therefrom, or the emoluments arising from any ferry licenses which the common council might give. Whether the legislature of New York can or cannot interfere with this exclusive grant, and divest the city of the rights which it acquired by such charter, is a question which has not yet arisen. The grant seems to have been one of property as well as of public or political power; and whenever the question shall arise in regard to the control of the state acting by its legislature, over the grant, the remarks of Chancellor Kent, in his notes to the charters of New York (Note xxx, page 235), in opposition to the theory that the grant is within the reach of gratuitous legislative resumption, will undoubtedly receive the consideration which has always been given to the opinions of that eminent judge. *Benson v. Mayor, etc.*, 10 Barb. S. C. R., 223; *Darlington v. Mayor, etc.*, 31 N. Y., 164, 203; *People v. Mayor, etc.*, 32 Barb. S. C. R., 102; *Mayor, etc., v. Staten Island Ferry Company*, 8 Jones & Spencer, 233.

§ 26. *Quære: Whether the ferry franchise of the city of New York is limited to its original territory.*

2. The second question is, whether the exclusive franchise is or is not limited to the establishment of ferries from Manhattan Island, the original territory of the city. The grant, which has been heretofore substantially recited, was a grant of an exclusive right to establish ferries around Manhattan Island, from said island to any of the opposite shores. On the one hand, it is urged that municipal jurisdiction extended throughout the whole island, and that whenever, in either of the three charters, Manhattan Island was referred to, it was referred to for the purpose of designating the territory made subject to the corporate franchises and powers of the city, and was referred to as the territorial limit to which the ferry franchises could then extend, because the island and city territory were then identical, and that the meaning of the charter is, that wherever the jurisdiction of the corporation extended, namely, throughout the island, that territory was affected with a corporate and exclusive right in the corporation to establish all needful ferries, and that the powers which the mayor and common council rightfully exercised over the old territory were, by the act of annexation, to be exercised over the new territory, to the same extent as if such territory had always been a part of the city, and that thus the ferry franchises were extended to and impressed upon such new territory. On the other hand, it may be urged that the charter was of a municipal corporation, which was established upon an island; that the prosperity and the very existence of the city depended upon its abundant, permanent and regular means of intercourse with the main land; that there was a necessity that the city should be furnished with the exclusive power to authorize the permanent establishment of regular and frequent means of communication with the opposite shores and with Long Island; that, therefore, the power was given to the corporation to connect the island by ferries with other places, as a power indispensable to the welfare of the city; that this power being in terms for the establishment of ferries around the island was not, by the act of annexation, extended to a power to establish ferries from the newly acquired territory beyond the island, but the construction of the grant should be governed and controlled by the circumstances which existed when the charter was given, and which made such a grant necessary; and that, therefore, the city of New York, as enlarged by the annexation, possesses only the same franchise which it previously had — that of establishing ferries from the *island*, and not necessarily from the territory of the city, and that this construction limits the grant to the natural meaning of the words employed. The view which I take of the third question renders it unnecessary to express an opinion upon this point.

§ 27. *A ferry-boat fitted for the transportation of railway cars is not a ferry within the meaning of the Montgomerie charter of 1730.*

3. Is the liberty or privilege which the defendants now use, of running the steamer Maryland, in the manner and for the uses described in the statement of facts, a ferry, within the meaning of the grant in the Montgomerie charter? In *Bridge Proprietors v. Hoboken Company*, 1 Wall., 116 (Constr., §§ 2087-92), the supreme court held that a railroad bridge, which was an extension of the iron rails which composed the material part of a railroad over the Hackensack river, together with such substructure as is necessary to keep the rails in place and enable them to support the cars, was not a bridge, within the meaning of an act of the legislature of New Jersey, passed in 1790, by which that state empowered certain commissioners to contract for the building of a bridge over

the Hackensack, and provided that it should not be lawful for any person to erect any other bridge across the said river for ninety-nine years. The decision was upon the ground that a railroad bridge, on which there was "no planked bottom, no roadway or path, nothing on which man or beast or vehicle could pass, save as it is carried over in the cars," was not a bridge, within the minds of the framers of the act of 1790, or within the true intent and meaning of the exclusive grant contained in that act. To the same effect are *Mohawk Bridge Co. v. Utica R. Co.*, 6 Paige, 554; *McRee v. Railroad Co.*, 2 Jones, Law, 186; *Thompson v. N. Y. & Harlem R. Co.*, 3 Sand. Ch. R., 625. The decision in *Enfield Bridge Co. v. Hartford & N. H. R. Co.*, 19 Conn., 40, where the contrary doctrine was ably maintained, is not in accordance with the prevailing opinion which is now entertained by the courts of this country.

The reasoning which denies that a railroad bridge is an interference with an exclusive right theretofore granted to build an ordinary bridge applies with almost equal force to the question whether a ferry franchise is interfered with by a ferry which is designed for the transportation of railroad cars only. The boat of the defendants is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat; it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars. The whole arrangement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else. The ferry is a part of a continuous through railroad line from places north and east of the city of New York, to places south and southwest of that city, and the trips of the boat are dependent upon the arrival of through railroad trains.

Such a ferry is unlike an ordinary ferry for the transportation across a river of persons, animals and freight, at intervals more or less regular, for fare or toll. The ordinary ferry is a substitute for the ordinary bridge, and is a means of transportation of all persons and ordinary vehicles, and is for the accommodation of the public generally, and should, therefore, be accessible to the public. The railroad ferry is a substitute for a railroad bridge, and is a part of a railroad route for the transportation of the cars which are used upon a railroad track, and the burden which they bear, and is not for the accommodation of any persons except those who happen to be, for the time being, railroad passengers. A railroad ferry is a means of connecting railroad tracks, or two railroads, as a railroad bridge is the continuation of railroad tracks across a stream of water. It differs widely, except in name, from a general or unlimited ferry (*Fitch v. Railroad Co.*, 30 Conn., 38), and is not within the spirit of the grant which was made to the city of New York in the year 1730; and the adoption of the word ferry, "to express the modern invention, does not bring it within the terms of the" charter, "if it is not within the intent of it." *Bridge Proprietors v. Hoboken Co.*, 1 Wall., 116 (Constr., §§ 2087-92).

But it is urged that, in *Aiken v. Western R. R. Co.*, 20 N. Y., 370, a ferry which was used by a railroad for the transportation of its passengers and freight has been held to interfere with a ferry franchise theretofore granted. The ferry which the Western Railroad Company used at Albany was not the ferry which is described in the agreed statement of facts, and which is now known as a railroad ferry, and designed for the transportation of cars, although

it was used by a railroad corporation, but was an ordinary steamboat, and transported other persons, teams and carriages than such as were borne upon the railroad. It was justly held that the maintaining by a railroad company of a ferry, upon which it regularly and constantly transported gratuitously persons not passengers nor in its service, was an invasion of the right of a proprietor of a ferry franchise. The decision in this case does not conflict with the doctrine which is recognized in *Fitch v. Railroad Co.*, 30 Conn., 38.

It results that the establishment of the railroad ferry of the defendants is not an invasion of the exclusive franchise of the plaintiffs, assuming that their franchise was extended to the territory which was annexed in 1874. Let there be a decree dismissing the bill.

FANNING v. GREGOIRE.

(10 Howard, 524-534. 1853.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the district court of the United States for the district of Iowa. The plaintiff filed his petition in the district court of the county of Dubuque, stating that by an act of the legislative assembly of the territory of Iowa, approved the 14th of December, 1838, he was authorized to establish and keep a ferry across the Mississippi, at the town of Dubuque, and depart from and land at any place on the public landing of said town for the term of twenty years from the passage of said act; and that the act provided that no court or board of county commissioners should authorize any other person to keep a ferry within the limits of the town; that the petitioner was required, within two years from the passage of the act, to use for said ferry a good and sufficient steam ferry-boat; that a sufficient number of flat boats were also required to be kept, with a competent number of hands to work them, so as to convey across the River Mississippi, persons and property as might be required; that a horse ferry-boat, by an amendatory act, was substituted for a steam ferry-boat. And the plaintiff avers that the above acts of the legislature conferred on him the exclusive privilege of ferrying across the river at the above place during the twenty years named in the act. And he avers that in all things he has complied with requirements of the above acts, and that, in doing so, he has incurred great expense; that at the commencement, his ferry yielded little or no profit; but he persevered in keeping it up, hoping to be remunerated for his expense in its future profits.

He represents that the defendants, confederating with others to defraud him of his ferry right, have placed upon the ferry at the town of Dubuque a steam ferry-boat for the transportation of passengers, etc., and charges them for such transportation, etc., and claim that they have a right to do so, although the twenty years of the plaintiff's grant have not yet expired. He therefore prays for an injunction, etc.

At the appearance term of said court, the defendants represented that one of them was a citizen of the state of Missouri, and the other a citizen of the state of Illinois; that the matter in controversy exceeds \$500, and they pray that the said action may be removed to the next district court of the United States, to be held in the northern division of the district of the state of Iowa, and gave the security required by law; and the cause was removed to the district court.

The defendants, in their answer, admit that the plaintiff has a charter to ferry across the River Mississippi at Dubuque, but they deny that it secures to him an exclusive right. And they say that their steam ferry-boat was put on and is run by them in accordance with a contract made with the city of Dubuque, authorizing the running of said boat for six years from the 1st day of April, 1852; and they say that in running said boat they do not interfere with the right of the plaintiff other than such interference as is necessarily the result of a fair competition. And the defendants say that the city of Dubuque entered into said contract with the said Gregoire by virtue of the power vested in the council by the fifteenth section of an act to incorporate and establish the city of Dubuque, of the 24th of February, 1847.

The act granting the ferry right to the plaintiff bears date the 14th of December, 1838. The first section provides "that Timothy Fanning, his heirs and assigns, be and they are hereby authorized to establish and keep a ferry across the Mississippi river, at the town of Dubuque, in the county of Dubuque, and to depart from and land at any place on the public landing of said town, which was set apart for public purposes by act of congress approved the 2d of July, 1836 (5 Stats. at Large, 70), for the term of twenty years from the passage of the act."

The second section declared "that no court or board of county commissioners shall authorize any person (unless as herein provided for by this act) to keep a ferry within the limits of the town of Dubuque." The conditions annexed were that Fanning, his heirs and assigns, should, within two years from the passage of the act, procure a sufficient steam ferry-boat, and shall keep flat boats and a sufficient number of hands for the accommodation of the public. On failure to do so, proof being made to the satisfaction of the county commissioner or the county court, the charter should be declared to be void. By the act of July 24, 1840, a horse boat was substituted for the steam ferry-boat.

The right of the defendants arises under a contract made between the city of Dubuque and Charles Gregoire, the 11th of November, 1851; in which it was agreed by the corporation of the city, "in consideration of the covenants and stipulations hereinafter enumerated, have granted a license to Gregoire to keep a ferry across the Mississippi river, opposite the city of Dubuque, for six years from the 1st day of April next; it being understood that the city grant all the right it has and no more, with the privilege to land at any point opposite the city that he may choose.

Gregoire agreed to pay the city a sum of \$100 annually, and to provide for said ferry a good and substantial steam ferry boat, of sufficient capacity and dimensions to accommodate the traveling community, and to keep the same in good repair. And if the city should wish to grant the said franchise to any railroad before the expiration of the lease, they reserved the power to do so. By the fifteenth section of the act incorporating the city, power is given to the city council to license and establish ferries across the Mississippi river, from the city of Dubuque to the opposite shore, to fix the rates of the same, and to impose reasonable fines and penalties for the violation of such laws and ordinances. This act was approved the 24th of February, 1847.

§ 28. *A city council may license a ferry by contract signed by the mayor. The agents of a corporation may bind it by parol.*

It is objected by the plaintiff's counsel, that the license set up by the de-

fendants cannot avail them, as there is no ordinance of the council granting a ferry license to them, and that the council can only act under their corporate powers in that way. That the council have legislative powers in regard to the police of the city is admitted, but it does not follow that a contract may not be made under their sanction by the mayor, as was done in this case. The contract was in writing, and contained stipulations in regard to the public accommodation, which were important. The old rule was, that a corporation can make no contracts which shall bind it except under its seal. That doctrine has long since been overruled, and it is now fully established that the agents of a corporation may bind it by parol.

A license having been given, which, according to its terms, must be considered binding on the corporation, it is unnecessary to look into the acts of the council regulating ferries, as they are not important, as regards the question of power. If the form of the license had been laid down in the city charter, or the mode of granting it, a conformity to such a regulation would be required, but no such provision is found in the charter. Regulations are made by ordinances, but as to them, beyond the granting of a license in this case, we need not inquire.

§ 29. *That a grant by a legislative act is exclusive must be clearly expressed or necessarily inferred from the language used.*

The principal question in the case is, whether the right granted to Fanning is exclusive. The language used in the territorial act, it is argued, would seem to authorize an inference that the right was intended to be exclusive. The right was given for twenty years to Fanning and his heirs, subject to the conditions expressed. An ordinary license is not granted to a man and his heirs. But it is said the beginning of the second section is somewhat explicit on this point. It provides, "that no court or board of county commissioners shall authorize any other person (unless as hereinafter provided for by this act) to keep a ferry within the limits of the town of Dubuque."

The condition provided for, in the act above referred to, is any neglect on the part of Fanning or his heirs which shall incur a forfeiture of his right. The prohibition on the court and the board of county commissioners to grant a license for another ferry, it is urged, would seem to show an intent to make the grant exclusive. And that the reason for this might be found in the alleged fact that when the ferry was first established a considerable expenditure was required and little or no profit was realized for some years. But all the judges present except one held that the grant was not intended to be exclusive. In their opinion this view is sustained by the consideration that, although the county court and county commissioners were prohibited from granting another license at Dubuque, yet this prohibition did not apply to the legislature; and as it had the power to authorize another ferry, the general authority to the council to "license and establish ferries across the Mississippi river at the city," enabled the corporation, in the exercise of its discretion, to grant a license, as the legislature might have done. This power was clearly given to the city, and it may be exercised unless the grant of Fanning be exclusive.

The board of commissioners has been established, and the legislature has substituted in its place, for the purpose of licensing ferries at Dubuque, the city council, and it is contended that this change of the power ought not to affect the rights of the plaintiff. The restriction on the commissioners of the county does not apply, in terms, to the city council; and the court think it

cannot be made to apply by implication. The license to Gregoire was granted thirteen years after the grant of the plaintiff. And it may well be presumed, from the increase of the city at Dubuque, and the great increase of the line of trade through it, that additional ferry privileges were wanted. Of this the granting power was the proper judge.

The exclusive right set up must be clearly expressed or necessarily inferred, and the court think that neither the one nor the other is found in the grant of the plaintiff nor in the circumstances connected with it. The argument that the free navigation of the Mississippi river, guaranteed by the ordinance of 1787 (1 Stats. at Large, 51), or any right which may be supposed to arise from the exercise of the commercial power of congress, does not apply in this case. Neither of these interfere with the police power of the states, in granting ferry licenses. When navigable rivers, within the commercial power of the Union, may be obstructed, one or both of these powers may be invoked. The decree of the district court is affirmed, with costs.

§ 30. Construction of grants.—It is the settled rule of construction of grants by the legislature to corporations that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication. Any ambiguity arising out of the terms used must be resolved in favor of the public. So it was held that a town charter providing that "the board of trustees shall have power to make such by-laws and ordinances as they shall deem necessary and proper;" among other things, "to lay out . . . and keep in repair all streets, roads, bridges, ferries, . . . and to authorize the construction of the same," did not authorize the town to grant an exclusive right to maintain a ferry. *Minturn v. Larue*, 23 How., 435 (CONP., §§ 1938-95.; S. C., McAL., 870).

§ 31. Subject to legal control.—A right of ferry is of a public nature and is subject to legal control. The government is not only authorized but is bound to make suitable provisions for the accommodation of the public. *Bowman v. Wathen*,* 2 McL., 876.

§ 32. It seems that where a state, in incorporating a toll bridge company, discontinues a ferry, operating at the proposed site of the bridge, it cannot, after the bridge is built, authorize the continued use of the ferry, to the detriment of the bridge company. *East Hartford v. Hartford Bridge Co.*, 10 How., 511, 541 (CONSTR., §§ 2088-86).

§ 33. When the legislature of the territory of Wisconsin granted an exclusive ferry right across Lake St. Croix, and reserved to the legislature of the territory or state within which said ferry might be situated the power to modify or amend the said ferry right; and the legislatures of Wisconsin and Minnesota, between which two states the ferry runs, did modify the same, allowing another to keep a ferry within half a mile of the old one, it was held a valid modification or amendment. *Perin v. Oliver*,* 1 Minn., 202.

§ 34. Powers of congress.—The power of congress over navigation and intercourse is part of the power to regulate commerce, and is possessed by congress as fully as it possesses the power to regulate commerce, but not to a greater extent. So it was held that congress had no authority to require a license to carry on a ferry over the Missouri river, at a place altogether within the limits of the state of Missouri. *The Steamboat James Morrison*, Newb., 241.

§ 35. Subject to power of eminent domain.—A state, by virtue of its sovereign power of eminent domain, upon making compensation to the owners, may take away the franchise of a ferry. *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (CONSTR., §§ 2058-82).

§ 36. Power of state to revoke grant.—The grant by a state to a town of a ferry right across a navigable river is not a contract in the meaning of the constitution of the United States, and the state may revoke the grant at pleasure. *East Hartford v. Hartford Bridge Co.*, 10 How., 511 (CONSTR., §§ 2088-86).

§ 37. In 1818, a toll-bridge owned by an incorporated company became greatly damaged; the legislature, on the petition of the bridge company, passed a law discontinuing a certain ferry, doing business in competition with the bridge, "after the company shall have repaired the bridge;" the company expended large sums of money in rebuilding and repairing the bridge, and in 1836 the legislature repealed the law discontinuing the ferry, which was from that time maintained and kept up, whereby the bridge company lost many of the tolls which it would otherwise have collected. *Held*, that the law discontinuing the ferry was a contract with the bridge company which the legislature could not violate; that the law of 1836, allowing the ferry to be resumed, was a violation of that contract and void. *Ibid*.

§ 38. Inquiry as to right.—The exclusiveness of a ferry right cannot be inquired into by a proceeding in the nature of a writ of *quo warranto*. The inquiry is whether the respondent has usurped a franchise. *United States v. Fanning*,* 1 Morr. (Iowa), 348.

§ 39. A state legislature has the power to grant a ferry right over a navigable river forming the boundary between states. *Ibid*.

§ 40. Rights of owner of soil.—The owner of the soil over which passes a public road cannot, by virtue of his ownership of the soil, prevent one licensed by the proper authorities from keeping a ferry at that point. *Gant v. Drew*,* 1 Or., 35.

§ 41. Sale of land to which right is appurtenant.—A riparian owner to whose lands a ferry right is appurtenant may convey the lands in fee and reserve the ferry right to himself, and a reservation to himself of such right in the deed of conveyance will leave the right in fee to the ferry in him, though his heirs are not mentioned. *Bowman v. Wathen*,* 2 McL., 376.

§ 42. A riparian owner of lands on the Ohio river has an appurtenant right of ferry, and holds it by as sacred a tenure as he holds the lands from which it emanates. This right cannot be divested by the state except by a constitutional exercise of the right of eminent domain. *Ibid*.

§ 43. A ferry right is real estate, and subject to all the incidents of real property. *Ibid*.

§ 44. Sale of ferry right.—It seems that a ferry right may be conveyed and the grantor will still retain the fee in the land. The grantee has in such case the use of the soil for a ferry landing and for ferry ways so far as the public accommodation is concerned, as fully and completely as could be exercised by the grantee of the soil, but he has no right to enter on the soil for any other purpose. *Ibid*.

§ 45. The grant of a ferry franchise may be assigned. *Ibid*.

§ 46. A personal trust is not assignable. So where one was a grantee of a license to keep and operate a ferry under the law of Massachusetts, which provided for the granting of licenses by the proper authorities "to such person or persons as shall be judged suitable," it was held that the license could not be assigned. *The Maverick*, 1 Spr., 23.

§ 47. Grant of right held void.—The statute requires the commissioners, when they deem a ferry necessary, "to establish and confirm the same by especial order;" to cause a license to be issued; to fix the toll "from time to time." Such ferries are subject to an annual tax. *Held*, that the legislature intended the commissioners to establish a permanent ferry; and that an order merely directing a license for one year to issue was void, and the licensee acquired no right to keep a ferry. *Cason v. Stone*,* 1 Or., 39.

§ 48. Validity of law.—The approval by the governor of a law as follows: "I give the statute my approval, but still I regard the law in some respects as void, because it transcends the bounds of legislative power," is a valid approval, and the statute gives sufficient authority for the exercise of a ferry right granted therein. *United States v. Fanning*,* 1 Morr. (Iowa), 348.

§ 49. Collision.—The steamer Sylph, a ferry-boat, and another steamer collided during a dense fog. Each vessel complied with the regulations and usages usually observed in such a fog; each was running at five knots an hour; the fires on each were kept low; a person on each was assigned to constantly ring the alarm bells; each did everything possible to avoid a collision as soon as aware of the danger. *Held*, that the ferry-boat was not to blame for the collision and consequent damage to the other vessel, and could not be held liable in damages therefor. *The Sylph*, 4 Blatch., 24.

§ 50. The Columbus, in making her usual trip at the usual time, collided with a steam ferry-boat; the ferry-boat had just left her berth, going out at her usual time; the vessels did not discover each other sooner on account of intermediate objects intercepting the view, and each vessel, as soon as aware of the other, made every exertion to avoid the collision. *Held*, that the ferry-boat could not recover damages for the injuries occasioned by the collision. *The Columbus*, Abb. Adm., 384.

§ 51. In cases of collision, where neither party is to blame, each pays his own costs. *Ibid*.

§ 52. Liability for negligence.—The steamboat *Maverick* was plying without license, contrary to law, between one part of Boston and another part called East Boston, and ran against the warp of another vessel and thereby broke the leg of the mate of said vessel. To avoid liability for the said injury the *Maverick* set up a usage requiring other vessels to let go their warps on the approach of ferry-boats. *Held*, that the *Maverick*, being illegally run, could not require other vessels to conform to the usage. *The Maverick*, 1 Spr., 23.

§ 53. Right of railroad company to maintain a ferry.—The charter of a railroad company, after locating the line of the road to a certain point, contained the following provisions: "thence by steamboats, or other boats, over and across the ferry, to East Boston." *Held*, that the railroad company was not authorized to maintain a ferry for all travel and purposes in no wise connected with the road. *Ibid*.

§ 54. *Taxing ferry-boats.*—The *situs* of a boat is its home port, which depends on the locality of her owner's residence and upon the place of her enrollment. *St. Louis v. The Ferry Company*, 11 Wall., 423.

§ 55. The Wiggins Ferry Company is incorporated by the state of Illinois; run its boats between St. Louis and a point opposite in Illinois; its pilots and engineers reside in Illinois, where its real estate is situated; its boats, when not in actual use, are laid up by the Illinois shore and are taxed in that state; it has a general office in St. Louis, where its books are kept and its general officers reside; it pays a ferry license to St. Louis, and taxes on its wharf-boat attached to the St. Louis landing; its boats, by city ordinance, are not allowed to remain at the St. Louis wharf or landing more than ten minutes at a time. *Held*, that the boats could not be taxed by St. Louis as property "within the city." *Ibid*.

§ 56. *Rights barred by lapse of time.*—In 1802 the governor of Indiana, without express statutory authority, licensed a person to keep a ferry at a point where a right appurtenant to the soil existed. The ferry was established by the licensee, and the license was confirmed by the legislature of Indiana some years later. The owner of the appurtenant ferry right never established any ferry, but was chargeable with notice of the existence of the ferry under the license and legislative confirmation. He died in 1820, and in 1838 his devisees brought suit, claiming the right to the ferry to the exclusion of the right of the licensee and his grantees. *Held*, that the right of the devisees was barred by lapse of time by the neglect of their testator and themselves to assert it within a proper time. *Bowman v. Wathen*, * 2 McL., 376.

§ 57. Complainants, non-residents of Indiana, claiming a ferry right in that state, bring their bill in equity, seeking an account, and an injunction against defendants who have used the ferry for thirty-eight years under a grant from Indiana. The agents of complainants, having the management of their property at the place of the landing of the ferry, knew of complainants' claim before the defendants' ferry was in operation, and since that time had used the ferry as had other passengers. *Held*, that complainants were guilty of laches, and could not maintain their bill; that without regard to notice to complainants through the knowledge of their agent, their negligence had permitted the defendants' title to grow into full maturity by lapse of time. *Bowman v. Wathen*, 1 How., 189.

§ 58. *Infringement of rights.*—It seems that a state cannot grant a new ferry to the material prejudice of an old one unless public accommodation shall require it. *Bowman v. Wathen*, * 2 McL., 373.

§ 59. Though a ferry right be exclusive, yet when the owners thereof or their assignees destroy the ferry the right to exclude others is likewise destroyed; the fate of the incident must follow that of the principal. So where a bridge company, claiming to be assignee of a ferry, erect their bridge so as to destroy the ferry, the exclusive privileges incident to the ferry are also destroyed, and there being no grant of exclusive privileges in the charter of the bridge company, the company had not the right to maintain a bridge to the exclusion of others. *Charles River Bridge v. Warren Bridge*, 11 Pet., 420 (CONSTR., §§ 2038-83).

§ 60. Complainant claims an exclusive right of ferry, as assignee of the grantee of the town of Oakland; he seeks to enjoin defendant from keeping a ferry, which is alleged to be an infringement of complainant's right. It was held that the injunction would not issue on bill and affidavits, before the coming in of the answer; that complainant's title was doubtful and the injury complained of was not irreparable. *Minturn v. Larue*, McAL., 370.

§ 61. The law requires that one applying for a ferry license must have published his intention to make such application in some newspaper, or have advertised the same on the door of the court-house, or house used as such, and in three of the most public places in the county, for four weeks, etc. Plaintiff complied with the requirement as to length of time, and as to posting notices in so many as three of the most public places in the county; he posted a notice on a large tree near the house which was afterwards used by the first court as a court-house; he obtained his license from the court, in December, 1851, at its first meeting; his bond was approved in April, 1852,—it could not have been approved sooner; he paid his license fee as soon as there was an authorized officer to receive it (although he had run his ferry-boat prior to that time), and before a valid license had been granted to any other. *Held*, that plaintiff could enjoin defendant, who had obtained no valid license, from keeping a ferry at a place where plaintiff is licensed to keep his ferry. *Drew v. Grant*, * 1 Or., 197.

§ 62. *Laws of congress for protection of passengers.*—The act of congress of 1838, "To provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," does not apply to ferry-boats, and they are not liable for the penalties imposed by said act. *The Steamboat Planter*, Newb., 202.

§ 63. A vessel built as a ferry-boat, and used as such daily, does not become liable to the penalties imposed by the acts of congress of 1838 and 1852, by being used for one day in transporting passengers from Detroit to Hamtramck, when she on the same day made her regular trips as a ferry-boat between Detroit and Windsor. *The Steamboat Ottawa*, Newb., 536.

§ 64. **Engineers and pilots.**—The act of congress of August 30, 1852, does not require engineers and pilots employed on steamers used as ferry-boats to be licensed. *The Sylph*, 4 Blatch., 24.

§ 65. **License.**—Where a ferry right had been granted by the legislature, and a law passed empowering county tribunals to grant ferry licenses, with this proviso, however: "That license shall not be granted to any ferry within the limits granted to any other ferry previously, by legislative enactment," it was held that the grantee of the legislature could not be subjected to the penalties imposed for maintaining a ferry without being licensed by the county. *Territory of Kansas v. Reyburn, McCahon*, 134.

§ 66. Where one is indicted for carrying on a ferry without license, the question as to whether he has forfeited the right by a non-compliance with conditions cannot be inquired into. *Quo warranto* is the proper proceeding for that purpose. *Ibid.*

§ 67. **Enrolling and licensing.**—The act of congress for enrolling and licensing ships and vessels to be employed in the "coasting trade" does not apply to a ferry-boat employed in crossing a river within a state. *The Steamboat James Morrison, Newb.*, 241.

§ 68. The grant of a ferry franchise belongs exclusively to the state government. Steamers used on the ferry between New York city and Elizabethport, New Jersey, touching at Bergen Point, New Jersey, and Mariners' Harbor, New York, are not required by the acts of congress of 1833 and 1853 to be licensed and enrolled. *The Elizabethport and New York Ferry Company v. United States*, 5 Blatch., 193.

§ 69. A ferry is but a continuation of a road, though it cross a navigable river which is the boundary between two states. A vessel that merely crosses such a river as a ferry-boat can in no sense be said to be engaged in any trade. So it was held that the act of congress of 1833 did not require a license to be obtained by steamboats employed as ferry-boats crossing the Mississippi river. *Steam Ferry-boat Wm. Pope, Newb.*, 256.

§ 70. The act of congress of 1838 does not require vessels to be enrolled and licensed that were not required to be enrolled and licensed before the passage of that act. There is no law enacted previous to the passage of that of 1838 requiring ferry-boats to be enrolled and licensed. *Steam Ferry-boat Wm. Pope, Newb.*, 256; *The Steamboat James Morrison, Newb.*, 241.

§ 71. **In District of Columbia.**—Under the act of congress of March 3, 1801, the circuit court for the District of Columbia may in its discretion grant or refuse a ferry license over the eastern branch of the Potomac. *Young's Case*, 2 Cr. C. C., 453.

FICTITIOUS ACTIONS.

See ACTIONS.

FINAL PROCESS.

See WRITS.

FINES.

See CRIMES; PENALTIES.

FIRES.

See CARRIERS; TORTS.

FIRE INSURANCE.

See INSURANCE.

FISHERIES.

[See CONSTITUTION AND LAWS, §§ 823-24, 2170-73. As to Fishing Laws and Vessels, see MARITIME LAW.]

SUMMARY — *Right of fishery; state may regulate mode*, § 1.

§ 1. Whatever rights of property exist in the soil below low-water mark of navigable waters belong to the state in trust for and subject to the common right of taking shell and floating fish. The state may regulate the mode of such fishery and thereby prevent the destruction of the fishery. The law of Maryland, therefore, prohibiting the use of other instruments than the rakes and tongs then in use in taking oysters within the waters of the state, and providing for the forfeiture of all boats or vessels engaged in the unlawful fishing, was not invalid under the constitution of the United States, and applied to vessels enrolled and licensed for the coasting trade under the laws of the United States. *Smith v. State of Maryland*, §§ 2-7.

[NOTES.— See §§ 8-36.]

SMITH v. STATE OF MARYLAND.

(18 Howard, 71-76. 1853.)

Opinion by MR. JUSTICE CURTIS.

STATEMENT OF FACTS.— This is a writ of error to the circuit court for Anne Arundel county, in the state of Maryland, under the twenty-fifth section of the judiciary act of 1789. It appears by the record that the plaintiff in error, being a citizen of the state of Pennsylvania, was the owner of a sloop called *The Volant*, which was regularly enrolled at the port of Philadelphia, and licensed to be employed in the coasting trade and fisheries; that in March, 1853, the schooner was seized by the sheriff of Anne Arundel county, while engaged in dredging for oysters in the Chesapeake bay, and was condemned to be forfeited to the state of Maryland, by a justice of the peace of that state, before whom the proceeding was had; that on appeal to the circuit court for the county, being the highest court in which a decision could be had, this decree of forfeiture was affirmed; and that the plaintiff in error insisted, in the circuit court, that such seizure and condemnation were repugnant to the constitution of the United States.

This vessel being enrolled and licensed, under the constitution and laws of the United States, to be employed in the coasting trade and fisheries, and while so employed having been seized and condemned under a law of a state, the owner has a right to the decision of this court upon the question whether the law of the state, by virtue of which condemnation passed, was repugnant to the constitution or laws of the United States. That part of the law in question containing the prohibition and inflicting the penalty, which appears to have been applied by the state court to this case, is as follows (1833, ch. 254):

“AN ACT to prevent the destruction of oysters in the waters of this state.

“Whereas, the destruction of oysters in the waters of this state is seriously apprehended, from the destructive instrument used in taking them, therefore

“SEC. 1. *Be it enacted by the general assembly of Maryland*, That it shall be unlawful to take or catch oysters in any of the waters of this state with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this state, on pain of forfeiting to the state the boat or vessel employed for the purpose, together with her papers, furniture, tackle and apparel, and all things on board the same.”

The question is, whether this law of the state afforded valid cause for seizing a licensed and enrolled vessel of the United States, and interrupting its voyage, and pronouncing for its forfeiture. To have this effect, we must find that the state of Maryland had power to enact this law. The purpose of the law is, to protect the growth of oysters in the waters of the state, by prohibiting the use of particular instruments in dredging for them. No question was made in the court below whether the place in question be within the territory of the state. The law is, in terms, limited to the waters of the state. If the county court extended the operation of the law beyond those waters, that was a distinct and substantive ground of exception, to be specifically taken and presented on the record, accompanied by all the necessary facts to enable this court to determine whether a voyage of a vessel, licensed and enrolled for the coasting trade, had been interrupted by force of a law of a state while on the high seas, and out of the territorial jurisdiction of such state.

To present to this court such a question upon a writ of error to a state court, it is not enough that it might have been made in the court below; it must appear by the record that it was made, and decided against the plaintiff in error. As we do not find from the record that any question of this kind was raised, we must consider that the acts in question were done, and the seizure made, within the waters of the state; and that the law, if valid, was not misapplied by the county court by extending its operation, contrary to its terms, to waters without the limits of the state. What we have to consider under this writ of error is, whether the law itself, as above recited, be repugnant to the constitution or laws of the United States.

§ 2. *The enrollment and license of a vessel for the coasting trade confer no immunity from the operation of valid state laws.*

It was argued that it is repugnant to that clause of the constitution which confers on congress power to regulate commerce, because it authorizes the seizure, detention and forfeiture of a vessel enrolled and licensed for the coasting trade, under the laws of the United States, while engaged in that trade. But such enrollment and license confer no immunity from the operation of valid laws of a state. If a vessel of the United States, engaged in commerce between two states, be interrupted therein by a law of a state, the question arises whether the state had power to make the law by force of which the voyage was interrupted. This question must be decided, in each case, upon its own facts. If it be found, as in *Gibbon v. Ogden*, 9 Wheat., 1, that the state had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful, and the proceedings under the law invalid. But a state may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws.

§ 3. *The soil under navigable water below low-water mark belongs to the state.*

In considering whether this law of Maryland belongs to one or the other of these classes of laws, there are certain established principles to be kept in view, which we deem decisive. Whatever soil below low-water mark is the subject of exclusive propriety and ownership belongs to the state on whose maritime border, and within whose territory, it lies, subject to any lawful grants of that soil by the state, or the sovereign power which governed its territory before the declaration of independence. *Pollard's Lessee v. Hagan*, 3 How., 212; *Martin v. Waddell*, 16 Pet., 367; *Den v. The Jersey Co.*, 15 How., 426.

§ 4. *Soil below low-water mark is held by the state subject to public rights of fishery.*

But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. *Martin v. Waddell*; *Den v. Jersey Co.*; *Corfield v. Coryell*, 4 Wash. R., 376; *Fleet v. Hagemen*, 14 Wend., 42; *Arnold v. Munday*, 1 Halst., 1; *Parker v. Cutler Milldam Corporation*, 2 Appleton (Me.) R., 353; *Peck v. Lockwood*, 5 Day, 22; *Weston et al. v. Sampson et al.*, 8 Cush., 347. The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from its duty to preserve unimpaired those public uses for which the soil is held. *Vattel*, b. 1, c. 20, s. 246; *Corfield v. Coryell*, 4 Wash. R., 376. It has been exercised by many of the states. See *Angell on Tide Waters*, 145, 156, 170, 192-3.

§ 5. *A state law preventing the destruction of oysters within the waters of the state, by the use of particular instruments in taking them, is constitutional.*

The law now in question is of this character. Its avowed, and unquestionably its real, object is to prevent the destruction of oysters within the waters of the state, by the use of particular instruments in taking them. It does not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the state of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the state to its own citizens, or a part of them, or by force of the constitution of the United States must remain common to all citizens of the United States; whether the national government, by a treaty or act of congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the state holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case, and upon which we give no opinion.

§ 6. — *and the forfeiture of a licensed and enrolled vessel is not an interference with the regulation of commerce.*

So much of this law is as above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters, whatever they may be; and it is the judgment of the court, that it is within the legislative power of the state to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board — treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments. *The Malek Adhel*, 2 How., 233-4, and cases there cited. Our opinion is, that so much of this law as appears by the record to have been applied to this case by the court below, is not repugnant to the clause in the constitution of the United States which confers on congress power to regulate commerce.

§ 7. *Admiralty and maritime jurisdiction of United States does not exclude state legislation not in conflict therewith.*

It was also suggested that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in *United States v. Bevens*, 3 Wheat., 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the states, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution. The objection that the law in question contains no provision for an oath on which to found the warrant of arrest of the vessel cannot be here maintained. So far as it rests on the constitution of the state, the objection is not examinable here, under the twenty-fifth section of the judiciary act. If rested on that clause in the constitution of the United States which prohibits the issuing of a warrant but on probable cause supported by oath, the answer is, that this restrains the issue of warrants only under the laws of the United States, and has no application to state process. *Barron v. Mayor, etc., of Baltimore*, 7 Pet., 243; *Lessee of Livingston v. Moore et al.*, 7 Pet., 469; *Fox v. Ohio*, 5 How., 410.

The judgment of the circuit court of Maryland in and for Anne Arundel county is affirmed, with costs.

§ 8. *As to rights of fishery.*—It is competent for the legislature of New Jersey, in the regulation of fisheries on the Delaware, to prohibit the exercise of common law rights or common rights of fisheries thereon. *Bennett v. Boggs*,* 1 Bald., 60.

§ 9. *Regulation of mode of fishing.*—Under the act of New Jersey of November 28, 1822, no person except a riparian owner was entitled to use a gilling seine or drift net in the Delaware. *Ibid.*

§ 10. The act of New Jersey of November 28, 1822, regulating the fisheries in the Delaware, was not in violation of the constitution of the United States. *Ibid.*

§ 11. *Rights of citizens of the several states.*—Each state owns the fisheries in its tide waters. The clause of the constitution which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states" does not invest a citizen of one state with any interest in the common property of the citizens of another state. So it was held that Virginia could prohibit citizens of other states from planting oysters in the waters of the state. *McCready v. Virginia*, 4 Otto, 891 (Const., §§ 821-24); 15 Alb. L. J., 418. *Contra, Ex parte McCready*, 1 Hughes, 598.

§ 12. The state of New Jersey passed a statute prohibiting non-residents from gathering oysters "in any of the rivers, bays and waters in this state, on board of any vessel not wholly owned by some person, inhabitant of, or actually residing in this state," under penalty of fine, and forfeiture of the vessel, tackle, etc., and vesting in state tribunals jurisdiction over offenses against the statute. *Held*, that the statute was not repugnant to that clause of the United States constitution granting to congress power to regulate commerce with foreign nations and among the several states; nor to that clause declaring that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states; nor to that clause declaring that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. *Corfield v. Coryell*, 4 Wash., 871.

§ 13. Under authority of the laws of New York state the township of Oyster Bay passed an ordinance prohibiting any person not an inhabitant from dragging or raking oysters within the bay. It seems that the ordinance is valid. *The Sloop Martha Anne, Olc.*, 18.

§ 14. *Anchoring in fishery.*—The master of a vessel, who in the usual course of navigation enters a fishery and anchors for the purpose of taking in the residue of his cargo and not with a malicious intent to injure the fishery, and departs as soon as wind, weather and tide permit, is not liable for the damages caused to the owner of the fishery. *Mason v. Mansfield*, 4 Cr. C. C., 580.

§ 15. The master of a vessel, who knowingly and without necessity, or any reasonable commercial purpose, anchors within the limits of a fishery so as to interrupt the same, or, having anchored as aforesaid, knowingly and without necessity, or any reasonable commercial purpose, remains within the same so as to interrupt the fishery, is liable to the owner of the fishery for the damage caused. *Ibid.*

§ 16. Constructing dams.—Rivers not navigable are often regarded as public rights and subject to legislative control. Riparian owners must so use their rights as not to interfere with the rights of others above and below them. It will not be presumed that the legislature in granting the right to construct a dam granted away its right to prevent the stream from being obstructed so that fish could not pass up and down. *Holyoke Company v. Lyman*, 15 Wall., 500 (Const., §§ 2170-76).

§ 17. Plaintiffs in error were incorporated for the purpose of constructing and maintaining a dam across a non-navigable river, and of creating a water-power. Nothing was said in the charter about building a fishway, and none was built. At the time of the incorporation the statutes of the state provided that every act of incorporation "shall at all times be subject to amendment, alteration or repeal, at the pleasure of the legislature." Subsequently the legislature passed a law requiring fishways to be built in the dams on the rivers in the state. Plaintiffs in error refused to comply with the statute on the ground that it impaired the obligation of their contract of incorporation. The court held the statute valid. *Ibid.*

§ 18. The act of congress of 24th of May, 1828, requires for mackerel fishery a license, distinct from that for cod fishery. Where a vessel was licensed for cod fishery and engaged in mackerel fishery without license for the latter, it was held that she might be libeled and forfeited under the act of congress of the 18th of February, 1793, which provides for the forfeiture of vessels engaged in any other trade than that for which they are licensed. *United States v. Schooner Paryntha Davis*, 1 Cliff., 532.

§ 19. Rights in New Jersey.—The exclusive right to oyster fisheries in navigable waters is a part of the *jura regalia*. The Duke of York acquired the exclusive right to the oyster fishery in the Raritan river and bay in the state of New Jersey by grant of Charles the Second, but it passed to him as a royalty incident to government, and was held by him in the same manner and for the same purposes as it was held by the crown. The grantees of the Duke of York in 1702 surrendered it to the crown when they yielded up "all the powers, authorities and privileges of and concerning the government of the province." Those claiming the fisheries under the Duke of York and his grantees have no title as against the state of New Jersey and her grantees. *Martin v. Waddell*, 16 Pet., 367.

§ 20. It seems that the oyster beds in Maurice river cove are within the territorial limits of New Jersey, but not within the limits of the county of Cumberland. *Corfield v. Coryell*, 4 Wash., 371.

§ 21. Vessel licensed for cod fishery.—It seems that a vessel licensed for cod fishery may catch mackerel for bait and provisions without being liable to forfeiture for being engaged in trade other than that for which she was licensed. *United States v. Schooner Paryntha Davis*, 1 Cliff., 532.

§ 22. Violation of license for cod fishery.—The schooner *Reindeer* was licensed for the cod fishery; when seized by the United States officers she was found to be well equipped for mackerel fishery, though prepared, also, to catch cod, and had quite a large quantity of mackerel on board, and a small quantity of cod; she had fished every day for cod and but three or four days for mackerel, and had not abandoned cod fishing. Held, that the schooner had not engaged in a trade other than that for which she was licensed; that she could catch mackerel, if she did not make it her principal business, without being liable to forfeiture, notwithstanding the act of congress of 1828 required a distinct license to engage in the mackerel fishery. *United States v. Schooner Reindeer*,* 4 Law Rep. (N. S.), 235.

§ 23. A vessel, licensed for the fishing trade, found laden with goods which are intended to be transported, is engaged in a trade other than that for which she was licensed, and may be libeled and forfeited. *Schooner Two Friends*, 1 Gall., 118.

§ 24. Share of fishermen.—Certain fishermen employed in cod fishing were by contract to receive a proportion of the fish caught. The owners sold some of the fish upon credit to a man who afterwards failed, and in paying the fishermen deducted from the share of each a proportional amount of the bad debt caused by said failure. Held, that the shares of the fishermen must be computed according to the cash value of the fish and could not be charged with bad debts. *Crowell v. Knight*, 2 Low., 307.

§ 25. Property in dead whale.—On the 23d of July, one of the boats of the ship *Hillman* pursued and killed a whale which it was unable to take to the ship; having anchored the whale and fixed a staff, with a red flag at its head, to it, the boat left, but with no intention of abandoning the whale. On the same day the ship *Zone* found and took possession of the whale; the staff, anchor and two lines were found on it, and in cutting in the whale and strip-

ping off the blubber, irons were found with the initials "H. N. B.," indicating that they belonged to the Hillman of New Bedford. The owners of the Hillman demanded the bone and oil of the whale and afterwards demanded the proceeds of their sale, but were refused. *Held*, that when the whale was killed and taken possession of by the boat of the Hillman, it became the property of the owners of that ship; that when the Zone found it anchored and with unequivocal marks of appropriation, and appropriated it, she was guilty of conversion, and her owners were liable for the value of it to the owners of the Hillman. *Taber v. Jenny*, 9 Law Rep. (N. S.), 27; S. C., 1 Spr., 315.

§ 26. Fishing bounty.—Before the owner of a vessel shall recover fishing bounty he shall produce to the collector a certificate mentioning the days on which the vessel sailed and returned on her different voyages. 3 Stat. at Large, 52. It seems that this act does not require the owners to keep a log-book, and the treasury department cannot make the keeping of a log-book a condition precedent to the payment of the bounty, and upon a certificate as required by said act the owner is entitled to the allowance. *Noble v. United States*,* Dev., 86.

§ 27. The certificate, required by the act of congress of July 29, 1819, to be produced to the collector before the owner of a vessel is entitled to fishing bounty, it seems may be supplied by other reliable evidence, if the master is unable to write. *Ibid*.

§ 28. The act of congress of July 29, 1813, provides that no vessel of twenty tons or upwards shall be entitled to fishing bounty unless the skipper or master thereof, before he proceeds on a fishing voyage, make an agreement in writing or in print with every fisherman employed therein to the following effect: "that the fish or the proceeds of such fishing voyage or voyages, which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught." This written or printed agreement was made, but the master, without authority from the owners of the vessel, made a private verbal bargain with the fishermen for the purchase by him of their shares at a fixed rate per thousand fish. *Held*, that the ship was not entitled to fishing bounty; that the title to the bounty depends on the performance of the statutory requirement. *Crowell v. United States*,* 11 Law Rep. (N. S.), 466.

§ 29. A vessel engaged in the fisheries without being enrolled and licensed is not entitled to fishing bounty. *United States v. Bartlett*, Dav., 9.

§ 30. The non-production of a shipping paper to the collector, which is required by law to be produced before the fishing bounty is paid, is sufficient ground upon which the United States may recover back the bounty paid. *Crowell v. United States*,* 11 Law Rep. (N. S.), 466.

§ 31. A vessel having complied with all the requirements prescribed by law for the payment of a fishing bounty was, while returning to port laden with a cargo of codfish, taken and destroyed by a Confederate privateer. *Held*, that the vessel was entitled to a bounty under the act of congress of 26th of May, 1824. *Fishing Bounties*,* 13 Op. Att'y Gen'l, 423.

§ 32. Void enrollment and license.—The act of congress of February 18, 1793, requires that, in order to the enrollment of any ship or vessel, an oath or affirmation shall be taken by the owner, declaring certain facts. Where a vessel was enrolled and licensed on oath of the master, not the owner, it was held that the enrollment and license were void and conferred no authority to engage in the fisheries. *United States v. Bartlett*, Dav., 9.

§ 33. Whaling voyage.—The stipulation, in the shipping papers for a whaling voyage, that the master shall have the right to ship the catchings home at any time during the voyage, is valid. *Frates v. Howland*, 2 Low., 86. See MARITIME LAW.

§ 34. Where oil and bone were shipped home during a whaling voyage, it was held that the owners were not bound to sell until the return of the vessel or other termination of the voyage, but might in good faith hold on for a better market, in the interest of the fishermen as well as themselves. *Ibid*.

§ 35. The captain of a whaling vessel fraudulently appropriated a large amount of oil to his own use. Under the shipping articles the mate was to receive a certain portion of the whole amount of oil taken. *Held*, that the owners must pay the mate his proportion, not only of the oil actually received by the owners, but also his proportion of that converted by the captain. *Jay v. Allen*, 1 Spr., 130.

§ 36. Where a mate of a whaling vessel is to receive, under the shipping articles, a proportion of the money arising from the sale of the oil, interest is allowed in his favor against the owners, after a sufficient time for the arrival and sale of the oil and adjustment of the voyage, and after demand made. *Ibid*.

FISHING LAWS AND VESSELS.

See MARITIME LAW.

FIXTURES—FOREIGN COURTS.

FIXTURES.

See CONVEYANCES, IX; LAND.

FLORIDA.

See STATES. Florida Land Titles, see LAND.

FLOYD ACCEPTANCES.

See BILLS AND NOTES.

FORCIBLE ENTRY AND DETAINER.

See LAND.

FORECLOSURE.

See CONVEYANCES.

FOREIGN ADMINISTRATORS.

See ESTATES OF DECEDENTS.

FOREIGN ATTACHMENT.

See WRITS.

FOREIGN COIN.

See MONEY.

FOREIGN CORPORATIONS.

See CORPORATIONS.

FOREIGN COURTS.

See COURTS; JUDGMENTS.

FOREIGN GOVERNMENTS.

[See CITIZENS AND ALIENS. As to principles of International Law, see CONSULS; CONSTITUTION AND LAWS; TREATIES; WAR.]

SUMMARY—*Right of foreign sovereign to sue in federal courts, § 1.—British subjects may sue in court of claims, § 2.*

§ 1. A foreign sovereign in his sovereign capacity may sue in the courts of the United States, and a suit to which he is a party does not abate by his deposition. *The Sapphire*, §§ 3, 4. See § 7.

§ 2. The English "petition of right" gives all persons, aliens as well as subjects, the right to prosecute claims against the British government, and that being the case, British subjects are entitled to sue the United States in the court of claims. *United States v. O'Keefe*, § 5. See § 6.

[NOTES.—See §§ 6-40.]

THE SAPPHIRE.

(11 Wallace, 164-171. 1870.)

APPEAL from U. S. Circuit Court, District of California.

STATEMENT OF FACTS.—Libel, by the Emperor Napoleon III., as owner of the transport *Euryale*, on account of a collision with the *Sapphire*. There was a decree in favor of the libelant, which was affirmed in the circuit court.

§ 3. *A foreign sovereign or state may sue in the courts of the United States.*

Opinion by MR. JUSTICE BRADLEY.

The first question raised is as to the right of the French emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. *King of Spain v. Oliver*, 2 Wash., 431. The constitution expressly extends the judicial power to controversies between a state or citizens thereof, and *foreign states*, citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit. *King of Spain v. Hullett*, 1 Dow & Cl., 169; S. C., 1 Cl. & Fin., 333; S. C., 2 Bligh, N. S., 31; *Emperor of Brazil*, 6 Adol. & Ell., 801; *Queen of Portugal*, 7 Cl. & Fin., 466; *King of Spain*, 4 Russ., 225; *Emperor of Austria*, 3 DeG., F. & J., 174; *King of Greece*, 6 Dow. Pr. Cas., 12; S. C., 1 Jurist, 944; *United States*, Law Reports, 2 Equity Cases, 659; Ditto, id., 2 Chancery Appeals, 582; *Duke of Brunswick v. King of Hanover*, 6 Beav., 1; S. C., 2 H. of L. Cas., 1; *De Haber v. Queen of Portugal*, 17 Q. B., 169; also 2 Phillimore's International Law, part VI, ch. 1; 1 Daniel's Chancery Practice, ch. II, § II.

§ 4. *The deposition of a foreign sovereign, a party to a suit, does not abate the suit.*

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereign, and that sovereignty is continuous and

perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning emperor, or national assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successors in the government of the country. If a substitution of names is necessary or proper, it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the *Euryale* has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result.

[Here the court examined the merits, and held that, on the evidence, both vessels were in fault, and the damages ought to have been divided.]

Reversed.

UNITED STATES v. O'KEEFE.

(11 Wallace, 178-184. 1870.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—O'Keefe, a British subject, brought suit against the United States in the court of claims. There was a decision in favor of his claim and of his right, although an alien, to sue in that court, and the United States appealed.

Opinion by MR. JUSTICE DAVIS.

It is insisted that Great Britain does not accord to our citizens the right to prosecute claims against her government in her courts, because the mode of proceeding in that country for the recovery of claims against the government depends on the will of the crown, while with us the right is absolute. It is a familiar principle that all governments possess an immunity from suit, and it is only in a spirit of liberality, and to promote the ends of justice, that they ever allow themselves to be brought into court. If the privilege be granted at all, necessarily the regulations concerning it and the mode of proceeding will differ as much as the governments themselves differ.

§ 5. *The "petition of right" by English law affords citizens of the United States a right to prosecute claims against the British government, and that fact gives British subjects a right to sue in the court of claims.* (See COMITY, §§ 6, 7.)

In England, it is easy to see that the method of redressing injuries to which the crown is a party would be different from the remedy adopted in this country in case the United States be the aggressor, because of the principle underlying the English constitution, that the king can do no wrong. On this

account, although it would not do to issue mandatory process against the sovereign, yet the law being unwilling that private rights should be invaded in the conduct of public affairs and not redressed, has furnished the subject who is thus injured with a mode of obtaining redress, which is consistent with the idea of kingly prerogative. The law allows him by petition to inform the king of the nature of his grievance, and "as the law presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved." 3 Black. Comm., 255.

This valuable privilege, secured to the subject in the time of Edward the First, is now crystallized in the common law of England. As the prayer of the petition is grantable *ex debito justitiæ*, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject. It does not exist by virtue of any statute, nor does the recent legislation in England concerning it do more than to regulate the manner of its exercise and to confer on the petitioner the privilege, not before granted, of instituting his proceeding in any one of the superior courts of common law or equity in Westminster.

In this condition of the law regarding the petition of right, which is conceded to aliens as well as subjects, how can it be contended that the British government does not accord to citizens of the United States the right to prosecute claims against it in its courts? It is of no consequence that, theoretically speaking, the permission of the crown is necessary to the filing of the petition, because it is the duty of the king to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases, and this proves nothing against the existence of the right. It is easy to see that cases might arise, involving political considerations, in which it would be eminently proper for the sovereign to withhold his permission, but congress did not legislate with reference to such a state of things. It would be a severe rule of interpretation that would exclude all British subjects from the court of claims, because in a few sporadic cases, from motives of state policy, the petition of right was denied. And we cannot impute to the legislature an intention that would produce such a result, in the absence of an express declaration to that effect. Evidently congress meant to confer on the British subject the right to sue in the court of claims under the act relating to captured and abandoned property, if, in the ordinary course of the administration of justice in England, the law secures to the American citizen the right to prosecute his claim against the government in its courts. That the petition of right accomplishes this object cannot admit of question. If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights. Indeed, it is not less practical and efficient than a suit in the court of claims. And in one important particular the two proceedings are alike, for both end with the recovery of the judgments. After they are obtained, it depends in England on the parliament, and in this country on congress, whether or not they shall be paid.

We all agree that O'Keefe had the right to bring his action in the court of claims, and the judgment of that court is therefore affirmed.

§ 6. Aliens may sue in court of claims.—Under the act of congress of July 27, 1868 (15 Stat. at Large, 243), an alien is entitled to prosecute claims against the United States in the court of claims, where the government of which he is a subject accords to the citizens of the

United States the right to prosecute claims against such government in its courts. *Carlisle v. United States*, 16 Wall., 147. See § 2.

§ 7. *Suits in federal courts.*—Under the constitution federal courts have jurisdiction in cases where foreign states are parties. *King of Spain v. Oliver*, 2 Wash., 429; *Pet. C. C.*, 276. See § 1.

§ 8. Whether a suit can be supported in the federal courts in the name of the King of Spain, generally, or whether a king who has not been acknowledged by the United States government can support it, are questions not proper to be decided on motion. *King of Spain v. Oliver*, 2 Wash., 432.

§ 9. The existence of foreign states cannot be known judicially to the courts except by some act or recognition of other departments of the government. *Cherokee Nation v. State of Georgia*, 5 Pet., 1; *United States v. Palmer*, 3 Wheat., 610. See COURTS, § 275.

§ 10. The act of 1794, chapter 50, section 3, inflicts a forfeiture upon the ship fitted and armed "in the service of any foreign prince or state, to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace." *Held*, that this would not apply to a vessel fitted out by an insurgent power which had not been recognized by the United States "as a foreign prince or state." *Gelston v. Hoyt*, 3 Wheat., 246.

§ 11. In a prosecution for piracy, persons or vessels employed in the service of a self-declared government must be permitted to prove the fact of such service, as when in the service of an acknowledged state. The seal of such newly-erected government cannot be allowed to prove itself, but may be proved by such testimony as the case admits. *United States v. Palmer*, 3 Wheat., 610; *The Estrella*, 4 Wheat., 298.

§ 12. *Chinese Immigration.*—The sixth section of the act of congress of May 6, 1882, relating to the importation of Chinese laborers, requiring a certificate from the Chinese government for all Chinese, not laborers, coming to the United States, does not apply to such Chinese not laborers as resided out of China on the passage of the act, and the occupation of such persons may be proved by parol. *Case of the Chinese Merchant*,* 7 Saw., 546.

§ 13. The prohibition upon the master of a vessel, contained in the act of congress of May 6, 1882, suspending the importation of Chinese laborers for ten years, to bring within the United States from a foreign port any Chinese laborer, was intended to prevent the importation of such laborers who there embark on the vessel, and does not apply to his bringing a Chinese laborer who shipped for the voyage at a port of the United States, in an American vessel, and who was already on board of the vessel when touching at the foreign port. While on board such vessel, the laborer is within the jurisdiction of the United States, and does not lose, by his employment, the right of residence previously acquired by treaty. *Case of Chinese Cabin Waiter*,* 7 Saw., 536; *Case of Chinese Laborers*,* *id.*, 542. Such laborers do not lose their treaty rights by a merely temporary absence from the vessel, by the captain's permission, at a foreign port. *Case of Chinese Laborers*,* 7 Saw., 542.

§ 14. An unauthorized act of a minister of the United States to a foreign government is null and void. *Meade v. United States*,* 9 Wall., 691.

§ 15. *Claims against Spain.*—The claims assumed by the United States to the amount of \$5,000,000, by the ninth article of the treaty of February 22, 1819, with Spain, embraced only claims which were unliquidated at the time, and which had been presented to the secretary of state or to the minister of the United States, and the commission appointed under the treaty had no jurisdiction to consider an award by a Spanish commission against the Spanish government on such a claim, made after the treaty was signed but before it was ratified. *Ibid.*

§ 16. The convention of February 22, 1819, with Spain, was never abandoned by the United States, though not ratified within six months as it was to have been by its terms, and though the United States notified Spain, on the day before the six months elapsed, that after the next day, as the convention had not been ratified by Spain, all the claims and pretensions of the United States would stand as if the convention had never been made. The notification indicated that the United States might, under some circumstances, be induced to refuse to carry the treaty into effect. No such action was taken on the part of the United States, and the treaty was, after the ratification by Spain, re-ratified by the senate of the United States. *Ibid.*

§ 17. *Consuls—Exemption from suit.*—The exemption of a consul-general of a foreign government from being sued in a state court is not a personal privilege, but the privilege of a foreign sovereign; and it is not waived by the omission to plead it. *Davis v. Packard*, 7 Pet., 276. See CONSULS.

§ 18. A tribe of Indians within the United States is not a "foreign state" within the meaning of the constitution, and cannot sue in the federal courts. *Cherokee Nation v. State of Georgia*, 5 Pet., 1.

§ 19. *Jurisdiction of consuls to Pagan countries.*—The court cannot take judicial notice of the extent and character of the judicial jurisdiction which is vested in the consuls of the

United States to Pagan and Mohammedan states, because this jurisdiction is only such as is allowed by the laws and usages of the country to which the consul is accredited; and where the exercise of such jurisdiction is pleaded as a defense by a consul, the plea must set out the laws and usages of the foreign country upon which the jurisdiction depends, and show that the case in question is embraced in it. *Dainese v. Hale*, 1 Otto, 13. See CONSULS.

§ 20. Whether a revolted colony is to be treated as a sovereign state even *de facto* is a political question, and to be decided by the government and not the court. *The Hornet*, 2 Abb., 35; *Kennett v. Chambers*, 14 How., 38; *Clark v. United States*, 3 Wash., 101. See § 9. Also COURTS, § 2275.

§ 21. In determining the question whether a tribunal erected by the insurgent government of St. Domingo, a revolted colony of France, was capable of acting as a prize court, *held*, that the question of whether it was to be regarded as a sovereignty was a political rather than a judicial question, and the courts of the United States must consider the ancient *status* as continuing until some recognition of change by the government of the United States be known. *Rose v. Himely*, 4 Cr., 241; *United States v. Palmer*, 3 Wheat., 610.

§ 22. Foreign laws.—Courts will not take judicial notice of those laws of a foreign nation designed only for the direction of its own affairs, and they must be proved as facts. The rule is otherwise in a court of admiralty as to laws on a subject of common concern to all nations promulgated by the governing powers of a country. *Talbot v. Seeman*, 1 Cr., 1. See EVIDENCE.

§ 23. Laws in terrorem.—A court will not presume a law of a foreign power subjecting neutral vessels to capture and condemnation was enacted merely *in terrorem*, and that it will be disregarded by its judicial authorities. *Ibid*.

§ 24. Bills drawn by United States on France.—An instrument drawn in the form of a bill of exchange by the government of the United States on the government of France for money due under treaty stipulations is not governed by the law merchant and is not subject to protest and damages. Where the Bank of the United States, in a suit against it by the United States for dividends on stock, pleaded as set-off the damages on the protest of such paper of which it was the original payee and holder, *held*, that such set-off could not be sustained. *United States v. Bank of United States*, 5 How., 382.

§ 25. Right of election as to citizenship.—Persons born within the colonies of North America before the Revolution were natural-born subjects of Great Britain, and at the time of the declaration of independence, and afterwards during the war, had the right of election whether they would leave the country and remain subjects of Great Britain, or remain and become citizens of the United States. *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet., 99.

§ 26. Treaty with Spain as to privateers.—The second section of the fourteenth article of the treaty with Spain enforced by the act of congress of June 14, 1797, prohibited any citizen of the United States from cruising as a privateer against Spain under a commission from any prince or state with which Spain might be at war. *The Bello Corrunes*, 6 Wheat., 152.

§ 27. British creditors.—The acts of the state of Georgia in relation to debts due British creditors did not amount to confiscation, but only to sequestration, and on the restoration of peace by the treaty of 1783, the right of the creditors to recover the debt revived. *State of Georgia v. Brailsford*,* 3 Dall., 1. See CITIZENS AND ALIENS.

§ 28. The ninth article of the treaty of 1794 with Great Britain provided that British subjects holding lands in the United States and their heirs, so far as respected such lands, and the remedies incident thereto, should not be considered as aliens. The question whether the heirs-at-law of a person who had owned lands in New York in 1777, and who had died in 1798, could maintain ejectment for such lands, was held to depend on the question whether their ancestor had title to the lands at the time the treaty was signed. *Harden v. Fisher*,* 1 Wheat., 300.

§ 29. By virtue of the fourth article of the treaty of 1783 with Great Britain, British creditors were enabled to collect a debt contracted to them before the war of the Revolution by a citizen of Virginia, notwithstanding the fact that such debtor had, pursuant to the act of Virginia of October 20, 1777, paid a portion of said debt into the loan office of that state. *Ware v. Hylton*, 3 Dall., 199.

§ 30. Under the fourth article of the treaty of peace between Great Britain and the United States of September 2, 1782, providing "that creditors on either side shall meet with no lawful impediment to the recovery of all *bona fide* debts heretofore contracted," a period before the Revolution insufficient to bar, under the statute of limitations, a debt due to a British subject, cannot be added to a period subsequent to the treaty to make a bar. *Hopkirk v. Bell*, 3 Cr., 454.

§ 31. Under the treaty of 1794 with Great Britain, the alienage of a mortgagee who is a British subject is no defense to a bill by him to have the mortgaged land sold and subjected to the payment of his debt. *Hughes v. Edwards*, 9 Wheat., 489.

§ 32. Titles to land of British subjects.—The treaty of 1794, as well as that of 1783, with Great Britain, provided only for existing titles in British subjects to lands in the United States,

§§ 33-40. FOREIGN INSURANCE COMPANIES—FOREIGN PATENTS.

and where a British subject acquired such lands after the first and died before the second treaty, his capacity to transmit his estate, and that of his heirs to take it, was unaffected by any treaty, and remained as at common law. *Blight v. Rochester*,* 7 Wheat., 535.

§ 33. The sixth article of the treaty of 1783 with Great Britain protected the estate of a British subject from forfeiture by escheat by reason of alienage. *Orr v. Hodgson*, 4 Wheat., 453.

§ 34. The word "heirs" in the ninth article of the treaty of 1794 with Great Britain, which provided that British subjects and their heirs, so far as respected lands in the United States, should be under no disability from alienage, applied only to subjects of the contracting parties, and did not include persons, otherwise heirs, who were aliens to both governments. In case of descent cast, the inheritance of lands belonging to a British subject passed to the next heir of heritable blood. *Ibid*.

§ 35. The provision of the concluding clause of the fifth article of the treaty of peace with Great Britain of September 2, 1782, "that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights," held to save the rights of a mortgagee of lands confiscated and sold by the state of Georgia as the property of a British subject. *Higginson v. Mein*, 4 Cr., 415.

§ 36. Under the above provision of the treaty it was held that where a life tenant in possession had been subjected to confiscation, the remainderman was entitled to his estate when it should fall into possession free from all liens or incumbrances for improvements created by the life tenant or purchaser from the state, notwithstanding a state statute to the contrary. *Carver v. Jackson*, 4 Pet., 1.

§ 37. The effect of the confiscation acts of Maryland was to divest the title of legal and equitable property except debts of British subjects, and vest the same in commissioners without office found, entry or other act to be done, and empowered the commissioners to appoint fit persons to enter and take possession, for the purpose of preservation. *Smith v. Maryland*, 6 Cr., 286.

§ 38. Title to land in Virginia, vested in a British subject during the Revolution, and defeasible because of the alienage of the grantee, and not divested by any act of the legislature after the war, held to be confirmed and rendered indefeasible by office found or other means by the treaty with Great Britain of 1794. *Craig v. Bradford*, 8 Wheat., 600.

§ 39. In ejectment against a British subject in possession of lands in New York who was seized at the date of the treaty of 1794, it is held that he lawfully holds the lands under authority of that treaty. *Jackson v. Clarke*,* 8 Wheat., 1.

§ 40. The property of a British corporation, which was confirmed and protected by the sixth article of the treaty of peace of 1783 (8 Stat. at Large, 83), and the ninth article of the treaty of 1794 (8 Stat. at Large, 123), was not divested by the termination of the treaties in war. Treaties fixing rights and aiming at perpetuities do not necessarily become extinguished by a recurrence of war. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat., 464.

FOREIGN INSURANCE COMPANIES.

See INSURANCE.

FOREIGN JUDGMENTS.

See JUDGMENTS.

FOREIGN LAWS.

See CONSTITUTION AND LAWS, XV; EVIDENCE, XX; PATENTS, §§ 1677-79.

FOREIGN PATENTS.

See PATENTS, p. 268.

FORFEITURES — FRANCHISE.

FORFEITURES.

See MARITIME LAW; PENALTIES; REVENUE.

FORGED NOTES.

See BANKS, IX; BILLS AND NOTES, IX, 6; MONEY; PAYMENT.

FORGERY.

See CRIMES, III; XXVI, 4.

FORMER ACQUITTAL.

See CRIMES, XXIII.

FORMER ADJUDICATION.

See JUDGMENTS. Also BILLS AND NOTES, IX, 3.

FORMS OF ACTION.

See ACTIONS, IV.

FORNICATION.

See CRIMES.

FORTS.

As to Federal Jurisdiction, see CRIMES.

FORTHCOMING BOND.

See JUDGMENTS; WRITS.

FRANC.

See MONEY.

FRANCHISE.

See GRANTS AND FRANCHISES; CONSTITUTION AND LAWS; CORPORATIONS; FERRIES.

FRAUD AND FRAUDULENT CONVEYANCES.*

Fraud: See *BILLS AND NOTES*, IX, 5; *CONTRACTS*, IV, 8; *CONVEYANCES*, D, V, VI; *EQUITY*, I, 2; *PATENTS*, p. 260. See, also, *LAND*; *SALES*.

Fraudulent Conveyances: As to *Chattel Mortgages*, see *CONVEYANCES*, D, V, VI. *Assignments for Creditors*, see *DEBTOR AND CREDITOR*, p. 89. Under *Bankrupt Laws*, see *DEBTOR AND CREDITOR*, p. 626. *Ante-nuptial* and *Post-nuptial Settlements*, see *DOMESTIC RELATIONS*, p. 191. *Creditors' Bills*, see *EQUITY*, p. 631.

A. FRAUD.

B. FRAUDULENT CONVEYANCES.

A. FRAUD.

I. IN GENERAL, §§ 1-198.

II. FALSE REPRESENTATIONS, §§ 199-349.

1. *In General*, §§ 199-230.

2. *As to Credit of Another*, §§ 231-247.

3. *In Sales of Property*, §§ 248-349.

III. INADEQUACY OR FAILURE OF CONSIDERATION, §§ 350-370.

IV. RELATION OF THE PARTIES. UNDUE INFLUENCE, §§ 371-382.

V. CONCEALMENT, §§ 383-404.

VI. RELIEF, §§ 405-602.

I. IN GENERAL.

SUMMARY—*Fraud defined*, § 1.—*Intent to defraud; proof of other acts*, § 2.—*What sufficient to sustain an action*, § 3.—*Consignment to insolvent to enable him to defraud creditors*, § 4.—*Possession of property by one, ownership in another*, § 5.—*Possession by consignee*, § 6.—*Fraudulent negotiations for the purchase of an article with a view to keeping it out of the market*, § 7.—*Liability for acts of agent*, §§ 7, 8, 11.—*Fraud in inducing a sale*, § 8.—*Relief where there were means of knowledge*, § 9.—*Frauds of associates*, § 10.—*Settlement between debtor and creditor; parol evidence*, § 12.—*Dealing with ignorant person*, § 13.—*False statement in warehouse receipt*, § 14.

§ 1. Fraud in law is the commission of an act prohibited by the words or policy of the law, or where certain acts are deemed full evidence of fraud and fraudulent in themselves though not so intended. Cases of reputed ownership do not come within this rule. *Merrill v. Rinker*, §§ 15-18.

§ 2. Actual fraud is always attended with an intent to defraud, and the intent may be shown by any evidence which has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence. If a motive exists prompting a particular line of conduct, and it is shown that in pursuing that line a defendant has deceived and defrauded one person, it may be justly inferred that a similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit. Thus, in an action against defendants for fraud in holding out false hopes of consummating an agreement with the plaintiffs, in order to keep the plaintiffs' cotton-tie out of the market, and thus protect the defendants' cotton-tie from competition, it was held competent to prove that the defendants had similar negotiations with another respecting his cotton-tie, during the same season, and acted deceitfully towards such other person in order to keep his cotton-tie out of the market that year. *Butler v. Watkins*, §§ 19-21.

§ 3. In order to maintain an action for fraud it is sufficient to show that the defendant was guilty of deceit, with a design to deprive the plaintiff of some profit or advantage and to acquire it for himself, whenever loss or damage has resulted from the deceit. *Ibid.*

§ 4. A consignment of goods to an insolvent to enable him to defraud his creditors, to give him a false credit, or to hold him out in false colors on the credit of the goods, is fraudulent as to creditors and third persons, whether it be a sale or a consignment. And if the goods are seized by his creditors, the consignor cannot maintain an action of trover for them against the sheriff. *Merrill v. Rinker*, §§ 15-18.

§ 5. Possession of personal property by one person while the ownership is in another is not necessarily fraudulent or a badge of fraud. Such possession, to be fraudulent, must be inconsistent with the nature of the transaction and the dealings between the parties. *Ibid.*

§ 6. If goods are consigned with power in the consignee to sell at invoice prices, and the agreement binds him to return the goods if not sold, his possession is necessary and consistent with the contract, and is not constructively fraudulent or a badge of fraud. *Ibid.*

* Edited by THEODRIC B. WALLACE, ESQ., of Kansas City, Mo., under the supervision of the General Editor.

§ 7. The plaintiff, an inventor and patentee of a cotton-tie, sued the defendant, an English corporation, and its managing agent, for fraud, alleging that the agent, with intent to keep the plaintiff's cotton-tie out of the market and to protect a similar article manufactured and sold by the corporation from competition, fraudulently entered into negotiations for a purchase from the plaintiff, and through drafts of agreements and continued dickering protracted the negotiation until it was too late for the plaintiff to place his article upon the market for that year, when it was broken off. *Held*, that the lower court erred in instructing the jury that if the corporation never gave any authority to the agent to assent to the proposal or draft agreement in their behalf and in their name, and never sanctioned the same as a corporate act, the suit could not be maintained against them. *Butler v. Watkins*, §§ 19-21.

§ 8. Fraud inducing a sale, whether made by the vendor or his agent employed to make the sale, or one whose acts in negotiating the sale he has ratified and adopted, will make the transaction void. *Mason v. Crosby*, §§ 22-27.

§ 9. Though means of knowledge and explanation will usually defeat the rescinding of a contract for mere mistakes, yet it will not prevent a recovery for fraud, if fraud has been practiced in important particulars, and relied on by the purchasers. Thus, if falsehood has prevented a full and perfect examination, and false statements in respect to details have been relied on, the whole contract is vitiated. *Ibid*.

§ 10. A person will be affected by the consequences of a fraud committed by others with whom he is associated in interest and whose acts he has adopted. *Ibid*.

§ 11. Where a sale is made by an agent, the owners cannot take the benefit of his acts and negotiations without bearing the burden of them, or any liabilities growing out of them on account of falsehoods and frauds of the agent accompanying them and material to the sale. The owners need not have known the fraud, to be charged with the consequences, if they undertake to receive the benefit of the contract made under it. *Ibid*.

§ 12. Where a settlement is had between a debtor and creditor, unless it is shown that the debtor was fraudulently deceived and misled as to the contents of the written instruments, parol evidence is altogether inadmissible to show that the contract was different from the one reduced to writing. *Selden v. Myers*, § 28.

§ 13. A person taking a note and mortgage from an ignorant and unlettered man must show, beyond a doubt, when the latter resists a foreclosure on the ground of fraud practiced on him, that the latter fully understood the object and import of the instruments. *Ibid*.

§ 14. This was an action of deceit, the declaration alleging that the defendant, as a warehouseman, had given to the plaintiff, a commission merchant, a warehouse receipt stating that one A. had delivered to him certain goods for and irrevocably subject to the order of the plaintiff, agreeing to send them to the plaintiff, and that the plaintiff should hold the same for sale on commission, and hold a lien thereon not only for the subjoined draft but for all other liabilities incurred for the consignor; that the plaintiff accepted and paid the draft drawn by A.; but that the statement in the receipt was false. Damages were claimed on the ground of the loss of the commissions and gains which would have accrued, of the danger of losing the money paid on the draft, and of other injuries. On demurrer, it was held that damages were well claimed on the two special grounds stated. *Suydam v. Watts*, §§ 29, 30.

[NOTE.—See §§ 31-196.]

MERRILL v. RINKER.

(Circuit Court for Pennsylvania: Baldwin, 523-535. 1832.)

STATEMENT OF FACTS.—Viles, being insolvent, received goods from plaintiffs to sell, receiving as his profit all he could get above the prices in the invoice, and paying that amount to plaintiffs. The goods having been brought from New York into Pennsylvania were seized by defendant, a sheriff, at the instance of Viles' creditors, and this suit in trover was brought against him.

§ 15. *If goods are consigned in good faith for sale and seized as the property of the consignee, the owner can recover for them in trover.*

Charge by BALDWIN, J.

Whether, by the contract between the plaintiffs and Viles, there was a sale or a special consignment to the latter, of the goods in controversy, depends mainly on the intention of the parties. If the contract, as testified by the witnesses, and entered on the books of the plaintiffs, contains their whole agreement, as truly understood and intended by both parties, it is no sale in law or

fact; on the other hand, if the real object was a sale, under the cover of a formal consignment, then it was a sale and not a consignment, however it may have been entered on the books, or stated to the witnesses. This is a matter of fact for your consideration. Should you find the transaction to be a consignment, you will inquire whether it was fairly and honestly made, with no other object than has been stated or shown in evidence, or is evident from its nature; or whether it was done to enable Mr. Viles to defraud his creditors, to give him a false credit, or hold him out in false colors on the credit of the goods. Should you think that the goods were delivered for either of such purposes, it was fraudulent as to creditors and third persons, whether it was a sale or consignment, and your verdict ought to be for the defendant. Should you think that the contract was made fairly and honestly, as a special consignment, to enable Viles to support himself and family, your verdict will depend on whether it is fraudulent in law, though not in fact.

§ 16. *What is fraud in law.*

Fraud in law is the commission of an act prohibited by the words or policy of the law, or where certain acts are deemed full evidence of fraud and fraudulent in themselves, though not so intended; cases of reputed ownership do not come within this rule; they arise only under the positive provisions of a bankrupt law, by which a person in possession, at the commission of an act of bankruptcy, of goods with the consent of the true owner, is declared to be the reputed owner, and the goods pass to his assignees, in the same manner as if he was the real owner. In cases not within the statutes of bankruptcy, there must be something more than merely reputed ownership in the person in possession of goods, to affect the right of the real owner; something inconsistent with the nature of the transaction, the dealings between the parties, or some badge or evidence of fraud, intended or tending to injure others. 9 J. R., 201.

§ 17. *When the possession of personal property by another than the true owner is fraudulent, when a badge of fraud, and when not.*

As a general rule, the possession of personal property is evidence of ownership; but if, from the nature of the case, possession is necessarily in one person, and the ownership in another, it is neither fraudulent in itself, nor a badge of fraud; a possession for a special purpose by a person, for the use, by the orders or in the transaction of the business of another in its usual course, does not make the property liable to an execution or attachment for the debt of the holder. Such a possession is not within the principle of the statutes, or common law, for the suppression of fraud; if the contract is fair and honest, the possession consistent with its nature, terms and intentions of the parties, then as the want of possession by the real owner is fairly accounted for, his rights cannot be affected by a third person.

After an absolute sale of goods, possession by the vendor is *prima facie* evidence of fraud, which must be rebutted; if the sale is conditional, the retention of possession by the vendor till the condition is complied with is no evidence of fraud. Goods consigned to a factor, an agent, or delivered for a special purpose, cannot be taken from the true owner; if the conduct of the parties is consistent with their contract, and that in its terms is fair and honest, no fraud is imputable; its form is immaterial, whether it is in the shape of a consignment, a conditional sale, or partakes of the character of both, according to the true intention of the parties. *Vide* 9 J. R., 337, 338, and cases cited, 5 Serg. & R., 278.

In this case the contract was a special one, giving Viles power to sell at in-

voice prices, but binding him to return the goods if not sold; as between him and the plaintiffs, this did not vest the property in him by the delivery; he was their agent while the goods were in his possession, and when he sold them was their trustee for their invoiced price. Before a sale, the creditors of Viles had no more right to seize the goods than if they had been in the warehouse of a factor or commission merchant; from the nature of the contract Viles must have the possession and control, and while he was acting pursuant to the contract in good faith, his creditors had no right to take the goods. Any reputed ownership from possession, and selling the goods as his own, would not justify their seizure for an antecedent debt; though a person who, trusting to the visible ownership, had given him a credit, might set off his debt against a claim by the plaintiffs for the goods purchased. 7 D. & E., 359, 361. As a question of law, therefore, our opinion is, that the agreement between Viles and the plaintiff was not fraudulent in itself as against the law; you will decide whether it was fraudulent in fact or intention; if you negative fraud, then the contract is valid in law, either as a consignment or a conditional sale.

§ 18. *If goods are delivered to a consignee to sell, and are seized to pay his debts, the seizure cannot be justified on the ground that he was a partner, for partnership assets cannot be taken for separate debts.*

It has been contended that Viles was a partner, and the goods liable to seizure for his debt; but even admitting that the contract created a partnership, a creditor of an individual partner has no right to sell the partnership property; he can sell only what belongs to the debtor partner, after paying the debts due by the firm, and his own debt to the firm. An execution, an attachment, or act of bankruptcy, may dissolve the partnership, but gives no authority to force a sale of the joint stock before the share of the debtor partner is ascertained; what belongs to the creditors or the solvent partners of the firm cannot be appropriated to pay the private debt of a partner.

It is objected to the plaintiffs' right of recovery that they have no joint interest in the goods, or possession in law or fact, sufficient to sustain an action of trover. If you are satisfied that in point of fact Minikin had transferred his interest in the partnership effects to Foster, before the commencement of this suit, then in point of law the plaintiffs have a joint interest in the goods. Whether the plaintiffs have such possession or right of possession as will sustain this suit depends on your opinion on the question of fraud in fact; if you think the contract was colorable, intended as a cover for fraudulent purposes, the action must fail. But if you think the contract was in good faith, made for the purposes stated, the conduct of the parties consistent therewith, without any intention to defraud third persons, then, as no rule of law or policy is violated, the plaintiffs had the right of possession against any person who converted the goods to his own use, while the contract was in the course of execution, according to the true intention of the parties; they have the legal possession and may recover in trover the value of the goods with interest from the conversion. (Verdict for the plaintiffs.)

BUTLER v. WATKINS.

(18 Wallace, 456-465. 1871.)

ERROR to U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—Butler had patented a cotton-tie for fastening bales of cotton. Watkins was the agent of a British company making and dealing

in articles of a similar character, and meeting Butler in New Orleans entered into a negotiation with him, apparently for the purpose of having Butler's ties manufactured by Watkins' company. The negotiation was protracted until it was too late for Butler to have his ties made for sale that season, and then it was broken off by Watkins and his principal, the English company, which it then appeared was largely interested in a rival article. Upon allegations to this effect, Butler brought suit against Watkins and the company, charging fraud, by which he was seriously damaged. There was judgment for the defendant.

§ 19. *Where a plaintiff asks for no instructions he cannot complain in an appellate court that none were given in his favor.*

Opinion by MR. JUSTICE STRONG.

We are unable to discover error in the instructions given to the jury by the court below or in the answers made to the prayers of the defendants, except in a single particular. What the court said may have been inadequate to a full presentation of the case, but the plaintiff asked for no instructions, and he cannot, therefore, now be heard to complain that full instructions were not given. The bills of exceptions bring upon the record only that which was said to the jury and to that alone can error be assigned.

It is quite true that the suit was not brought upon any contract. The theory of the plaintiff was that no agreement had ever been made, and that the defendants had never intended making one, though all the while, during the negotiation, deceptively and fraudulently holding out to the plaintiff a profession of intention to conclude an agreement, and that this was done with the purpose of keeping the plaintiff's "cotton-tie" out of the market. The answers to the defendants' prayers, so far as they tend to show that no contract had been concluded, were, therefore, favorable rather than hurtful to the plaintiff's case, and they furnish no just ground for complaint.

§ 20. *Although a principal may not authorize an agent to make a contract, he may, nevertheless, be liable for the agent's fraudulent pretenses to a contract.*

The court, however, erred in charging the jury that if they believed "the corporation never gave any authority to the defendant, Watkins, to assent to the proposal or draft agreement in their behalf, and in their name, and never sanctioned the same as a corporate act, the suit could not be maintained against them." If by this it was meant that no suit upon the contract could be maintained, the instruction was correct, but this could not have been so understood by the jury. No such question was before them. It does not follow, because the corporation never authorized or sanctioned a contract, that they may not be responsible for such a fraud as was alleged in the petition. We have not all the evidence before us, but it does appear that some evidence was given tending to show that the acts and conduct of the defendants (Watkins and the corporation) were deceitful and fraudulent, designed to mislead, and done for the purpose of keeping the plaintiff's cotton-tie out of the market in order that they might secure heavy sales of the Beard tie, in which they were largely interested. If the evidence did establish or tended to establish such deceit and fraud, for such a purpose, and if the plaintiff was injured thereby, as his petition alleged, it was erroneous to charge the jury that the suit could not be maintained. Competition in efforts to secure the market is doubtless lawful. A manufacturer may, by superior energy or enterprise, supply all the buyers of a particular article, and thus leave no market for similar articles manufactured by others. But he may not fraudulently or by deceitful

representations induce another to withhold from sale his products without being answerable for the injury occasioned by the fraud. Whether negotiations for a purchase never concluded were in fact fraudulent; whether they were commenced and continued solely with the purpose of dishonestly inducing the plaintiff to forego offering his goods until the market had been supplied, and whether such was the consequence of the defendants' fraudulent conduct, were questions of fact which should have been submitted to the jury on the evidence. If answered affirmatively, the action was sustainable. In order to maintain an action for fraud it is sufficient to show that the defendant was guilty of deceit, with a design to deprive the plaintiff of some profit or advantage, and to acquire it for himself, whenever loss or damage has resulted from the deceit. This was well illustrated in *Barley v. Walford*, 9 Ad. & Ell. (N. S.), 197. There it appeared that a plaintiff, who was a dealer in silk goods, had been hindered in his trade and induced to refrain from making goods with a certain ornamental design, by a false representation made by the defendant, and known by him to be false, that a pattern of the goods had been registered by another, and it was ruled that an action would lie to recover damages for the injury, especially when the deceit was with a view to secure some unfair advantage to the defendant.

§ 21. *It is competent, as evidence of a fraud, to show that the same party practiced a like fraud on another person.*

We think also the court erred in refusing to receive in evidence the defendants' letters to Wailey in connection with Wailey's testimony. It was an important inquiry in the case, what was the purpose or *animus* of the defendants in their negotiations with the plaintiff? Was it to mislead him by holding out false hopes of consummating an arrangement by which his cotton-tie could be introduced into the market, and was this in order to secure the defendants themselves against competition? Deceit in effecting such a purpose lay at the basis of the action. But how can such a purpose be shown when it has not been avowed? Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence in actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit. If, therefore, it be true that in the spring or early summer of 1868, the defendants had similar negotiations with Wailey respecting his cotton-tie, and conducted towards him deceitfully, in order to keep his tie out of the market that year, the fact tends to show that in their conduct towards the plaintiff there was the same *animus*, and that they had the same object in view. That the evidence offered was admissible for that purpose is abundantly proved by the authorities. *Castle v. Bulard*, 23 How., 172; *Lincoln v. Claffin*, 7 Wall., 132 (§§ 287-92, *infra*).

Judgment reversed and a new trial ordered.

MASON v. CROSBY.

(Circuit Court for Maine: 1 Woodbury & Minot, 842-868. 1846.)

STATEMENT OF FACTS.—Crosby and Barstow gave to Fifield a contract for the purpose of enabling him to sell certain lands of theirs known as the

Munroe Gore. Fifield, as the agent of Crosby and Barstow, endeavored to sell the lands, and in doing so made false representations, procured fraudulent certificates, and by these means effected the sales, which it was the object of this bill to rescind. The bill charges that the defendants ratified all the acts of Fifield. The answers to the bill denied the fraud generally. Further facts sufficient to elucidate the legal principles involved appear in the opinion of the court.

Opinion by WOODBURY, J.

It is a matter of regret that the bills in this case, both the original and the supplemental, are not drawn with more precision. Several important matters are alleged only indirectly, and it is unusual that so many others, introduced with directness enough, are not even attempted to be proved. In the answers, also, some things are alleged which are not responsive to the bill, and much difficulty is caused in settling first what is duly set out in both, and next, what is properly proved of that which is duly set out.

§ 22. *A sale will not be rescinded on the ground of mistake alone, where there was ample opportunity to examine the land. Examination will not prevent a rescission where there is fraud.*

But from the whole it is undoubted that the plaintiffs intend to claim relief on account of a fraud in the sale of the land in controversy, and not on account of a gross mistake. Whether, when fraud alone is averred and a mistake alone is proved, a recovery can be had on the latter ground—the allegations of fraud being considered broad enough to include a mistake—need not be here considered. See on this, *Smith v. Babcock*, October Term, 1846, Mass. Dist. (see §§ 309–17, *infra*). Because, if there is not proved some falsehood or fraud, material in this transaction, it is doubtful whether the plaintiffs could recover for a mistake alone, when they had so ample an opportunity to examine the land before the purchase, and undertook to make the examination, and expressed themselves satisfied with the result. On this, the case of *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277–86, *infra*), may be regarded as decisive, and may be referred to for the precedents in support of that view. It was settled there, that though means of knowledge and explanation will usually defeat a rescinding of a contract for mere mistakes, yet it will not prevent a recovery for fraud, if that was practiced in important particulars, relied on by the purchasers.

If the falsehood rendered the examination less perfect and full, or made the statements of the party to be in part confided in, as in respect to details, extending personal inquiry only to general matters and general appearances, the falsehood vitiates the whole. See cases cited in *Smith v. Babcock*, and *Tuthill v. Noble*, Mass., Oct. T. 1846. Thus if a vendor affirm the rent to be more than it is, it is a fraud for which he is liable; as that lies more within his private knowledge, even if the vendee made some further inquiries. *Risney v. Selly*, 1 Salk., 211; *Pasley v. Freeman*, 3 D. & E., 51; 2 Esp. Ca., 572. Otherwise, if it was not so, and the truth could easily be ascertained. *Harvey v. Young*, Yelv., 21; *Leakins v. Clissil*, 1 Sid., 146.

§ 23. *Parties to a contract whose fraud will vitiate a sale. Character of the fraud which will have this effect.*

The next question then is, whether falsehood or fraud were practiced in leading the plaintiffs to purchase the land of the respondents at the high price given. If they were, the sale was void, provided they were practiced by either of the respondents, or by any person whom they previously employed

as an agent to make the sale, or whose acts in negotiating the sale they ratified or adopted afterwards. They would be thus liable, if the plaintiffs relied mainly on the statements thus falsely made to them, though some examination of the premises and timber may have been attempted by them, but carried on slightly, or imperfectly, or erroneously, in consequence of such reliance on what was false. See *Warner v. Daniels*, 1 Woodb. & M., 90; *Harding v. Randall*, 15 Me., 332; 2 Hayw., 240; Lit. Sel. Cas., 218; 14 Ves., 7, 289; 3 Cow., 537; 2 Ves. Jun., 628.

Nor is it material, in this case, whether or not either of the respondents or their agents knew to be false what was stated by any of them, provided he did state what was not true, and it was to a material point and was relied on. A vendor, in cases like this, is not in his own person or by another to throw fire-brands, and say he is in sport, or make material statements which are untrue, and excuse himself by his own ignorance. In relation to the evidence of fraud here, it is not of that plenary character which is found in some of the cases that occurred in the speculating era of 1835. Nor is it brought home so clearly to one of the defendants, Crosby. So far as affecting him, it is rather as a fraud in law and an avoidance of the contract in respect to him in consequence of fraud committed by others, with whom he was associated in interest, and whose acts in making the sale he adopted, and hence is bound by their misconduct in respect to the sale, rather than from any personal behavior of his own, which is proved to be either dishonest or dishonorable. -

What then, in the first place, are the leading facts proved, from which to infer fraud? The great general fact, which is shown by full testimony, is, that the Munroe Gore, in April, 1835, cost the respondents only \$2.25 per acre; and that this was \$2 per acre more than it cost Munroe only five years previous, with timber on it then, which had since been sold by him for a sum equal to all the original cost. The next fact of this character so proved is, that in only four months after this purchase, without making any improvements, the complainants were by some means induced to give \$8 per acre for this same land, a price nearly fourfold what it had cost; and the respondents received of it themselves, in money and notes, \$6 per acre, being a net gain in those few months of near three hundred per cent.

Another of these facts so proved is, that from 1830 to 1835 this tract of land had been cut over by permission of the true owner, and all the timber which the licensee deemed worth cutting removed; and that when this sale was made, which was effected chiefly on account of timber on the land, nothing in fact remained there, except from a half to one and a half thousand feet to the acre. It will at once strike every observer of these general data, that there must have been some extraordinary mistake existing, or some extraordinary deception practiced, in order to enable the respondents to sell land thus stripped of timber, to purchasers on account of the timber, and at such an extraordinary advance, within so short a period, on even the high price which the respondents had given.

The times then were, to be sure, unusual and almost insane. But, had the whole truth been known to the respondents, madness must have "ruled the hour," or they could not have given \$8 per acre for land on account of timber, when only a half to one and a half thousand feet of pine existed to the acre, and that, as will soon be seen, could not then easily be got to market, nor much value be then attached to any spruce or cedar timber thus situated.

The next inquiry would naturally be, who could have any interest in mislead-

ing the plaintiffs to give so excessive a price, except the owners, who were to receive, or some agent or trustee in connection with them who was to receive, a portion of the consideration for his services in effecting such a sale? Accordingly the position taken by the plaintiffs is that the contract of sale, the price, and all the preliminary negotiations for the sale, were made with Nathaniel Fifield, who had a bond for the land from some of the parties in interest.

The form of this bond is not very distinctly proved, though its existence is by the evidence and circumstances satisfactorily shown. It is highly probable that the bond on its face either allowed Fifield to have the land on paying \$6 per acre if taken before a specified time, and which in that form was considered on this subject, in 1835, as constituting him an agent to sell at that price, and assumed this form in order that his statements as an apparent owner should have more weight than if he was an apparent agent merely. Or the bond on its face authorized him to sell for the owners at that price, he retaining for his services all he sold it for beyond that price. It is of little consequence which was the form, if it was in either. The evidence in support of its existence and tenor is not so distinct as it might be expected if Fifield had not been dead, and hence he could not state the facts as a witness, or, if made a party, disclose them in his answer to proper interrogatories in the bill.

But I see no reason, except perhaps the subordinate interest of Boynton and Porter, who are supposed to have given the bond, why their testimony should not have been taken by the plaintiffs to prove the particulars, or at least been offered by the respondents to rebut what is set up on that subject, if it could be rebutted. As the evidence now is, however, in respect to the existence and terms of the bond, one of the respondents, Barstow, admits in his answer, that before the sale he heard that two of the owners in interest, viz., Boynton and Porter, had given a bond to Fifield to enable him to sell. He admitted it also to Ware, and again in a letter, April 5, 1837, he states, "We then told two of our company they had better put the land into the market at \$6 per acre." He further states in that letter that a bond was given to Fifield by Boynton and Porter, that Fifield sold the land to the plaintiffs, and then introduced them to him, and a deed was given to them. And Jones understood from Barstow that Fifield said in behalf of all the owners to Bullard, "that the land had been bonded to Fifield to enable him to sell it for Crosby and Barstow."

This evidence looks much like the giving of the bond to Fifield of the character named, and by arrangement of all, and like a subsequent execution of his contract, with full knowledge that Fifield had made it for them. The statements of one of a company so situated bind all. *Van Reimsdyk v. Kane*, 1 Gall., 630; 18 Wend., 354; 2 Hill, Ch., 109. In their answers, likewise, both of the respondents concede that they had stated verbally, "any person should have a deed of the land who would give" therefor \$6 per acre. Barstow in his answer says he gave Boynton verbally the refusal of all his interest at that price, and supposes Fifield acted under a belief they would sell at that rate, and Fifield receive all he got over \$6 per acre.

It is to be remembered, in connection with this, that Boynton is the son-in-law of D. Barstow, and that the latter admits further in his answer that the plaintiffs were introduced to him before the sale was completed by Fifield, as being the persons who wished to purchase the land; that Fifield informed him

they had been to Bangor to examine the land, and that he understood from some quarter, Fifield was to have any sum he could get per acre beyond the \$6 paid over to the respondents. He admits, also, that Fifield paid him for going to Boston, and he said to Bullard that he came there to close the delivery of the deed and the giving of the notes and payment of the money, or, in other words, "for the purpose of completing the bargain for the purchase, as it had been agreed upon by the said Fifield." And it is stated in several of Barstow's own letters, offered in evidence, that the plaintiffs bought the land of Fifield and not of the respondents; and it was on that ground, chiefly, for some time Barstow hesitated to make any compromise with the plaintiffs.

So he stated also to Ware. The testimony is explicit from several witnesses that Fifield in fact made the negotiations for the sale, arranged the terms, fixed the price, and probably received the two dollars per acre over the six, which the plaintiffs agreed to give. After all this, it is hardly permissible to deny that he acted prominently in the transaction; that his acts, so far as regards the sale at \$6 per acre, were adopted or carried into effect by the respondents; that being thus perfected by them and not him, he never having obtained the title himself, nor conveyed it to the plaintiffs, all he did must be regarded in the light of an agent, and not of a principal; that his conduct for the owners was not only thus ratified, but had the previous express assent of two of those interested in the premises, and the subsequent knowledge of his participation, having the refusal and a bond, without disapprobation, by Barstow, one of the respondents and the acting owner, and the general assent of the other, Crosby, to a sale to anybody who would give \$6 per acre. He left the details of the business to be arranged by the others interested, on account of the pressure of his own individual concerns.

§ 24. *A rule as to the false representations of an agent authorizing a rescission of the sale and binding the principal.*

Under these circumstances it has been settled in the case of *Doggett v. Emerson*, 3 Story, 700 (§§ 293-97, *infra*), that the owners cannot take the benefit of acts or negotiations like those of Fifield, without bearing the burthen of them, or any liabilities growing out of them, on account of any falsehoods or frauds of his that accompanied them and were material to the sale. 12 Mod., 490; 1 Bos. & Pull., 406; Story on Agency, 455; 1 D. & E., 710; 10 Mass., 327; 1 Bailey, Eq., 343. It has also been settled, in the first named case, that this agency, independent of the circumstances which exist here and did not there, of an agency created, or known or recognized by some of the owners themselves, as by Barstow, one of these respondents, holding with the other all the legal title, is to be inferred in law, with all its consequences and adjuncts, *civiliter*, if the owners choose to carry into effect the contract made by and under it. It is a subsequent ratification of it. *Clark v. Van Reimsdyk*, 9 Cranch, 153; 7 id., 299; *Long v. Colburn*, 11 Mass., 98; *Cushman v. Loker*, 2 id., 106; *Ward v. Evans*, 2 Salk., 442; 1 Met., 650; 1 Dess., 461, 470. See, also, 1 Story, 172; 15 Wend., 114; 4 D. & E., 39, 41, 177; 2 Story, 488; 3 Hill, 552.

So it is settled there, that the owners need not have known the falsity or fraud in order to be charged with its civil consequences, if they undertake to receive the benefit of the contract made under it. This is not a new doctrine as some seem to suppose. In *Doe v. Martin*, 4 D. & E., 66, Lord Kenyon observes, "But it is said that the transaction, as far as Martin was concerned, was fair and honorable, and that the fraud only consists in the misapplication of the purchase money; but without imputing any fraud to Martin, and, indeed,

it is negatived by the verdict, the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails both in courts of law and equity."

But in addition to that principle for charging the respondents here, it is proved by two witnesses, that one of them, Barstow, and the one who seems to have been the active person in transacting the business, made, before the sale was completed, like representations with Fifield himself as to the certificates about the timber and the quantity of it, and that another equitable owner, Boynton, probably furnished those very certificates, which are charged in the bill to have been so untrue and deceitful. Besides this, three, if not more, of the owners, were consant to Fifield's acting as agent for the whole, and did not forbid him to go on, but rather acquiesced in the bargain he had made, and thus gave him credit and standing. See on this, *Pickard v. Sears*, 6 Adolphus & Ellis, 469.

More in illustration need not be now detailed after the numerous decisions in this court on questions resembling these. No progress can ever be made in disposing of cases of this character, unless we regard the decisions already made in this circuit on similar questions as binding till reversed by the supreme court, or overturned by this court itself on a clear conviction of their error. Neither of these having yet happened as to what has been adjudged in *Doggett v. Emerson*, *Warner v. Daniels*, and several others, they are to be regarded as landmarks for the future, and it is considered not necessary on this occasion further to explain or to go behind them.

Next, in what did the falsity consist? In what particulars is the evidence as to falsity or fraud in material parts of this transaction, committed either by Fifield or any of the owners personally? It is sworn to by two or three witnesses, that Fifield represented the certificates to be true and trustworthy, which stated the pine timber to be six thousand feet per acre, when in fact it did not exceed from a half to one and a half thousand, and that, "small, scattered and rotten." One of the certifiers further stated that he had "recently" explored the land to ascertain the quantity, when in fact he had not been on it for several years, and then all which possessed any value was in progress of being cut off, and when in fact the other certifier had not examined at all over half the land.

Both the certificates, also, instead of being trustworthy in other respects, had been procured by Darling under a promise from Smith, who held a bond of the land at \$1 per acre, that he should have one quarter part of the interest in the bond if he would assist him in selling it. Darling is also one of the certifiers to Sawyer's character, as if disinterested, when in fact he was secretly interested in the sale of the land to the extent of one-fourth, and is proved to have been afterwards paid one-fourth of all the increased price thus obtained.

It further appears that these certificates were sent by Darling to Smith, in April, 1835, and that he, Smith, sent them to Boynton, one of the owners at the time of this sale, and the son-in-law to Barstow. The latter admits he saw them in Boynton's possession, who being part owner by subcontract, and the one who gave the bond to Fifield, doubtless delivered these certificates to him with the bond. They had been so effective as to help Smith sell the Gore at \$2.25 per acre, for which he gave only \$1, and enabled Boynton and his associates to sell for \$8 in gross, or \$6 net, what had cost them only about one-third of the last sum.

It was furthermore shown that Fifield himself had represented to different

witnesses the pine timber to be eight, ten and twelve thousand feet per acre, being willing to guaranty ten, and the facilities for getting the timber off as good, and so good that it could be run twice a year to market, which would greatly increase its value, and especially impart all the value which the spruce possessed. When in fact it is now proved to have required usually two years then to get the timber to market, and so continued, till some improvements were since made in the stream at a considerable expense.

It was next shown specially that Barstow, one of the respondents, in person confirmed most of these statements, and urged the truth of these certificates on the plaintiffs, as a reason for completing the sale. He told Jones that the quantity of timber was double what the certificates stated, according to his belief; and the stream of water good to run the timber to market twice a year. Bullard testifies to similar statements of Barstow. What is the result of all this? It is summed up truthfully by Barstow, in October, 1836, in his letter to Mason, in these words: "We all now believe that you have been basely imposed upon in the purchase of the Munroe Gore."

§ 25. *The omission of a person who ought to be made a defendant cannot be taken advantage of except by plea in abatement.*

But other objections have been urged to a recovery here, because other persons interested in the land beside the respondents have not been made parties. It is to be remembered, however, that the respondents alone bought the land of Munroe, and that the title was vested in them alone by the deed, and by them alone conveyed to the plaintiffs. Under these circumstances the bill can well be sustained against them alone. *West v. Randall*, 2 Mason, 181-190; *Wormly v. Wormly*, 8 Wheat., 421, 451, and note. But how much, under the circumstances here, must be paid back by them on a rescinding of the sale, in consequence of such subcontracts, is a difficult question, and will be soon considered. See *Doggett v. Emerson*, May Term, 1846, on the Master's Report, 1 Woodb. & M., 195. In actions on contracts, which form the nearest analogy to the present proceedings, an omission of a person, who ought to be a co-defendant, cannot be taken advantage of except by plea in abatement. *Powers v. Spear*, 3 N. H., 35; 1 Ch. Pl., 29; 1 Saund., 291 b, note 4, and 154, note; *Nealley v. Moulton*, 12 N. H., 485. Dormant partners, also, are not necessarily parties in a suit, and are not allowed to become so to defeat the action. *De Mautort v. Saunders*, 1 Barn. & Ad., 398. Non-joinder of a defendant can be objected to only in abatement. 5 Co., 119; 1 Saund., 154.

Here the plaintiffs might perhaps have made all parties who got the money and had any kind of interest at the time of the sale in its proceeds, and, on some accounts, that course would have been preferable. But it is very evident that they were not obliged to prosecute any but those who conveyed to them, who alone contracted with them, and who possessed the legal title to the premises, leaving all subordinate interests and equities to be settled among those who were the parties to them, or to affect only the amount to be refunded by the respondents, and not their liability.

§ 26. *Where one of the parties has conveyed his interest he may still be joined as a complainant for the benefit of his grantees.*

Another objection is, that one of the plaintiffs has conveyed all his interest in the premises to the other complainants. But it does not follow from this that he is not entitled to join in bringing the suit for the benefit of his grantees, the original cause of action or complaint having arisen to him, and the remedy being properly in his name. Nor does his conveyance to them

prevent them from releasing, or reconveying to the defendants all the title which came from them, it being still all in two of the plaintiffs, if not in the three equally. Such objections, going to form rather than substance, should be taken earlier than pleas to the merits, and especially are they untenable if the decree can be so made as to prevent any injustice if there be a misjoinder. 4 Younge & Coll., 557; 1 Bev., 277. Again, if one applies for an injunction and relief against a judgment for land, to which he had, after the judgment, released his interest, it has been held to be no bar, as it is a naked equity, and nothing passed by the release, as he then had no interest and could have none till created by a decree of a court of equity. *Dunlap v. Stetson*, 4 Mason, 349, 353 (EQUITY, §§ 2049-58).

§ 27. *The rule as to lapse of time with reference to bringing a suit to rescind a contract of sale of land.*

The length of time from this transaction, in August, 1835, to the filing of the bill, in August, 1841, is likewise urged against any recovery here. It would operate against the present proceeding, if not bar it, under some circumstances, unless satisfactorily explained, though six years had not quite elapsed before these proceedings were instituted. Because, when a party has taken possession of property purchased, and discovers fraud in the sale which he thinks vitiates it, he ought, as a general rule, to return, or offer to return, the property speedily, so as not to change in any material respect its condition or the rights of the other party before rescinding, and so as not to deprive him of remedies over, which would have been good if he had been called on earlier. Here, however, the fraud does not appear to have been discovered before the autumn of 1836, and from that time till 1839, there is evidence of negotiations and mutual propositions to compromise the dispute, and an impression that it was or would be compromised till the bill was filed in 1841.

Indeed, an actual compromise is set up in the answers of Barstow as having taken place, and been confided in by him till these proceedings were instituted. And though no evidence has been offered proving it in such manner as to be binding in law or equity, yet it is admitted by the respondents, and accounts in some degree for the lapse of time without suit after the fraud was discovered. Another reason, probably, why the plaintiffs need not be so active in reconveying or bringing a bill in this case is their impression that the respondents had foreclosed their mortgage and taken possession of the premises; and though the foreclosure is denied, it is admitted by Barstow that he had entered on the premises and sold half of them to Holyoke, or half of the mortgage and notes, as early as 1838. See on this, *Warner v. Daniels*, before cited, and 20 John., 585; 2 Scho. & Lef., 635.

There is one view, however, in which this length of time, though not barring the liability of the respondents, may have an equitable influence on the amount they are to refund, and I will consider this when giving directions concerning that amount. There are, also, several minor questions which have been stated in argument as to the competency of some of the witnesses, and the irresponsible character of some of the answers, which, on this view of the evidence, it is not necessary to discuss or settle. On the question, then, of the liability of the respondents, my opinion is, that the sale of the land in question was void on account of the false and fraudulent representations which accompanied it, as they were very material in their character, reaching nearly the whole value of the premises, and were much relied on, notwithstanding the imperfect exploration, for only one day or less, which was attempted by the plaintiffs.

It must be set aside, therefore, and the consideration paid for it be refunded so far as hereafter pointed out, and the land reconveyed to the respondents. All this can be inquired into and reported on as to particulars by a master in chancery. But in order to prevent difficulty and delay before him, and after his report is made, it is proper to consider two questions more at this time, in respect to the amount to be refunded. One is the influence which the length of time, under all the circumstances of this case, ought to have on the amount which these defendants should in equity refund.

It has already been stated that it is not such as to bar this liability, and I see no reason, therefore, why it should prevent the recovery of the whole amount of money which was received by themselves of the plaintiffs, either at the time of the sale or since, and retained for their own use. But as the money received by them then in equity belonged to others, who by subcontracts were entitled to portions of it, and those portions were paid over before this bill was instituted, and the plaintiffs knew of the existence of such subcontracts, and yet did not make the parties to them parties to the bill, nor prosecute the respondents at an early day, so as to enable them, if liable, to have a useful or seasonable remedy over on those subcontractors, I am inclined to think this injurious neglect in the plaintiffs should prevent them from enforcing a repayment from the respondents beyond the amount of money which they have retained for their own shares.

Called upon by this bill to exercise extraordinary powers on the ground alone that it is equitable, we ought to exercise them no further than is clearly equitable; and the parties beyond that, if left as they stand at law, have no reason to complain. In respect to the notes received by the respondents from the plaintiffs, and still retained in their possession, or which were under their control when the bill was filed, I think they should be required to surrender all of them, as the lapse of time has not interposed so as to change the character or position of the respondents concerning them. These notes run to them, and were to be kept and collected by them in trust for all the shareholders.

The next question connected with the amount proper to be refunded grows out of the sum and notes received separately by Fifield, the agent, and which did not pass originally into or through the hands of the respondents. If Fifield was a party to the bill, the proper rule would be usually, not looking to the exception here on account of the length of time operating as to subcontracts, to charge him and the other respondents with such portions as they respectively received of the money and notes, and to require a reconveyance of the premises by the plaintiffs, on being repaid such sums as they had advanced, and on having their notes, which had not yet been paid, returned.

There is no agent here through whose hands all the money and the notes passed, so as to make him responsible in the first instance for all, and to be aided afterwards by the others who are parties to the bill, according to the portion each received, as in *Daniel v. Mitchell*, 1 Story, 172, and *Doggett v. Emerson*, before cited. But Fifield not being a party, Crosby and Barstow can alone be charged, and the amount they can be required to pay in respect to him is a question of some difficulty. Fifield is not a party as Emerson was in *Doggett* and Emerson, and as Todd was in *Daniel* and *Mitchell*. Nor did the money and notes, received by Fifield, pass through the hands of the respondents, or the latter run to the respondents, as they did in the former case, if not in the latter, and which seemed to be considered an essential ingro-

dient to charge them, when one of the agents, such as Williams, in Doggett and Emerson, was not a respondent in the bill.

Besides this, there is no admission in either answer that money or notes were actually given to Fifield, though it is manifest from them and the evidence, and especially the letters in the case, that Fifield acted as an agent in the transaction, and indorsed some of the notes, and the bill states the amount given to him. The answers deny any knowledge that Fifield received \$2 per acre, or any other sum, for his services, except by hearsay, or that the respondents in truth agreed to pay or allow any sum whatever for his agency aforesaid. The length of time, then, during which the plaintiffs neglected to prosecute their claims, is a decisive bar to making it equitable for them to account for Fifield's money or notes by construction, when they never had either, nor can control either.

The money and notes to Fifield might have been obtained back, had the respondents been called on and charged for them early. They went into the possession of Fifield at once, and from the plaintiffs, not the respondents; and hence with the knowledge of the plaintiffs that they were in his possession. The respondents laid by and did not sue till, according to the evidence, Fifield had become insolvent and died; and after that, to charge them for his receipts, when the remedy over would be worthless, and has become so probably by the neglect of the plaintiffs, would be anything but equitable.

The most obvious remedy for them at all would have been against Fifield rather than the defendants. I must hesitate, then, under these peculiar circumstances, to charge the defendants with any money averred to have been paid to Fifield, as their agent, in part consideration for the land or on account of any notes so given to him.

Some question arises whether the sum to be refunded by the respondents is to be done jointly or severally. The deeds to and from them seem to have been joint, as were the notes to them. But they were acting for themselves and others, owning, in fact, separate shares; and as their shares are recognized in these proceedings as severed from the rest, in the amount to be refunded, it may be proper that a severance should be made between themselves in the decree. But this point has not been discussed, and before drawing up a decree we will hear the counsel on it for both parties. It will now be entered for the plaintiffs, on the principles here laid down, and the case submitted to a master, to make the computations necessary and the inquiries indicated.

There are also some questions of costs for amendments and filing supplemental bills, which the counsel will please to present early, so as to have them settled by the time the case is ready for final judgment on the report.

SELDEN v. MYERS.

(20 Howard, 506-511. 1857.)

Opinion by TANEY, C. J.

STATEMENT OF FACTS.—This is an appeal from the circuit court for the District of Columbia. It appears that the appellant, for some years before the execution of the instruments hereinafter mentioned, kept a restaurant in the city of Washington, and had considerable dealings with Lawrence Myers & Company, who are merchants in New York, and who, from time to time, had supplied him with liquors for the use of his restaurant. On the 31st of December, 1846, the appellant gave his promissory note for \$1,246.68 to Law-

rence Myers & Company, payable with interest on the 1st of January, 1849, for value received; and on the same day he executed a deed to Walter Lenox, of the city of Washington, which recites that he is indebted to Lawrence Myers and Philip Pike, of the city of New York, trading under the name of Lawrence Myers & Company, in the sum of \$1,246.68, for which sum they held his promissory note, dated the 31st of December, 1846, drawn to the order of the said Lawrence Myers & Company, payable on the 1st of January, 1849, and that the appellant was desirous to secure the payment of the said debt, and all interests and costs that may accrue thereon; and then proceeds to convey certain real property in the city of Washington to the said Lenox, in trust; that in case the appellant should fail to pay the said debt, or any part thereof, or any proper costs or charges that may accrue thereon, then, at the request of the holders of the note, due and unpaid, to sell the said premises (or such part thereof as the trustee may deem necessary to pay so much of the debt as shall be then unpaid), in such manner, after such notice, at such time and place, and upon such terms and conditions, as the trustee shall deem most convenient for the interest of all concerned, and convey the same in fee-simple to the purchaser.

This deed was duly acknowledged by Selden, according to law, before two justices of the peace for the county of Washington, and recorded among the land records of the county. Some years after the expiration of the credit mentioned in these instruments—that is to say, in 1853—the trustee, at the request of Lawrence Myers & Company, advertised the premises to be sold on the 18th of July in that year; and thereupon Selden filed this bill to obtain an injunction to stay the sale.

The bill states that in 1846 the appellant had a settlement of accounts with Lawrence Myers & Company; and after the settlement, Myers, in order to enable him to carry on his business, agreed that the company would make advances to him from time to time in goods or money, as he should need them, provided he would give them his note for \$1,246.68, payable on the 1st of January, 1849; that he accepted the proposition, and thereupon executed the promissory note above mentioned; and afterwards, at the request of Myers, executed the deed of trust to Lenox.

The bill further charges that it was the distinct understanding of the parties that advances should be made to the amount set forth in the note; but that only a small advance of about \$200 had afterwards been made, and that sum diminished by sundry payments made by appellant; that the property conveyed by him in trust was of much greater value than the amount of the note; that he can neither read nor write; and when he executed the deed did not know that the whole of said property was included, and was under the impression that it conveyed only a portion of it. The bill further charges that Lawrence Myers & Company persuaded him to execute the deed with the intention to defraud him, and since its execution had refused to make advances to him in money or goods; that the west half of the lot conveyed in trust was advertised for sale by the trustee, and if the sale was allowed to proceed he would be injured and defrauded.

The members of the firm of Lawrence Myers & Company, and Lenox, the trustee, and McGuire, the auctioneer, were made parties defendants to the bill.

The answer of Lawrence Myers, who answers separately, denies that the note was given for the purpose stated in the bill, and states that it was given

upon a settlement of accounts for goods before that time sold to the appellant, and for the amount which the appellant acknowledged to be then due; that the deed was executed voluntarily, and with full knowledge of its contents, and after it had been read and explained to him, and denies all fraud charged in the bill. The respondent also denies that the property conveyed was more than sufficient to pay the debt; that the east half of it had been previously mortgaged, and had since been sold to pay that debt, and the remaining half is not more than sufficient to pay the debt due to the defendant. He admits that the appellant is entitled to a credit of \$119.70, with interest from the 11th of September, 1845, on account of so much money received on a note of a certain William Walker, assigned by the appellant to Lawrence Myers & Company.

The answer of Philip Pike, the other partner in the firm, is substantially the same with that of Myers, as far as he has knowledge. But he was not in Washington when the note was taken and the conveyance made, and had therefore no personal knowledge of that transaction.

And the answer of Lenox, the trustee, states that he prepared the deed at the request and according to the instructions of Lawrence Myers; that Selden and Myers met together at his office, on or about the day of the date of the deed; that he laid the note and deed before the parties; that he cannot charge his memory that the entire deed, word for word, was read to the parties, but avers that the description of the property conveyed, and the nature and purport of the deed, were made known and explained to each of the parties, and so much read as was necessary for that purpose; that the transaction was the subject of conversation between the parties in his presence; and that Selden showed a clear knowledge of its character and purpose, and that it was declared by both parties that it was a settlement between them of past dealings and accounts; and that the note and deed were prepared by him, and strictly conformed to the views of both parties, as made known to him by each of them. They were not signed in his presence, but taken away by Myers, in company with Selden. And he denies all fraud and deceit charged in the bill.

Testimony was taken on both sides. On the part of Selden several witnesses were examined, who state that, from conversations between Selden and Myers, at which they were present, about the time when the note and deed were executed, or shortly before the advertisement for the sale, they understood that Selden owed nothing to Myers & Company when they were given, and that they were intended to secure future supplies which Myers & Company were to furnish. But none of these witnesses were present when they were executed, and none of them know whether they were or were not read and explained to the parties before they were signed. And, certainly, parol testimony is altogether inadmissible to show that the contract was different from the one reduced to writing, unless it can also be shown that the party was fraudulently deceived and misled as to the contents of the written instruments.

§ 28. *Party taking note and mortgage from unlettered and ignorant man must show that he fully understood their import.*

It is true that Selden is an unlettered man, and can neither read nor write. He makes his mark to the instruments he executed; and, dealing with such a person, it is incumbent on Myers & Company to show, past doubt, that he fully understood the object and import of the writings upon which they are

proceeding to charge him; and if they had failed to do so, the above-mentioned testimony offered by the appellant, as to the state of the accounts between them at the time, would have furnished strong grounds for inferring that he had been deceived, and had not understood the meaning of the written instruments he signed. But the testimony offered by Myers & Company is conclusive on this point. Lenox, who was necessarily made a defendant in these proceedings, was, by consent of parties, examined as a witness on the part of Myers & Company, and in his testimony he confirms the statement made in his answer in every particular. He proves that the parties were together at his office; that they talked of their accounts while there, and that Selden admitted that the balance due from him at that time to Myers & Company was the amount for which the note was given. He says, "I read so much of it (the deed) to the parties as explained its object, the amount of the note, and the description of the property, and the purposes; and it was admitted by both parties that it was right, and received from me as such by them together, and they left my office for the purpose of executing it." The testimony of this witness is not impeached, nor his statement of facts contradicted by any witness for the appellant, and is therefore a decisive answer to the allegations in the bill of the appellant.

Nor is there any ground for supposing that Selden, in his ignorance of accounts, was deceived or imposed upon as to the balance actually due. The accounts of the dealings between the parties up to that time have been produced by Myers & Company, and proved to be correct by the clerks who were at that time in their employment, and whose duty it was to keep them; and these accounts show that the balance then due was the amount for which the note was taken.

In this view of the subject it is unnecessary to examine particularly the testimony of the different witnesses produced by the complainant. They no doubt speak to the best of their recollections; but every one knows how liable a party is to be led into mistakes who hears casual conversations about accounts in which he has no interest, and how liable they are to be mistaken, when some years have elapsed, both as to the particular time when the conversation took place and the precise language used by the speaker. And the strong probability is, that the conversations of which they speak, and in which they understood Myers to admit that he had been paid, related to the small transactions which took place after these instruments were executed; for it appears that liquors were supplied by Myers & Company after this settlement, and for which Selden made some payments; and this account, it appears, was not adjusted and balanced when the property was advertised for sale, and there was some controversy about it. The depositions of these witnesses were taken many years after the instruments of writing were executed, and after these conversations are supposed to have passed, and the accuracy of their recollection in such a matter can hardly be relied on as to time or language; and they, as well as Selden, who is an unlettered man, and incapable of keeping accounts, and who does not appear to have had any regular books kept by a clerk, would most likely have but a confused recollection of these conversations, and might, without any evil intention, confound what had been said in relation to dealings subsequent to the note with conversations which passed at the time it was executed.

And this view of the subject is strengthened by the fact, that although Selden states in his bill that he had a settlement with the company of all accounts at that

time standing unsettled between him and the firm, he does not state that nothing was found due from him on that settlement, nor does he say that the balance against him, if any, was paid. His statement of a settlement is no doubt true; but it is evident from the testimony that, upon that settlement, the sum claimed by Lawrence Myers & Company was found to be due, and the note and deed given to secure it.

We see no reason, therefore, for disturbing the decision of the circuit court dismissing the bill, and the decree must be affirmed, with costs.

SUYDAM v. WATTS.

(Circuit Court for Ohio: 4 McLean, 162-163. 1843.)

Opinion of the COURT.

STATEMENT OF FACTS.—This is an action of deceit. The case made in the three first counts in the declaration is, in effect, this: The defendant executed a receipt saying that Samuel Adams, on the 24th of November, 1843, delivered to him two thousand barrels of mess pork, marked A, in good order, etc., for and irrevocably subject to the order of the plaintiffs, and agreeing to deliver the same with all reasonable diligence, so soon as the navigation would permit, to the plaintiffs, in New York, in like good order, dangers of fire excepted, they paying charges, etc., and further specifying that the plaintiffs should hold said pork for sale on commission, and have a lien thereon, not only for the subjoined draft against his (the said Adams') property, of \$12,000, but also a general lien thereon for all other liabilities incurred or to be incurred for the consignor. Adams drew his draft for the above sum, subjoined to the receipt, indorsed the same to the Leather Manufacturers' Bank, and forwarded the draft and receipt to plaintiffs, who accepted the draft and paid the same at maturity to a *bona fide* holder. But the statement was false; no produce, whatever, had been delivered by Adams to Watts, and plaintiffs have lost their reasonable commissions, and are in danger of losing the amount of their advance. To these counts there is a general demurrer.

In the declaration three grounds are assumed on which damages are claimed: 1. In being defrauded of divers commissions and gains which would have accrued to them on the sale of the said property. 2. In being in danger of losing the moneys paid on the draft. 3. In being otherwise greatly injured and damnified.

The third ground, it is argued in support of the demurrer, is too general. That if it stood alone, the declaration would be bad for uncertainty. That its only use is, to show the violence, etc., of the defendant's conduct, and give character to the case. 1 Chitt. Pl., 398. The cause of action, it is contended, set forth is not such as necessarily shows that the plaintiffs have sustained damage. It might be all true that the defendant gave a false receipt, and that the plaintiffs were thereby induced to accept the bill, etc., and yet the plaintiffs not be injured. Adams, the drawer of the bill, might have refunded the amount of it to the plaintiffs. Hence the necessity, in pleading, to negative such payment by Adams, and aver the special damage. The rule is, "that when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity." 1 Chitt. Pl., 396. That another rule is, "that the particular damage, in respect of which the plaintiff proceeds, must be the legal and natural consequence of

the injury done." And "special damage must be stated with particularity, in order that the defendant may be enabled to meet the charge, if it be false." *Ibid.* And the counsel insist that the special damages claimed in this case are not the "legal and natural consequence of the act complained of." And first it is said the alleged loss of commissions and gains which it is claimed "would have otherwise accrued." The acceptance of the draft, it is said, "had no connection whatever with the commissions."

In answer to this, it may be asked for what purpose does a commission merchant make advances? That is a part of his regular business. It is true, he may charge a commission on his advances, but his business is not to loan money, but to sell property on commission. And as a means to enable him to secure consignments, he makes advances. Was not that the object of the plaintiffs in accepting the draft in this case? It was not that the money would be paid to them with interest and a per cent. for the advance, but that the property should be consigned to them for sale. This was promised by the receipt, and it was in the line of the plaintiffs' business to make such an advance. Then it was the natural and legal consequence of the payment of the advance that the plaintiffs should have the usual commissions for the sale of the property consigned.

With the view to this action, the transaction must be considered as real, and the legal consequences resulting from it. It having been fraudulent and fictitious is the ground of complaint, and shows the damage by showing what would have been the benefit had the transaction been *bona fide*. The defendant's counsel would limit the payment of the draft, under the second ground, to the danger of losing the money advanced. If the money had not been advanced, the plaintiffs could not have been in danger of losing it; but the inducement to make the advance is the question here. Not that the plaintiffs are in danger of losing it, because they made it. The only inducement to the advance was to secure the consignment of the property as above stated.

§ 29. *The loss of anticipated commissions on expected consignments, which by fraud were not made, and on which money had been advanced, is a good ground for damages.*

The counsel seems to think that the law, in a case like the present, can give no compensation. That that is done for services rendered, and not because, by the conduct of the defendant, the plaintiffs "have lost the opportunity to make commissions." Why not give compensation in such a case? Is it not a contract? Have not the plaintiffs advanced \$12,000 to secure the sale of the pork; and, if the sale be not given to them, may they not claim compensation for a breach of the contract? This does in no respect differ from ordinary contracts made daily, for a breach of which the law gives damages. But, it is said, if there was a contract, why not bring the action upon it? There was the form of the contract, but the fraud of the defendant withheld from it the substance of a contract. He has made himself responsible on the ground of fraud, and for that he should be prosecuted.

The false warehouse receipt which he gave, saying in it that the property was to be irrevocably held subject to the plaintiffs' order, created a responsibility on the part of the defendant, if the statement had been true, to keep the property safely, and forward it as soon as practicable to the plaintiffs, which he promised to do. The whole being false, he is not the less liable to the plaintiffs for the deceit. And it is not for him, or those who represent him, to say: Sue on the contract and not on the fraud. He is liable as the

plaintiffs seek to make him liable, and that is a sufficient answer to the demurrer.

As to the second ground, that the plaintiffs are in danger of losing the money paid on the draft, it is said the allegation does not allege a loss, and consequently they, having suffered no damage, can recover none. And it is objected that there is no averment in the declaration of the inability of Adams to refund the money paid on the draft. Can this be relied on by the defendant as a sufficient answer to his liability? That Adams, having received the money, is liable, is admitted; but is not the defendant also liable? If he be liable, the plaintiffs are not bound to sue Adams before they can resort to their suit against him.

§ 30. *A warehouseman giving a false receipt is liable for advances made on the credit of it.*

The advance was made on the faith of the defendant's receipt as a warehouseman. The plaintiffs looked to the pork as a security for the money; and, by the advance made, it was their own until they were completely reimbursed. Though Adams may be, or may have been, a man of property, the \$12,000 were not paid on his credit. The transaction was commercial in its character, and the defendant, as a warehouseman, occupied a position of peculiar trust and confidence; and he is bound to answer in that capacity. He was the chief instrument in the fraud, which could not have been successfully carried out had it not been for his co-operation. He is, therefore, in morals as well as in law, responsible to the plaintiffs for the injuries experienced by them through his fraud. The demurrer to the first three counts is overruled.

§ 31. In general.—Deceit is an essential ingredient of fraud. *United States v. Watkins*, 3 Cr. C. C., 441.

§ 32. Fraud is either actual or constructive. The former implies a design to deceive or overreach another to his injury by false suggestions or by suppression of facts, the disclosure of which is known or believed to be material. The latter may consist with perfect moral rectitude, and derives its character from the nature and consequences of the act in relation to others. *Postmaster-General v. Reeder*, 4 Wash., 678.

§ 33. To constitute actual fraud between two or more persons to the prejudice of a third, contrivance and design to injure such third person, by depriving him of some right or otherwise impairing it, must be shown. *United States v. Arredondo*, 6 Pet., 691.

§ 34. If the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former ought to be preferred. *Ibid.*

§ 35. Where an act does not necessarily import fraud, where it has more likely been done through a good than a bad motive, fraud should not be presumed. *Gregg v. Sayre*, 8 Pet., 244.

§ 36. In equity as at law fraud and injury must concur to furnish a ground for judicial action. A mere fraudulent intent, unaccompanied by any injurious act, is not the subject of judicial cognizance. *Clarke v. White*, 12 Pet., 178.

§ 37. Judgments and all other human transactions may be impeached for fraud. *Schedda v. Sayer*, 4 McL., 181.

§ 38. Actual fraud, in all cases in which it is directly imputed, must be proved by the party alleging it. *Clark v. Hackett*,* 1 Cliff., 269; *Badger v. Badger*, 2 Cliff., 137; *Gaines v. Nicholson*, 9 How., 856; *United States v. Arredondo*, 6 Pet., 691; *Vint v. King*,* 2 Am. L. Reg., 712; *Jordan v. Dobson*, 2 Abb., 398; *Phettiplace v. Sayles*, 4 Mason, 812 (§§ 560-65); *Parker v. Phettiplace*,* 2 Cliff., 70; *Parrish v. Danford*, 1 Bond, 345.

§ 39. Actual fraud must be proved, and ought never to be presumed. *Atlantic Ins. Co. v. Conard*, 4 Wash., 662; *Kempner v. Churchill*,* 8 Wall., 362; *Parker v. Phettiplace*,* 2 Cliff., 70; *Garrow v. Davis*,* 10 N. Y. Leg. Obs., 225; *Cooper v. Galbraith*, 3 Wash., 546; *Cornett v. Williams*, 20 Wall., 226; *Vint v. King*,* 2 Am. L. Reg., 712; *United States v. Arredondo*, 6 Pet., 691; *Jones v. Brittan*, 1 Woods, 667; *Henckley v. Hendrickson*, 5 McL., 170; *Godfrey v. Beardsley*, 2 McL., 412; *Gaines v. Nicholson*, 9 How., 856; *Parrish v. Danford*, 1 Bond, 345; *Town of Lake v. Hequembourg*, 6 Biss., 325.

§ 40. Fraud may and generally must be proved by circumstantial evidence. *Rea v. Missouri* 17 Wall., 532; *Godfrey v. Beardsley*, 2 McL., 412; *Henckley v. Hendrickson*, 5 McL., 170; *Kempner v. Churchill*,* 8 Wall., 332.

§ 41. Fraud is rarely made out by direct evidence, the proof of it being generally arrived at by the interweaving of circumstances. *In re Rathbone*, 8 Ben., 50.

§ 42. Fraud is not to be presumed either as a matter of law or fact unless under circumstances not fairly susceptible of any other interpretation. *Tucker v. Moreland*, 10 Pet., 58.

§ 43. Fraud cannot be presumed without proof. But this proof need not be by positive evidence; it may be by circumstantial, if so strong, convincing and preponderating as to admit of no other rational conclusion. *Huchberger v. Home Ins. Co.*, 5 Biss., 106.

§ 44. Whenever there is any evidence of fraud, however slight, it is the duty of the court to submit it to the jury. *Howard v. Crawford County*,* 1 Pittsb. R., 531.

§ 45. Fraud is always a question of fact to be determined by the court or jury upon a careful scrutiny of the evidence before it. *Smith v. Vodges*, 2 Otto, 183; *Humes v. Scruggs*, 4 Otto, 22.

§ 46. Fraud is generally a question of fact, to be established by all the circumstances of the case. *Sedgwick v. Place*, 12 Blatch., 163.

§ 47. Fraud is not to be considered as a simple fact, but as a conclusion drawn from all the circumstances of the case. It may be inferred from the nature of the contract itself, or from the condition and circumstances of the parties. *Burt v. Keyes*, 1 Flip., 61.

§ 48. The question of fraud is one of law and fact. The court declares what constitutes a legal fraud, and it is for the jury to say whether the evidence proves the fact of fraud. *Parish v. Danford*, 1 Bond, 345.

§ 49. Fraud ought not to be imputed on mere suspicion. It may be inferred from facts and circumstances, but when these facts are susceptible of a natural and probable explanation consistently with good faith and honesty, it is sufficient to say that they do not prove fraud, and the legal conclusion is in favor of innocence. *Garrow v. Davis*,* 10 N. Y. Leg. Obs., 225.

§ 50. On the question of fraud, the whole circumstances of the case, as well as the positive testimony and the character and relations of the parties, are all proper subjects of consideration. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-86).

§ 51. Fraud may be proved by circumstances as against the positive oaths of the parties to the transaction that it was done in good faith. *Alexander v. Todd*, 1 Bond, 175 (§§ 838-42).

§ 52. Where a plaintiff relies on fraud, the burden of proving it rests on him; and where the fraud is explicitly disavowed by the answers, he must maintain the suit by his own strength. It is not sufficient for him to show circumstances of suspicion or doubt, or even of inflamed suspicion or doubt. The fraud must be established beyond reasonable doubt. *Phetplace v. Sayles*, 4 Mason, 312 (§§ 560-65).

§ 53. Fraud may be inferred from circumstances, but it cannot be presumed without proof, and he who makes the charge has the burden of establishing it. Where fraud is imputed in a bill in equity, and positively denied in the answers, it cannot be pronounced on the testimony of one witness without corroborating circumstances. But satisfactory proof may be made out, in such a case, by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter. *Parker v. Phetteplace*,* 2 Cliff., 70.

§ 54. Stronger evidence may be required to satisfy the court of the truth of the fact, irrespective of the effect of the answer, in cases of fraud than in other issuable matters in controversy. But fraud must be established by fair and reasonable inferences to be drawn from the facts proved; and unless it is so established the case fails. Charges of actual fraud, unsupported by any evidence showing the truth of the imputations, if denied by the answer, are of no avail, since fraud cannot be presumed without proof. *Clark v. Hackett*,* 1 Cliff., 269.

§ 55. Fraud is often a mixed question of law and fact, and when it is so it is not improper for a court of chancery to direct an issue to have the question tried by a jury. *McLaughlin v. Bank of Potomac*,* 7 How., 220.

§ 56. In Texas the equitable rule is followed, and the party charging fraud must point out, at least in general terms, the acts on which he relies to sustain it. *Hitchcock v. City of Galveston*, 8 Woods, 287.

§ 57. Question of fact whether an assignment of a land warrant was procured by fraud. *Connor v. Featherstone*, 13 Wheat., 199.

§ 58. Intent.—Fraud consists in intention, and that intention is a fact which ought to be averred, if a plea relies upon fraud as a defense to an action upon a bond. *Moss v. Riddle*, 5 Cr., 351.

§ 59. Innocent parties.—He who trusts another with powers that enable him to commit a fraud ought to suffer rather than the injured party. *Merchants' Bank v. State Bank*, 10 Wall., 604.

§ 60. Fraud in other cases.—If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be

avoided be not shown to be tainted with fraud, it cannot be affected by those other frauds, unless in some way or other it can be connected with or form a part of them. *United States v. Arredondo*, 6 Pet., 691; *Clark v. White*, 12 Pet., 178.

§ 61. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible. *Lincoln v. Claflin*, 7 Wall., 132 (§§ 287-92).

§ 62. Act of one the act of both.—Where two persons are engaged in a fraud, every act of each in furtherance of the common design is in contemplation of law the act of both. *Ibid.*

§ 63. Where two persons are engaged in a common design to defraud, the declarations of each, relating to the transaction under consideration, while engaged in the furtherance of the object, are evidence against the other; but not so if made after the consummation of the enterprise. *Ibid.*

§ 64. Of third party.—It seems that a court of equity will not afford relief for an injury sustained by the fraud of a person who is no party to the contract induced by that fraud. *Russell v. Clark*, 7 Cr., 69.

§ 65. One cannot claim property, or the avails of it, through the fraudulent act of another, without being affected by that act, especially if he is a partner, the same as if it were his own. *Stockwell v. United States*, 2 Cliff., 284.

§ 66. To charge one with fraud committed by another it must be shown that he was either cognizant of it or knowingly profited by it. It seems that it is not necessary that the person committing the fraud should be a part owner or an agent, it being enough if the vendor, knowing that such false representations have been made by any one, and that they have influenced the vendee to make the purchase, neglects to undeceive him and profits by the falsehood. *Ferson v. Sanger*, * 1 Woodb. & M., 138.

§ 67. Waiver.—If a party offers to perform his contract after being informed of all the facts bearing upon the unfairness practiced by the other party, it is a waiver of the fraud. *Blydenburgh v. Welsh*, Bald., 381.

§ 68. A breach of trust, though accompanied by falsehood, does not amount in law to swindling unless accompanied also with an intent to defraud. *Forrest v. Hanson*, 1 Cr. C. C., 63.

§ 69. Presumptions.—When the expected profits of a contract are unreasonable and unconscionable, this fact may be evidence of fraud in procuring it. But when the contract is established against all charges of fraud, it is entitled to all the consequences of a fair contract. *Hitchcock v. City of Galveston*, 3 Woods, 287.

§ 70. Fraud in part.—A security constructively but not actually fraudulent in part may be upheld in a court of equity as to the part not affected by the fraud. *Whiston v. Smith*, 2 Low., 101.

§ 71. In judicial proceedings.—Fraud practiced by counsel upon his client must, in order to invalidate the decree, be of such kind as to have caused a decree which would not otherwise have been rendered. *Amory v. Amory*, 6 Biss., 174.

§ 72. Accusations charging as fraudulent accounts settled in the probate court more than thirty years ago ought to be specific, and point out the items of account which are alleged to be false, especially when all the parties implicated and many of those who had the best means of knowledge in regard to the transactions are dead. *Badger v. Badger*, 2 Cliff., 137.

§ 73. Fraud in obtaining a judgment is a ground of equity jurisdiction. *Byers v. Surget*, 19 How., 303.

§ 74. A bill to set aside a decree of the circuit court of the District of Columbia and of the supreme court affirming it, on the ground of fraud committed by the parties, including the complainant's own counsel, in procuring them, was held to have been rightly dismissed by the court below, for failure of complainant to establish the allegations of fraud. *Clark v. Hackett*, * 1 Black, 77.

§ 75. Actual fraud, when charged, is issuable, and the burden of proof lies on the party who seeks to set aside judicial proceedings on account of it. *Clark v. Hackett*, * 1 Cliff., 269.

§ 76. It seems that a circuit court of the United States may set aside and annul a judgment or decree of the supreme court or of another circuit court, on the ground that it has been obtained by fraud. *Ibid.*

§ 77. Where a court is induced by falsehood and deceit to render judgment for plaintiff in a collusive attachment suit, brought upon fictitious demands, and prevented from correcting its error by the strenuous opposition and affidavits of both the attorneys; and by means of these proceedings the property of the fraudulent debtor is transferred to the plaintiff in the suit, a participant in the general scheme to defraud creditors, he will be declared a trustee for the benefit of the *bona fide* creditors. *Shainwald v. Lewis*, * 6 Saw., 556. See *EQUITY*, §§ 1820-26, 1873-75.

§ 78. A decree obtained by fraud and false testimony may be set aside on a bill of review. *United States v. Sampersac*, Hemp., 118.

§ 79. A decree of a court of probate, if procured by fraud, is not conclusive but may be avoided, although the statute in general terms declares the decree of the court of probate to be conclusive and final. *Pratt v. Northam*, 5 Mason, 95.

§ 80. A bill in equity lies to set aside a judgment upon the ground of newly discovered evidence of fraud on the part of the original plaintiff in procuring it, and in procuring the policy of insurance upon which it was rendered, where such new evidence is not merely cumulative, and would have furnished a defense if known and introduced at the trial. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

§ 81. It is not a fraud for a judge to become interested in an execution which has issued under authority of the court of which he is a member, or in the property sold under such execution. *Cooper v. Galbraith*, 3 Wash., 546.

§ 82. A decree in bankruptcy, rendered in proceedings which are regular on their face, cannot be impeached for fraud, in a suit by the assignee to recover an unlawful preference. *Michaels v. Post*, 21 Wall., 398.

§ 83. A party seeking to avoid a decree in equity on account of fraud must prove it affirmatively; it will not be presumed. *Jones v. Brittan*, 1 Woods, 667.

§ 84. Rights innocently acquired under judgments or decrees fraudulently obtained are protected. *Piatt v. McCullough*, 1 McL., 69.

§ 85. A fraudulent combination to give jurisdiction to a court by one of the parties appearing as garnishee when he did not owe the defendant anything is a fraud in law from which no court will relieve either party. *Warburton v. Aken*, 1 McL., 461.

§ 86. Where a court has been induced by falsehood and deceit to render judgment in favor of the plaintiff in a collusive attachment suit founded upon fictitious demands, such as fabricated notes, etc., and by means of such suit and judgment the property of the fraudulent debtor has been transferred to the plaintiff therein for a nominal sum, he will be declared a trustee for the *bona fide* creditors. *Shainwald v. Lewis*, 6 Saw., 556.

§ 87. Bills and notes.—An agent who held a bill for collection gave it up to the acceptor to be canceled, upon the assumption of another in writing to pay the debt. The owner of the bill afterwards got possession of it under pretense that he wished to calculate the interest on the third person's assumption. *Held*, that if the owner came into possession of the bill by a fraudulent and deceitful practice, he could not recover upon it, and that obtaining possession of it by any false pretense was evidence of a fraudulent obtaining of it. *Wilson v. Cromwell*, 1 Cr. C. C., 214.

§ 88. If an accommodation acceptor, holding as security against his liability as such the notes of the drawer payable at the maturity of the draft, exchange them, before they are due, for notes payable on demand, on the eve of the failure of the drawer, with a view to enable him to sue at once and make an attachment before the interference of others, and this is done before payment by the acceptor of the drafts, and the old notes being absent are not immediately returned, it is strong evidence of fraud and collusion. *Whetmore v. Murdock*, 3 Woodb. & M., 380.

§ 89. In an action by an indorsee upon a promissory note, a general allegation in a plea that the note was obtained by fraud and misrepresentation is good, but it must also be averred that the indorsee participated in the fraud or had knowledge of it. *McClintick v. Johnston*, 1 McL., 414.

§ 90. An indorser of a bill of exchange against whom a judgment has been rendered thereon, and who alleges that, unknown to him, payment had been made to the holder by the maker before the institution of the suit, and that he has been defrauded, is entitled to the aid of a court of equity. *Atkins v. Dick*, 14 Pet., 114.

§ 91. In a suit upon a note, between the original parties thereto, fraud in obtaining the note may be given in evidence, for it avoids the whole transaction. *Morrison v. Clifford*, 1 Cr. C. C., 585.

§ 92. If a holder of a note procured by fraud had notice of the fraud when he took it, or participated in it, he cannot recover thereon. But it is otherwise if he took the note for value and without notice. *Riley v. Anderson*, 2 McL., 589.

§ 93. Negotiable paper.—If circumstances are proved showing fraud in the inception of negotiable bonds sued on, the burden is cast upon the plaintiff to show that he paid value for the instruments. *Smith v. Sac County*, 11 Wall., 139.

§ 94. Bonds.—In an action at law upon a bond, the only fraud permissible to be proved is fraud in the execution of the instrument. *George v. Tate*, 12 Otto, 564.

§ 95. A suit at law by the United States may be maintained upon a bond required by law to be given, although the instrument has been mutilated by the destruction of the seal, unless the mutilation has been procured by fraud and imposition practiced upon a public officer in the discharge of his duty by the party bound by the instrument. *United States v. Spalding*, 2 Mason, 478.

§ 96. In an action upon a bond in Indiana the defendant pleaded that the obligee represented to him that he had a requisition on him from the governor of Ohio to answer the charge of larceny in the latter state, that the bond was given to settle the same and for no other consideration, and that the representation was false. In Indiana bonds are assignable by statute, but the obligor may set up any defense which he had against the obligee. The plea was sustained. *Bell v. Nimmo*, 5 McL., 109.

§ 97. In an action on a bond to pay the amount that shall be recovered in an action pending between third persons, collusion between such third persons may be shown. But it cannot be shown that the proceeding by the plaintiff in that action was fraudulent as against the defendant therein. *Greathouse v. Dunlop*, 3 McL., 303.

§ 98. A bottomry bond containing fictitious items and executed for a much larger sum than that actually advanced, the intention being to defraud the underwriters, is void, and cannot be enforced as a lien on the vessel even as to the amount actually advanced. Nor can the lender resort to his general maritime lien, the execution of the bond being inconsistent with an intention to rely upon such lien. *Carrington v. Pratt*, 18 How., 63.

§ 99. Where the title of a lender upon respondentia bonds depends upon the validity of the respondentia contracts, no fraud practiced by the borrower or his agents will avoid them, unless the lender has participated therein. *Atlantic Ins. Co. v. Conard*, 4 Wash., 662.

§ 100. Non-joinder of parties.—Where complainants are allowed to dispense with parties on account of their numerousness, any one of whom would have a right to come in by petition and be made a party, if necessary to protect their interests, they ought to proceed with the utmost fairness and good faith. *Campbell v. Railroad Company*, 1 Woods, 368.

§ 101. Government.—Fraud is not imputable to the government. *Gouverneur v. Robertson*, 11 Wheat., 332.

§ 102. If a partnership is dissolved by the death of one of its members, and the partnership creditors or the personal representatives of the deceased partner do not commence proceedings to liquidate the affairs of the partnership, the surviving partner may deal with the firm property as his own, and it is not a fraud upon the firm creditors for him to apply it in payment of his individual debts, where there is nothing showing an intention to defraud. *Fitzpatrick v. Flannagan*, 16 Otto, 648.

§ 103. If one partner executes a note in the firm name without the knowledge or authority of the other partners, the transaction is a fraud upon the latter. *Shainwald v. Lewis*, *6 Saw., 556.

§ 104. Purchasers in good faith, without notice, and for a valuable consideration, from one who has obtained lands by fraud, will be protected in equity. *Norton v. Meader*, 4 Saw., 603.

§ 105. One who purchases with notice from a fraudulent vendee is held in equity to be a trustee for the original vendor, but only to the extent of the latter's interest at the time of the sale. *Rogers v. Marshall*, 3 McC., 76.

§ 106. Fraud in a grant of lands made by the legislature cannot be set up as against an innocent purchaser from the grantee. *Fletcher v. Peck*, 6 Cr., 87.

§ 107. Innocent purchasers from one who has fraudulently obtained possession of a deed are entitled to recover for permanent improvements made by them while permitted to retain possession, so far as such improvements have not been made by rents and profits. *Utterbach v. Binns*, 1 McL., 242.

§ 108. A *bona fide* purchaser, for a valuable consideration, and without notice, from a fraudulent grantee, will hold the estate at law against the original grantor. *Wood v. Mann*, 1 Sumn., 506.

§ 109. Whether a plea of *bona fide* purchaser for valuable consideration, without notice of fraud, is a good plea in bar to a legal title asserted, as it is to an equitable one, *quære*. *Ibid.*

§ 110. A plea by a defendant to a bill to set aside a conveyance for fraud, that he is a *bona fide* purchaser from the alleged fraudulent grantee, for a valuable consideration, without notice of the alleged fraud, and that he has paid a part of the consideration money, the rest being secured by a mortgage, furnishes no bar. It should aver that the whole of the consideration money has been paid before notice of the fraud. *Ibid.*

§ 111. In cases of sales procured by fraud on the part of the purchaser, if third persons buy absolutely and for a new and full consideration, and without notice of the fraud in procuring the goods, they are to be protected in holding them. But if they have notice of the fraud, or give no new valuable consideration, or are mere mortgagees, pawnees, or assignees in trust for the debtor, or for him and others, such third persons are to be regarded as in no better condition than the original purchaser. *Johnson v. Peck*, *1 Woodb. & M., 334.

§ 112. If a purchaser has notice at any time before the conveyance or the payment of the purchase money of a prior equitable incumbrance, and persists in the purchase, it is held to be in fraud of such incumbrance. *Merrill v. Dawson*, Hemp., 563.

§ 113. A purchaser without notice of any fraud in the sale to his grantor is protected in his title. *Dexter v. Harris*, 2 Mason, 531.

§ 114. Administrator.—The creditors of a deceased debtor can sustain a bill in equity, upon a special case made, against the administrator and a third person to subject property fraudulently withheld to the payment of the debts of the deceased. *Hagan v. Walker*, 14 How., 29.

§ 115. A purchase by an executor of property of his intestate, by using the name of a nominal buyer who is to convey it to the executor, is fraudulent upon its face. It matters not whether the sale is made with or without the sanction of judicial authority, or with ministerial exactness, and for a fair price. Acquittances given by *cestuis que trust*, without full knowledge of the fraud, do not bar their rights. *Michoud v. Girod*, 4 How., 508.

§ 116. A second license to an administrator to sell property already sold by him, and a second purchase by the same person, is not evidence of fraud in the first sale. *Comstock v. Crawford*, 3 Wall., 396.

§ 117. A purchaser of land at a sale made by an administrator, who procured the sale, either by himself or his agent, through collusion and combination with the administrator for the purpose of defrauding a creditor, cannot recover it as against such creditor to whom it has been conveyed by the son of the deceased. *Cornett v. Williams*, 20 Wall., 226.

§ 118. Whether an administrator has acted fraudulently in confessing a judgment and buying from the purchaser at the execution sale of the land of the intestate is a question for the jury. *Swayze v. Burke*,* 12 Pet., 11.

§ 119. A party who by fraud and violence has obtained from an administrator a conveyance of land under the order of an orphans' court, unfairly and collusively obtained, shall not be allowed, in a court of law, any more than a court of equity, to shelter himself under a title so acquired, against the heirs at law of the intestate, upon the ground that the sale has been confirmed by the sentence of the orphans' court, and the fraud may therefore be examined into in a suit in ejectment against him. *Rhoades v. Selin*, 4 Wash., 715.

§ 120. An administrator, who was one of the heirs of the deceased, confessed a judgment in favor of a creditor of the deceased. Execution was issued, and the attorney for the plaintiff in the suit purchased the land sold, declaring publicly at the sale that the administrator might redeem at any time on payment of the debt, and that he did not intend to buy the land to hold it. No money was paid by the attorney on his bid, and four years later the administrator, having remained in possession and received the rents and profits during this time, purchased from him on payment of the debt only. It was held that if the proceedings on the part of the administrator were a fraud on the other heirs, his title could not be sustained, even though the attorney was not a party to or cognizant of the fraud. *Swayze v. Burke*,* 12 Pet., 11.

§ 121. Debtor and creditor.—If creditors agree to release a debtor if he will make a deed of his property to trustees, it is a fraud upon the debtor and the other creditors for one creditor to refuse to execute the release after it has been executed by the others, and the deed to the trustees has been made. *Bartleman v. Douglass*, 1 Cr. C. C., 450.

§ 122. Where one creditor, in order to obtain for himself a preference, induces another, by fraudulent means, to release his debt, the latter may regard his debt as in full force, and such debt will support a petition in bankruptcy against the debtor. *Michaels v. Post*, 21 Wall., 898.

§ 123. It is not fraudulent for a debtor, on discovering that the debt is about to be attached in his hands by creditors of his creditor, to pay the debt and thus defeat the attachment, though his creditor be insolvent, and he obtained the information by opening a letter written by the creditors and addressed to a third person whose mail he probably had authority to open. *Simpson v. Dall*, 3 Wall., 461.

§ 124. In an action on bank notes against the directors of the bank, under the act of Michigan making them liable individually if the debts of the bank in case of insolvency shall exceed a certain amount, it is no defense that the notes came into the possession of a third person who fraudulently put them into circulation, where the plaintiff is an innocent holder who took them in the ordinary course of business. *White v. How*, 8 McL., 291.

§ 125. Vendor and purchaser.—To enable a vendor to avoid a sale on the ground that the buyer did not intend, at the time he bought, to pay for the goods, it is not enough to show that the buyer knew himself to be insolvent at the time of making the purchase. It must be shown that he bought knowing that he could not pay or intending not to pay. An instruction which makes no reasonable expectation to be the same, in legal effect, for this purpose, as no expectation, is held to be erroneous. *Biggs v. Barry*, 2 Curt., 259.

§ 126. If teas selected by a purchaser are afterwards changed by the seller, and other teas substituted, the purchaser may rescind the contract and refuse to take the teas, as soon as the fraud is discovered, and recover back the purchase money paid, or plead failure of consideration to a note given for the price; or he may affirm the contract and claim damages for a breach of it. *Cheongwo v. Jones*, 8 Wash., 359.

§ 127. Where lands were sold, and before the conveyance could be recorded they were at-

tached as the lands of the grantor in a suit on a note given on the day after the conveyance, but antedated to a time previous thereto, the ante-dating of the note was held to be a fraud upon the grantee in the conveyance, and the title acquired under the attachment was held to be void as to him. *Eriggs v. French*, 2 Sumn., 251.

§ 128. In an action for damages for breach of contract for not delivering teas of the quality contracted for, no evidence can be given calculated to impute fraud to the defendant, by showing that after the examination of the teas by the purchasers they might have been changed and other teas substituted. *Gilpin v. Consequa*, Pet. C. C., 85.

§ 129. Six or seven years' possession by a grantee, without any complaint of mistake or misrepresentation, during which time he continues to do work upon the land and make payments on the price, strongly repels the idea that any such ground for relief exists, and goes far to bar the equity of the claim. *Ferson v. Sanger*, *1 Woodb. & M., 138.

§ 130. The circumstance that a vendor, when about to make the sale, made inquiries as to the vendee's anxiety to buy, though not wholly without weight, is too slight to raise a suspicion of grave and intended fraud. *Stebbins v. Eddy*, 4 Mason, 414 (§§ 298-302).

§ 131. Rescission of sale of land.—Where land is obtained for an inadequate consideration, from the owners, who live at a distance from it, and are ignorant of their title, and the quantity, value and situation of it, by one knowing the facts, but who falsely represents that it is of much less value and quantity than it is, and that he has a claim upon it for taxes, the conveyance will be set aside in equity. *Tyler v. Black*, 13 How., 230.

§ 132. A sale in partition proceedings is not constructively fraudulent because some of the commissioners and guardians of the minor heirs become interested in the property after the sale and before the purchase money is all paid. *Kearney v. Tylor*, 15 How., 494.

§ 133. At public sale.—If an association of individuals to bid at a legal public sale of property has for its object not the prevention of competition but the inducement of those composing it to participate in the bidding, the purchase by such association should be upheld; otherwise if the association is formed for the purpose of shutting out competition. *Ibid.*

§ 134. Where the property sells for a full price and there is no actual fraud, the fact that the auctioneer is aware at the time of the sale that he can have an interest in the company formed to purchase the property does not render the sale constructively fraudulent, the company being formed for a lawful purpose and not to shut out competition. *Ibid.*

§ 135. Sacrifice of land at judicial sale.—Where, under a plea of former discharge in bankruptcy, the court gave judgment against a non-resident plaintiff for costs, and the attorney for the defendant taxed the costs adjudged to the defendant; assumed to himself the power not only of selecting final process, but of prescribing also the description and quantity of the property which he desired to have seized; furnished a list of the parcels and the amount which he chose to have thus seized; ordered the sheriff to levy upon the whole of what he had so described; prepared and furnished to the officer such advertisements for the sale of the property as he approved; required the sheriff to sell \$40,000 worth of land to satisfy an execution for \$39; and became the purchaser for the sum of about \$9, the sale was set aside as fraudulent. *Byers v. Surget*, 19 How., 308; *Surget v. Byers*, *Hemp., 715.

§ 136. Disaffirmance of conveyance.—A second conveyance made for the purpose of disaffirming one made during infancy, though fraudulent as to the first grantee, is valid as a disaffirmance. *Tucker v. Moreland*, 10 Pet., 58.

§ 137. Acquiring title to which another has the better right.—If a person, by false and fraudulent means, acquires the legal title to property to which another has the better right, and which he would have obtained had the facts as they existed been truly represented, equity will compel the holder of the legal title to transfer it to the person who is justly entitled thereto. *White v. Cannon*, 6 Wall., 448.

§ 138. A deed regularly executed for an expressed consideration is presumed to have been bona fide made until the contrary is shown. *Vint v. King*, *2 Am. L. Reg., 712.

§ 139. A conveyance which purports to be bona fide and for a valuable consideration must be taken prima facie to be so. *Briggs v. French*, 2 Sumn., 251.

§ 140. Fraud in the execution of a deed, or in the procurement of a patent, may be shown at law as well as in equity; but at law the fraud is limited to the execution of the instrument, and no matter behind that transaction is admissible as evidence to show fraud. *Cooper v. Roberts*, 6 McL., 92.

§ 141. A purchaser from a defrauded vendee cannot take advantage of the fraud. *Simpson v. Wiggin*, 3 Woodb. & M., 413.

§ 142. Limiting liability of stockholder.—An agreement between a corporation and a stockholder limiting the liability of the latter upon his subscription is void as to creditors. *Upton v. Tribilcock*, 1 Otto, 45.

§ 143. An agreement by a corporation with its stockholders that if they will pay a certain percentage of the value of their shares they may take full-paid certificates, and that they shall

not be liable on such shares for any further payment, is a good and valid agreement as between the company and its stockholders, but is void as to its creditors as being a fraud in law. *Sco-vill v. Thayer*, 15 Otto, 158.

§ 144. **Placing an inadequate stamp on a deed for the purpose of misleading and defraud-ing creditors** does not make it void under the stamp acts of congress. The act must be done with intent to defraud the government. *Dowell v. Applegate*, 7 Saw., 232.

§ 145. **Promise on sale of slave.**—An action of deceit will lie against a person who induces the plaintiff to sell his slave much below her real value, by falsely and fraudulently promising not to remove her out of the district, and not to sell her to southern negro traders. *Fenwick v. Grimes*, 5 Cr. C. C., 603.

§ 146. The plaintiff having sold a slave to the defendant and reduced the price upon the promise that the latter would not remove the slave from the district, sued for deceit, alleging that the defendant had sold her to a negro trader, by means whereof she had been removed from the district. An arrest of judgment was moved for, on the ground that one of the counts was bad for want of a *scienter*; that is, an averment that the defendant knew that the person to whom he sold was a negro trader. The court arrested the judgment, holding that, as no deceit previous to the sale was averred, there was only a breach of promise, and that an action of deceit would not lie for a breach of promise. *Fenwick v. Grimes*,* 5 Cr. C. C., 439.

§ 147. **Effect of bankruptcy.**—It seems that a claim to the repayment of purchase money paid on a contract of sale induced by the fraud of the seller is not discharged by the bankrupt laws. *Doggett v. Emerson*,* 1 Woodb. & M., 195.

§ 148. **A secret settlement made by a woman on the eve and in contemplation of her marriage**, and without the knowledge of her intended husband, is a fraud upon his marital rights, and he can maintain a bill to set it aside. *Linker v. Smith*, 4 Wash., 224.

§ 149. **Offer of reward—Deceit by public officer.**—A large sum of money having been stolen from the county of Marion in the state of Iowa, the officers of that county, in the name of the county, offered a reward to any who might apprehend the robbers; and citizens of Mis-souri, acting upon the faith of the offer, performed the service. It turned out that the county officers had no authority to bind the county for the payment of the reward in the manner in which they had attempted, but it was not pretended that there was any fraudulent intent on their part, having acted in good faith, intending to bind the county and believing that they had power to do so. Those who caught the robbers sought to charge the officers as for a fraud, upon the technical ground that the latter were conclusively presumed to know the law of Iowa, and therefore must be held to have offered the reward knowing that the county would not be bound, and hence to have intended to mislead and deceive the plaintiffs. It was held that the officers could not be charged with a fraud while in fact acting in good faith; and that the plaintiffs, though citizens of Missouri, were also bound to know the law of Iowa, and could not therefore, upon their own theory, have been deceived. *Huthsing v. Bosquet*,* 3 McC., 569.

§ 150. **In bankruptcy.**—A general plea of fraud in a bankruptcy case, where the bankrupt has been engaged in large commercial business, is not sufficient. He cannot be expected to be prepared to meet the fraud unless reasonable notice of the facts relied on to show it is given. *Lathrop v. Stewart*, 6 McL., 630.

§ 151. **Defense not enjoined, when.**—It is no part of the functions of a court of equity to enjoin a defendant from setting up a legal and just defense in a court of law, under the alle-gation that it is a fraud for him to differ with the plaintiff in his construction of the contract. *Magniac v. Thompson*, 2 Wall. Jr., 209.

§ 152. **If an agent fraudulently makes any profits out of his agency at the expense of the principal**, he must account to the principal therefor; and the agent shall gain nothing by his fraud. *Northern Pacific R. Co. v. Kindred*, 3 McC., 627.

§ 153. **Where a corporation employed agents to sell its lands, proposing to receive in pay-ment its preferred stock then outstanding, and the agents purchased a portion of the lands themselves by using the names of third persons, and by purchasing the preferred stock of the corporation in the market and delivering it to the corporation, representing it as stock paid in by such third persons**, it was held that the corporation, on discovering the fraud, might repudiate the contract, and need not return anything but what it had actually received on account of the fraudulent transaction. *Ibid.*

§ 154. **If an agent, in making a sale, though he be a special agent for this purpose, commits a fraud, or states falsehoods as to material facts, which are relied on, the sale may be avoided.** *Foster v. Swasey*, 2 Woodb. & M., 217.

§ 155. **Although an agent or officer may have unquestionable authority to make a contract, he may be guilty of fraudulent collusion with the other party in making it, and it may be void and not binding on the party for that reason.** And the terms of the contract, and all the cir-cumstances attending its negotiation and execution, including the conduct of the parties be-

fore and afterwards, may be considered for the purpose of evincing and proving such fraud. *Hitchcock v. City of Galveston*, 3 Woods, 287.

§ 156. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain or create an interest adverse to that of his principal in the transaction; and that fraud creates a trust, even where the agency may or must be proved by parol. *Jenkins v. Eldredge*, 3 Story, 181.

§ 157. Insurance.—If the insured, with a fraudulent intent, presents to the insurance company a claim for a larger loss than that sustained by them, they cannot sustain an action on the policy. *Huchberger v. Home Ins. Co.*, 5 Biss., 106.

§ 158. Overvaluation of the subject-matter of insurance is no necessary proof of fraud. But there may be very cogent circumstances from which fraud may be inferred, where the cause otherwise labors under strong suspicions. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

§ 159. Patent rights.—The procuring of a patent for a new and useful machine under the assumption of a re-issue of a prior patent which was not useful is a fraud upon the public, since it overreaches similar inventions made since the first patent. *Brooks v. Fiske*, 15 How., 212.

§ 160. In an action upon covenants executed by the defendant to the plaintiff in consequence of a license granted by the latter to the former to make and vend a certain patented article, the defendant, it seems, may show in defense that the plaintiff acted fraudulently in taking out the patent. *Wilder v. Adams*, 2 Woodb. & M., 829.

§ 161. The decision of the commissioner in granting a renewed patent raises a presumption against any fraudulent intention in surrendering the original patent and obtaining the re-issued letters. *Jordan v. Dobson*, 2 Abb., 398.

§ 162. In a suit upon a promissory note, the court instructed the jury that if the plaintiff sold to the defendant a patent right including an original invention, which was known to the plaintiff to have been previously patented to another, together with his, the plaintiff's, improvement on such original invention, for which improvement only, the plaintiff was entitled to a patent; and the defendant bought such patent right ignorant of the original invention having been previously patented to another, and with the belief that he would have an exclusive right to the whole machine; and the note in question was given as a part consideration for such purchase, then it was a fraud upon the defendant and the note was void in law. *Turner v. Johnson*, 2 Cr. C. C., 287.

§ 163. An applicant for a patent, to whom the commissioner has not given notice, as required by law, of a subsequent application by another covering the same ground, has received no wrong for which the United States is pecuniarily responsible, where, in pursuance of the directions of the secretary of state urging an early issue of patent to the second applicant, on the ground that it will facilitate a supply of the article for the government, the second application is taken up first and a patent issued to the second applicant. *Thistle v. United States*,* Dev., 130.

§ 164. It cannot be contended that a patent was obtained in fraud of another who was the original discoverer, where the latter has given up his right to the person obtaining the patent, by expressly or impliedly permitting him to encounter the trouble and expense of obtaining it. *Dixon v. Moyer*, 4 Wash., 68.

§ 165. If the original inventor of a machine and the inventor of an improvement thereon agree that the patent for the whole shall be taken in their joint names, the former is guilty of a fraud if he obtains the patent in his own name, and is in equity a trustee for the latter. *Reutgen v. Kanowrs*, 1 Wash., 168.

§ 166. If one fraudulently procures a devise to be made to him upon a parol agreement to hold in trust for another, equity will treat the fraudulent procurer of the legal title as a trustee *ex malificio*. But if an expectant heir fraudulently prevents a dying ancestor from making a will in favor of a daughter by a parol promise to hold in trust for her, it does not raise a trust which adheres to the title in the hands of the promisor and his heirs, but it is a mere parol promise which, on account of the fraud practiced, chancery will compel the promisor to execute. In such a case, therefore, a bill to enforce performance of the promise cannot be maintained against the heirs alone of the promisor. *Bedilian v. Seaton*, 3 Wall. Jr., 279.

§ 167. Suit for alimony.—A *feme covert* who has sued for alimony and obtained an injunction preventing her husband from conveying away his property, is to be considered as a creditor in equity, and competent to show, in a petition by slaves for freedom, that the act of the husband in manumitting the slaves pending her suit was in fraud of her rights. *Negro Claggett v. Gibson*, 3 Cr. C. C., 359.

§ 168. A deed of manumission made by a husband pending suit by the wife for alimony, and for the purpose of preventing her from recovering her claim, is fraudulent and void. But if made with a view of preventing her from obtaining, at his death, a distributive portion of his property, such motive does not avoid it. *Ibid.*

§ 169. **Landlord and tenant.**—The secretary of the treasury leased a building for a custom-house, upon the representations of the collector of the port, who was a joint owner of the premises, but who did not disclose this fact. The premises were unsuited for the purposes for which they were leased, and the rent stipulated to be paid was unreasonable and extravagant. *Held*, that the lease was fraudulently procured, that the United States were not bound by it, and that they might surrender the premises without becoming liable in damages therefor. *Larkin v. United States*,* 5 Ct. Cl., 526.

§ 170. The assignee of a lease procured by fraud of the lessor cannot claim damages for non-payment of rent after the premises are vacated, where the facts were matters of observation and record, and as such the assignee had notice of them at the time of his purchase. *Ibid*.

§ 171. A release given by one of two joint contractors, which is fraudulent, will not extinguish the lien as to the other, which has already become fixed by law. *Canal Company v. Gordon*, 6 Wall., 561.

§ 172. A ship's papers, when shown to be fraudulent, are no proof of a valid title, under the law of nations. *United States v. Amistad*, 15 Pet., 518.

§ 173. An act done in fraud of a law is done in violation of it. And it is for the jury to judge of the intention with which it was done. *Lee v. Lee*, 8 Pet., 44.

§ 174. **In drawing a lottery.**—Where a person employed by the operators of a lottery to do the manual acts of drawing the numbers, and so determining the prizes, secretly caused a ticket to be purchased for himself, and fraudulently pretended to have drawn the number of that ticket, so as to entitle it to the prize, and the operators, on the faith of this, paid the money to the person represented to be the purchaser of the ticket, it was held that the transaction was void, that an action for money had and received would lie, and that infancy at the time of the commission of the fraud was no defense. *Catts v. Phalen*, 2 How., 376.

§ 175. **Transactions between parent and child.**—If a man purchases land and takes a deed in the name of his son, for fear that his wife, whom he has married since the death of his son's mother, and her children by a former husband may claim the land; and he afterwards surrenders the deed never accepted by the son, and takes one in his own name, there is no fraud which will defeat the father's title in favor of the son, the father having always remained in possession, and having recorded the deed to himself many years before the claim is set up. *Longworth v. Close*, 1 McL., 282.

§ 176. **Foreclosure — Fraudulent combination.**—If the parties to a foreclosure suit, in order to counteract a claim set up by other parties for a portion of the mortgaged lands, combine together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property, a court of equity will not enforce such fraudulent agreement. *Randall v. Howard*, 2 Black, 585.

§ 177. **Railroad — Mortgage — Foreclosure — New company — Creditors.**—Pending proceedings to foreclose a mortgage upon a railroad, the holders of the mortgage bonds and other creditors of the company entered into an agreement whereby it was provided that a committee should be appointed to obtain a decree in the foreclosure suit, and purchase at the foreclosure sale, in behalf of all the holders of bonds, stocks and indebtedness of the company, all the rights, privileges, franchises and property of the company; that a new corporation should be formed to own and operate the road and its franchises; that the holders of the bonds, indebtedness and stock of the old company should deliver the same to a third person, subject to the order of the committee; that the committee should convey the railroad and all its franchises and appurtenances to the new company, who should make a first mortgage of the same to secure a certain amount of bonds, and a second mortgage to secure a certain amount of other bonds, a part of which should be called "first preferred income bonds" and a part "second preferred income bonds;" that the new corporation should issue a certain amount of stock; that the holders of the first mortgage bonds of the old company should receive in place of the same the new bonds, secured by the first and second mortgages, at a certain rate fixed by the agreement; that the holders of the unsecured indebtedness of the old company should receive, on surrender of their evidences of debt, "second preferred income bonds" of the new company at par, to the full amount of their respective debts and interest; that the holders of the first preferred stock of the old company should, on surrender of their certificates, receive stock of the new company to the amount of fifty per cent. of their old stock; and that the holders of the second preferred stock should receive stock of the new company to the amount of thirty per cent. of the old stock, and the holders of the common stock of the old, twenty-five per cent. in the stock of the new. On a bill by a holder of unsecured indebtedness of the old company, charging the plan for the reorganization of the company as fraudulent as to creditors, it was held that the plan fairly contemplated the protection of all classes of creditors of the old company in the equitable order of their priority, and that the unsecured creditors were placed in at least as good a relation to the new company as they bore to the old. *Hancock v. Toledo, Peoria & Warsaw R. Co.*, 9 Fed. R., 738.

§ 178. Where the directors of an insolvent railroad company, when sued upon their indorsements for the company by creditors who also held mortgage bonds as collaterals, in order to relieve themselves from liability and throw the debt upon the company, procured foreclosure proceedings to be instituted upon the mortgage, and procured others to purchase the claim of the creditors pursuing them upon their indorsements, swelling the indebtedness of the road beyond its true amount by negotiating bonds not then delivered in order to accomplish this result, the sale under the decree, which was a sacrifice of all the property of the company, was set aside as fraudulent as to creditors. *Drury v. Cross*, 7 Wall., 299.

§ 179. Where the trustees in a mortgage to secure the bonds of a railroad company are made defendants in a bill by certain of the bondholders to foreclose the mortgage, and allow a decree to be taken by default, this is a constructive fraud against the bondholders whom they represent; and if knowingly taken advantage of by the complainants in the bill to the prejudice of the bondholders, they are participants in the fraud. *Campbell v. Railroad Company*, 1 Woods, 368.

§ 180. Land patents.—When a grant or patent for land, or legislative confirmation of titles to land, has been given by the sovereignty or legislative authority only having the right to make it, without any provision having been made in the patent or by the law to inquire into its fairness as between the grantor and the grantee, or between third parties, a third party cannot raise in ejectment the question of fraud as between the grantor and grantee, and thus look beyond the patent or grant. *Field v. Seabury*, 19 How., 323.

§ 181. Miscellaneous.—If a person, in consideration of a bond executed to him, transfers the equitable right to lands to the obligor of the bond, and afterwards acquires the legal title and refuses to convey it, and a part of the lands are lost by his neglect to pay the taxes on them, he is not entitled to the aid of a court of equity to enforce the bond, or to obtain satisfaction of a judgment at law thereon. *Skilern v. May*, 4 Cr., 137.

§ 182. A mortgage by a widow securing a claim against her deceased husband is not vitiated by a subsequent agency of the mortgagee in settling her affairs. *Jackson v. Ashton*,* 11 Pet., 229.

§ 183. The plaintiffs holding certain expired contracts for the purchase of certain lands, and thinking that the owner would sell to them for less than he would sell to others, and that this good-will might be a valuable subject of sale, employed one of the defendants to negotiate with the owner for the purchase of the lands, find out the lowest price at which he would sell to the plaintiffs, and then dispose of the plaintiffs' rights under the contracts at the best price he could obtain. In this bill they alleged that this defendant had defrauded them of this good-will by entering into a combination with the other defendants to obtain from the plaintiffs their rights under these contracts for a trifling sum and then negotiate a purchase from the owner as if for the plaintiffs; and prayed that the defendants might be treated as trustees, and for an account, and for other relief. It was held that the plaintiffs could maintain their action if they could show that the agent disposed of what he was employed to sell for less than its value, and that he did this fraudulently; but that the proofs failed to show either of these facts. *Garrow v. Davis*,* 15 How., 322.

§ 184. The aid of a court of equity cannot be invoked to enforce an agreement made with intent that it shall operate as a fraud upon the rights and interests of third persons. Thus if, in a suit for trespass against several joint wrong-doers, the plaintiff makes a secret agreement with some of the defendants that if they will make no defense he will not levy execution on their property, but collect the whole of the judgment from the other defendants, and judgment is taken against all, the defendants who made the agreement cannot obtain relief upon it in equity as against a *bona fide* purchaser of the judgment without notice of such agreement. *Selz v. Unna*,* 6 Wall., 327.

§ 185. Where A. received bonds of B. upon trust to purchase therewith, for the benefit of B., lands of the railroad company which had issued the bonds, "at or near the average price of five dollars per acre," and instead of doing so sold them to C. for six cents on the dollar, and C. sold them to E. at one hundred and fifty per cent. advance, both knowing the object for which A. had received them, it was held to be a clear case of fraudulent breach of trust, and that C. and E., being *participes criminis*, were bound to deliver the bonds to B. when demanded. *Kitchen v. Bedford*,* 13 Wall., 413.

§ 186. The assignee in bankruptcy of an insurance company filed a bill against those who had been the officers and directors of the company prior to the bankruptcy proceedings, alleging that they had fraudulently, and without paying any consideration to the company, divided among themselves and their friends certain bonds belonging to the company. The answer denied the charge and that the company ever owned the bonds. The evidence showed that the bonds did not belong to the company, but their possession was borrowed by its officers for the purpose of exhibiting them to the superintendent of insurance as evidence of the sound condition of the company and its right to continue the business of insurance, and were returned

by the officers to the owners. It was held that the bill was properly dismissed by the court below. *Walker v. Reister*,* 12 Otto, 467.

§ 187. In an action for money obtained by false pretenses, the pretense should be distinctly averred, and its truth denied in terms. *Fenwick v. Grimes*,* 5 Cr. C. C., 439.

§ 188. Where a plaintiff in a court of law is to make out by evidence that he answers to a certain description given in a statute, so as to take as grantee, this may be met by evidence of fraud, perjury or forgery on the part of the plaintiff in the obtaining of that evidence and bringing himself within the letter of the statute. *Seabury v. Field*,* 1 McAl., 60.

§ 189. It is no defense to a bill for the specific performance of a contract of a settler on lands purchased by the government from the Delaware Indians to convey a part thereof, when the title is obtained, to the plaintiff, who has furnished part of the purchase money to be paid at the sales, that the United States have defrauded the Indians, that the lands have been sold below their value, and that the defendant has obtained his title by fraud. Nor do the fourth and fifth sections of the act of congress of March 31, 1830, "for the relief of purchasers of public lands, and for the suppression of fraudulent practices at the public sales," afford any defense. These sections were intended to prevent fraudulent combinations among bidders and to protect others, proposing to purchase, from such combinations, and cannot be made to encourage fraud by releasing the party guilty of fraud from the obligation of his contract. *Fackler v. Ford*,* 24 How., 322.

§ 190. If two persons join in an effort to acquire land, and, while holding it jointly under an invalid title, one seeks to destroy that title and acquire a valid title himself alone and thereby hold adversely to the other, such acts are a fraud upon the latter; and if he succeeds, the person defrauded may obtain a conveyance of his share in equity. *Russell v. Beebe*, *Hemp*, 704.

§ 191. Whether the loss of a vessel alleged to have been occasioned by perils of the sea and stranding was occasioned by fraud or gross negligence is a question of fact for the jury. *Church v. Marine Ins. Co.*, 1 Mason, 341.

§ 192. Where a brig attached in the harbor of New York by virtue of a warrant from the United States district court for that district was collusively and fraudulently seized by A. and B., and carried into the district of Connecticut, and there caused to be attached at the suit of A., for the private debt of B., it was held that, on application of the marshal for the southern district of New York to the district court of Connecticut, the latter court correctly issued a warrant directing the marshal of the latter district to deliver the vessel to the marshal of the former. In the *Matter of the Brig Joseph Gorham*,* 2 N. Y. Leg. Obs., 389.

§ 193. The right of the heirs of a grantee in a Mexican grant of lands in California, made before that territory was ceded to the United States, is held not to have been taken away by attempts to enlarge the grant, after the cession, in order to defraud the United States. *United States v. West*, 22 How., 315.

§ 194. In a suit in Rhode Island upon a bond for the liberty of the prison, a discharge of the defendant under the poor debtor's law is a good defense though obtained by fraud. *Aimidon v. Smith*, 1 Wheat., 447.

§ 195. Where the capture under which a vessel seized for violation of the embargo act was carried to a foreign port was collusive, a decree of condemnation was affirmed. *The William King*, 2 Wheat., 148.

§ 196. Where, in a collision case, it appeared that the bills of the workmen and materialmen for the repair of the injured vessel had, with the knowledge and connivance if not the procurement of the master, been exaggerated, with a view to impose upon the underwriters, it was held that the court below did right in reducing the items to the lowest estimate, the court remarking that if the court below had rejected the entire amount of the bills tainted with the fraud the decision would have been upheld. *The Iola*, 4 Blatch., 28.

§ 197. Where the court below had set aside a conveyance as obtained by fraud, the consideration of which conveyance was the cancellation of a bond and mortgage which the grantee held against the grantor, and had decreed a redelivery of the bond and mortgage unaffected by any indorsement of credit or payment thereon, it was held that the court decided correctly in not making payment of the bond a condition precedent to the reconveyance of the plantation. *Neblett v. Macfarland*, 2 Otto, 101.

§ 198. Omission of the postmaster-general to cause suit to be instituted upon the bond of a postmaster, and to inform the sureties of his default, is not *per se* fraudulent. *Postmaster-General v. Reeder*, 4 Wash., 678.

II. FALSE REPRESENTATIONS.

1. *In General.*

SUMMARY—*Statement as to existing fact necessary, § 199.—Matters of opinion; contingencies; value of property, §§ 200, 201.—Setting aside compromise, § 202.*

§ 199. The law gives a different effect to a representation of existing facts from that given to a representation of facts to come into existence. To make a false representation the subject of an action it is usually necessary that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be a statement of an existing fact, a promissory statement not being generally the subject of an action. The law also gives a different effect to those promissory statements based upon general knowledge, information and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know will prove to be true or false. Thus where, on a bill to foreclose a mortgage given to secure a note given in payment of the defendant's subscription to the stock of a railroad company, the defense was that certain promissory representations made by the agents of the company as to the effect of the building of the road in enhancing the value of lands and improving the market for grain, and as to the company's paying dividends sufficient to pay interest on the subscription notes and also the principal when the notes should become due, which representations induced him to make the subscription and give the note and mortgage, did not come true, it was held that these representations were but the expression of hopes, expectations and beliefs; that neither party had a right to understand them as statements which must be made good, and upon which the validity of the subscription depended; and that no defense could be based upon them. *Sawyer v. Prickett*, §§ 203-205.

§ 200. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. A statement of an opinion assigning a certain value to property, like a mine or a quarry not yet opened, is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless. And whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character, and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. An owner of undeveloped sandstone quarries, desiring to work the same, procured a loan upon the security of a mortgage thereon, the lender being aware of the undeveloped state of the premises. He furnished to the lender an estimate of the probable value of the quarries, contained in the certificates of two others that they were residents of the place, acquainted with sandstone quarries about the village and with the quarry lots in question, and that in the best judgment of each the lots were worth the sums severally stated. Upon non-payment of interest the mortgage was foreclosed and the lots sold for almost one-twentieth of the amount stated in the certificates. In an action by the lender against the borrower and the persons who furnished the certificates, charging a conspiracy to defraud him by false certificates, it was held that the defendants were not liable. *Gordon v. Butler*, § 206.

§ 201. Notes secured by a marriage settlement were transferred in settlement, by way of compromise, of a debt. The compromise was effected through a lawyer, a mutual friend of the parties, acting as the attorney of neither, who drew the marriage settlement, and assured the parties that it was valid. It was held that the validity of the marriage settlement, as to creditors not provided for in it, was a question of law resting in opinion, and not a question of fact resting in evidence and representation; and that the representation of the attorney was of a matter of belief only. *Chapman v. Wilson*, §§ 207-10.

§ 202. Where a compromise is attempted to be set aside for fraudulent misrepresentation as to the insolvency of the debtors, the fact that by such compromise and a favorable turn in the value of their property they afterwards succeed in saving a considerable surplus is not sufficient for the purpose. *Ibid.*

[NOTES.—See §§ 211-230.]

SAWYER v. PRICKETT.

(19 Wallace, 146-167. 1873.)

APPEAL from U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—This was a suit by Sawyer to foreclose a mortgage given by Prickett to the Fox River Valley Railroad Company. The mortgage

was given to secure a note for \$2,000, given by Prickett on a subscription to the stock of the company. Sawyer became the owner by assignment.

Prickett pleaded in defense that his subscription was procured by fraud, and that Sawyer was not an innocent holder. The matters in respect to which the fraud is alleged are stated in the opinion.

§ 203. *What necessary to make a promissory statement the subject of an action.*

Opinion by MR. JUSTICE HUNT.

The law gives a different effect to a representation of existing facts, from that given to a representation of facts to come into existence. To make a false representation the subject of an indictment, or of an action, two things are generally necessary, viz., that it should be a statement likely to impose upon one exercising common prudence and caution, and that it should be the statement of an existing fact. A promissory statement is not, ordinarily, the subject either of an indictment or of an action. *People v. Williams*, 4 Hill, 9; *Roscoe*, Crim. Ev., 362; *Ranney v. The People*, 22 N. Y., 413. The law also gives a different effect to those promissory statements based upon general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know will prove to be true or false. It becomes necessary to classify, to some extent, the representations alleged to have been made in the present case.

1st. The facts alleged to have been represented as actually existing, but which it is said did not exist, are the following, viz.: that the Fox River Railroad Company was an organized incorporation; that McConnell appeared as a subscriber for stock to the amount of \$1,500, when, by secret agreement with the company, he was a subscriber for \$500 only; that one Woodell stood in the same position, giving the amounts; that one Sibley had become a subscriber for stock, and given his note and mortgage for the same, the amount not being specified; and that Conover represented himself as one of the officers of the company.

2d. The promissory representations, as might be expected, cover a larger space. Thus it is said to have been represented that the farms and lands of the contributors would be greatly enhanced in value; that the wheat market of Milwaukee was a better market than that of Chicago, and that they would be able to command five cents more per bushel for their wheat after the road should be built; also that the road should be constructed and equipped within one year; also that the company would pay large dividends upon its capital stock; that where farmers and others became subscribers for stock, and gave their mortgages for the same on long time, drawing eight per cent. interest, that the company, from its dividends, would pay the interest on such notes, and that the balance of the dividends, after paying the interest, would be sufficient to pay the principal of the said notes, when the same should become payable; and the defendant testifies that it was represented to his wife that it would be an everlasting benefit to her to sign the mortgage; that the railroad would probably make thirty per cent., and that it would give her and her family \$600 a year always.

It is scarcely credible that Prickett should have believed that the persons making representations like these intended to bind themselves to their fulfillment. That Prickett may have believed the prophecies is possible; that he may have understood the makers to believe them is possible, as it is possible the makers did believe them. But that Prickett believed the makers to have

undertaken for the accomplishment of the results promised is not to be believed. It is contradicted by all the facts in the case. A man of common intelligence, or of ordinary prudence and caution, could not have so believed.

He did not ask that they should enter into such engagements. He did not stipulate that his obligation to pay his note and mortgage should depend upon the realization of the rich promises made to him. On the contrary he made his subscription, gave his note and mortgage to secure its payment, and relied upon the success of the enterprise to indemnify and to enrich him. If there were dividends to pay the interest, he would not be required to pay it. If there were dividends applicable to the payment of the principal, the principal would also be discharged. If there were no dividends, or dividends to pay a portion only of his obligation, he must have known and understood that he had pledged his farm to the payment of the residue. If his present theory is correct, instead of giving security to them, Prickett should have required a bond and mortgage from the company, as the actual responsibility for results would rest on the company alone. We are satisfied that such representations, if made, were not relied upon by Prickett; that they did not form the inducement and consideration of his subscription.

This view is sustained by the additional writing made at the time the note and mortgage were executed. That paper recites the execution of the note and mortgage and their receipt in payment of the stock subscription; it stipulates that so much of the dividends of the stock as shall be sufficient to pay the interest on the note and mortgage is relinquished to the company, the company agreeing not to demand the interest, but to save Prickett harmless from the same. This would be well enough except for the two agreements immediately following in the same paper, viz., that Prickett undertakes in any event to pay the principal when it matures, and that the provision in relation to interest shall not be a defense on the part of Prickett to the payment of the interest, if the note or mortgage shall be in the hands of a third party, either as security or otherwise. So long as he bound himself, at all hazards, to pay the principal, and to pay the interest if the company should transfer the note, it is impossible to credit the theory that he relied upon the alleged promises and expectations as statements which the makers bound themselves to make good to him.

It is alleged that the representation was made that the road should be constructed and equipped, and in full operation, within one year from the date of the giving of the note and mortgage. Such a promise by parties having the means of knowledge of its falsity, from their position as managers and directors of a railroad, might in law stand upon a different basis. We do not examine this point, as there is no evidence of such statement by any one professing to have knowledge, or that there was knowledge of its falsity, if made. Prickett testifies that Conover stated that the rolling stock would be on in eighteen months. His allegation in his answer and his evidence do not agree. It is not proved that Conover was authorized to make the statement, or that he did not believe it to be true.

It is difficult to see how an action or a defense can be based upon promissory representations of the character we have considered, and we are of the opinion that they were the expressions of hopes, expectations, and beliefs, and that neither party understood, or had the right to understand, that they were to be received as statements of facts which any one was bound to make good, or upon which the validity of the subscription should depend.

The alleged representation of existing facts requires consideration.

1st. It is stated that it was represented that the railroad in question was duly incorporated and fully organized. The statement, if made, is sustained by the evidence. It appears that the company had a regular charter; that it was organized by the election of directors, the choice of a president and secretary; and that it had expended considerable amounts of money in grading its road, and in purchasing materials for its construction.

2d. It is said that the defendants were influenced by, and were deceived and defrauded by, a pretended subscription for \$1,500 of the capital stock of the road, made by McConnell, a man of wealth, of prudence, and caution, in whose judgment and discretion great confidence was placed, while in truth, by some secret agreement with the company, he was a subscriber for \$500 of stock only. The attempted proof of this allegation is a failure. It is proved on the other hand by the officers of the company, and by McConnell himself, that McConnell made a subscription for \$1,500; that it was a valid, *bona fide* subscription; that there was no condition, limitation or qualification of it by any agreement, secret or otherwise, and that he settled and arranged it as a subscription for \$1,500.

3d. It is alleged that one John Woodell subscribed \$1,000 upon a similar understanding or agreement. There is no proof to sustain the allegation. Prickett says that he has so heard, but that he has no knowledge on the subject.

4th. It is said that the persons obtaining the subscription caused it to be represented that John Sibley, a man of wealth, of integrity, and of influence, had subscribed largely to the capital stock of the company. Prickett testifies that Sibley told him he had mortgaged his house and lot for stock, and that it would be a good thing, and that he and others induced him to sign. In answer to a question by his own counsel, "Would you have become a subscriber to the capital stock of this company, except from the fact that McConnell became a subscriber and the other parties you have named?" he says: "If they had not represented as they did, and if McConnell and other leading citizens of the town had not subscribed, I certainly should not; but the representation was an inducement to make the farmers subscribe." "See here, you put in \$2,000, and you get \$600 for life. Is not that enough?" In effect, he says that he should not have subscribed except that McConnell and the others did so, but it is apparent that the controlling influence was the idea that if he subscribed for \$2,000 of the stock he should get a return of \$600 for life.

To make this alleged representation a defense to the mortgage we must believe, first, that it was actually made. Prickett says that it was made. Sibley testifies positively that he never made it; that he had subscribed for \$500 of stock in a road of Illinois, having the same name, with which this was intended to connect; that he told Prickett of that subscription, but that he had never subscribed to stock in this road, and had never so stated to Prickett or to any one. If any statement was made it was more likely to have been made as to the road where he did own stock than to this one.

It must be believed, secondly, that Sibley was the agent of the company by whose acts or declarations they would be bound. Sibley denies any agency or authority, in fact or assumed, and there is no reasonable evidence to the contrary. He states that as a citizen, and one desirous to have the road built,

he solicited subscriptions, and that he acted in this capacity only. And, lastly, it must be believed that Prickett relied upon the statement; that it was an inducement to him to become a subscriber. This has been sufficiently illustrated by what has already been said. These are all the allegations of misrepresentations in regard to existing facts. The evidence to sustain them is too weak to justify the decree.

§ 204. *Where a note is given for a subscription to the stock of a corporation, the maker cannot set up want of consideration because the enterprise proves unprofitable.*

The counsel for the defendants insist further that there has been a failure of consideration, and that a defense on that ground arises. We do not so understand it. The defendant received what he bargained for, to wit, a certificate that he was entitled to twenty shares of the capital stock of the company. He can, so far as the case shows, obtain his formal shares upon presentation of his certificate. The fact that the road is unprofitable, or that it has never been completed, does not entitle one who has paid in his subscription to the capital stock to recover it back, nor does it furnish a justification for a refusal to pay when the subscription has not, in fact, been paid. Moneys so paid or subscribed belong to the creditors of the corporation.

Nor does a defense arise from the separate paper in relation to the non-payment of interest, which has been before referred to. The paper expressly provides that it shall furnish no defense to the payment of interest, if the note and mortgage shall be transferred to another party. It is the personal, separate undertaking of the company to save him (Prickett) harmless from the ultimate payment of interest, leaving Prickett to pay the interest if the security shall be transferred, and to resort to the company for reimbursement. The paper does not require that there should be an absolute transfer of the interest and title to the mortgage to cut off the defense. A transfer conditionally, or as security, is sufficient.

§ 205. *To constitute a bona fide holder, it is not necessary that value should be paid at the time of receiving the note. A past consideration will suffice.*

We see no reason, however, to doubt that the plaintiff is a *bona fide* holder. He paid a portion of the amount of the mortgage in money, and canceled a valid debt against the company for the residue. He had no notice of any defense to the note, and received the note before its maturity. Under the rulings of this court it is not necessary to constitute a *bona fide* holding that the value should have been paid at the time of receiving the security. A past consideration is sufficient. *Swift v. Tyson*, 16 Pet., 1 (BILLS AND NOTES, §§ 382-86); *Goodman v. Simonds*, 20 How., 343 (BILLS AND NOTES, §§ 420-25). We have recently decided that the rule of *bona fide* holding applies to a case where the proceeding is to foreclose a mortgage accompanying a note, with the same force as when the suit is brought upon the note itself. *Carpenter v. Longan*, 16 Wall., 271 (BILLS AND NOTES, §§ 225-26).

The plaintiff had not been a director for some time previously to the taking of this mortgage, and had no part in getting up this or the other mortgages. The proof shows a large expenditure in grading and preparing, and in the purchase of materials, after the giving of this mortgage. For what reason the enterprise failed does not appear. There is no evidence of fraud or bad faith.

The defendant's position is an unfortunate one, but we do not discover any principle upon which he can justly avoid the payment of his mortgage. Decree reversed, and the cause remanded for further proceedings.

GORDON v. BUTLER.

(15 Otto, 553-558. 1881.)

ERROR to U. S. Circuit Court, Northern District of New York.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This was an action for alleged fraud upon Butler, the plaintiff below, in obtaining from him a loan of \$10,000 upon insufficient security. The facts of the case, so far as necessary to present the questions involved for our consideration, are briefly as follows:

Near the town of Potsdam, in New York, there are sandstone quarries, situated on the west bank of Racket river. The land containing them, when the loan was made, was divided into lots, varying in size from seven to thirty-six acres. Previously to 1873 the quarries, although generally supposed to consist of stone valuable for building and other purposes, had not been opened sufficiently to show their extent and value. A quarry similar in external appearance, situated on the river below and adjoining them, called the Parmeter quarry, had been worked for thirty or forty years, and furnished stone of a valuable quality in large quantities. For some years prior to 1872 the defendant Gordon, a resident of Potsdam, had been assiduously trying to get possession of the quarries, in the belief that on development they would prove valuable, like the Parmeter quarry. His letters to Butler, the plaintiff, written at the time, indicated a confident belief that a fortune was to be made out of them; and he invested in them whatever means he could raise.

The plaintiff, prior to 1872, had frequently visited Potsdam, where he became acquainted with Gordon, a lawyer in practice there, and often employed him professionally. During these visits he learned something of the quarries, and that Gordon desired to obtain possession of and develop them. In that year there was much correspondence between them on the subject. Gordon expressed a strong conviction that the stone would be very valuable, and find a ready market, and stated what he had heard of the buildings on which it had been used, and of those for which it would probably be wanted. He desired to organize a stock company to work the quarries, and to have the plaintiff join in the enterprise. Failing to secure his co-operation, and being advised by him that he had better work the quarries himself, Gordon applied for a loan for that purpose. After much correspondence and negotiation, the plaintiff promised to loan him \$10,000, to be secured by mortgage on some of the lots, and advised him against investing a larger sum in them. The plaintiff, as is manifest from the correspondence, was fully aware at the time of the slightly developed condition of the property; but an estimate of its probable value was furnished by the following certificate obtained by Gordon from the defendants Watkins and Foster, well known gentlemen of the place, and sent to him:

"Each of the undersigned hereby certifies that he is and has been for more than twenty years last past a resident of Potsdam, St. Lawrence Co., New York, and acquainted with the sandstone quarries south of Potsdam village; that he is acquainted with the quarry lots there owned by S. B. Gordon, and

situate on the westerly shore of Racket river; that said lots are roughly represented on the annexed diagram; have on them the buildings, and in his best judgment contain the quantity of land, and are worth the sums severally below cited, to wit:

No. 1 — Falls lot.	about 8 acres, worth	\$8,000
" 2 — Orchard lot.	" 4 " "	5,000
" 3 — Cox "	" 16 " "	8,000
" 4 — Hicks "	" 15 " "	5,000
" 5 — Meacham lot, house and barn.	" 7 " "	5,000
" 6 — Hale lot.	" 10 " "	1,000
" 7 — Parmeter lot, two houses and barns.	" 17 " "	8,000
" 8 — Train lot.	" 26 " "	8,000

Total, eight lots.	108	\$48,000
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"Dated Potsdam, Dec. 12, 1872.

"H. WATKINS.

"E. W. FOSTER."

No oral representations on the subject were made to the plaintiff by Watkins or Foster. Their connection with the loan consisted merely in furnishing this certificate at the request of Gordon. The loan was made on the first of the following January, and a mortgage taken as security for it upon four of the lots mentioned in the certificate, the aggregate value of which, as there stated, being \$26,000. Watkins and Foster were at the time interested in the proposed enterprise; and their estimate of value was placed upon the lots, not as agricultural lands, but as lands containing sandstone quarries not yet opened.

After receiving the loan Gordon proceeded to open the quarries, and his operations had not progressed far when the financial crisis of 1873 came, and in it his enterprise was engulfed. The work on the quarries was stopped and the value of the property rapidly depreciated. The mortgage to the plaintiff contained a clause declaring that the whole amount of the loan should at once become due if the interest was not punctually paid. Taking advantage of this clause, he commenced proceedings to foreclose the mortgage, and pressed them to a decree under which the premises were sold and bid in by him for the sum of \$1,500. He then commenced the present action against Gordon, who had obtained the loan, and Watkins and Foster, who had given the certificate as to the value of the property, to recover damages for the loss sustained by him. In his complaint he alleges that these parties conspired to defraud him by obtaining the loan upon a false and fraudulent certificate as to the value of the property.

The defendants pleaded the general issue. On the trial the plaintiff produced the correspondence between him and Gordon, which resulted in the loan. He also offered the testimony of geologists, experts and laborers as to the probable character and value of the material in the quarries. The whole, including the correspondence, covers many pages of the record, but its substance and purport, so far as it is at all material, we have stated. When it was closed the defendants requested the court to direct the jury to find for them on several grounds, and among others, that, upon the whole proof, no cause of action had been established against them. The court refused to give this direction and an exception was taken. Testimony was then produced by the defendants; and after instructions from the court, the case was submitted to the jury, who found for the plaintiff.

§ 206. *An action for fraud will not lie when it is based upon expressions of opinion, however fallacious, by defendants, as to property the value of which is conjectural and dependent on contingencies which may never occur.*

We do not deem it important to comment upon this testimony or to notice the rulings of the court upon matters which were objected to, nor upon its instructions to the jury. It is enough to observe that if the testimony did not weaken it did not strengthen the case against the defendants. The question then is, whether, upon the proof furnished by the plaintiff, a cause of action was established against the defendants; for, if not, the motion to direct the jury to find in their favor should have been granted. Upon this question we have no doubt. The essence of the charge against them is a conspiracy to defraud the plaintiff, carried into execution by a false and fraudulent certificate of valuation of the property given as security for the loan. The certificate of Watkins and Foster is that, *in the best judgment* of each, the lots were worth the sums severally stated. To justify any imputation of fraud in giving the certificate it was necessary to show that the parties signing it had knowledge, at the time, that the value of the property was materially less than their estimate. And from the nature of the property, and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it, as upon any knowledge of facts. The law does not hold one responsible for the extravagant notions he may entertain of the value of property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. How could an overestimate in such a case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individuals who give them utterance. A statement of an opinion assigning a certain value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value.

The case of *Holbrook v. Connor*, which arose in the supreme court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that land sold by them contained large deposits of oil, and was of great value for the purpose of digging, boring for, and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the supreme court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action. 60 Me., 578.

Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or what-

ever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries.

For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subjects in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating to the truth, and for a false statement of them, where deception is designed, and injury has followed from reliance on them, an action may lie. But to this class the present case does not belong. It falls within the class first mentioned.

It follows from these views that the court below should have directed the jury, upon the close of the plaintiff's testimony, to find a verdict for the defendants; for, from the nature of the subject in relation to which the certificate was given, the estimate of value was nothing more than a conjectural opinion, which, whether true or false, constituted no legal cause of complaint. The judgment of the court below must, therefore, be reversed, and the cause remanded for a new trial; and it is so ordered.

CHAPMAN v. SUCCESSION OF WILSON.

(Circuit Court for Louisiana: 5 Federal Reporter, 305-316. 1881.)

Opinion by BRADLEY, J.

STATEMENT OF FACTS.—Reuben Chapman, the complainant in this case, formerly governor of Alabama, and a lawyer by profession for a long time prior to the late civil war, and to some extent during the war, had dealings, as a planter in Alabama, with the firm of Bradley, Wilson & Co., commission merchants and bankers, of New Orleans, who had a branch house at Huntsville, Alabama. Before the war commenced the firm had become largely indebted to Chapman, and the debt was somewhat increased afterwards. Their dealings being very extensive, and many of their assets proving worthless, they became financially very much embarrassed. In May, 1867, whilst in this condition, their account with Chapman showed a balance due to him of \$23,650.29, which they proposed to compromise and settle by transferring to him a claim which they held against one Richard Prewitt, consisting of two notes drawn in 1861, and then past due, amounting, with interest, to \$20,136.23, and an open account amounting to \$1,231.71, and a draft against one Nimmo for \$150.75. The claim against Prewitt was secured by a provision in a marriage settlement made on the 27th day of April, 1866, between Prewitt and his wife before marriage, by which certain lands therein conveyed were appropriated, first, to the satisfaction of Prewitt's indebtedness to Bradley, Wilson & Co., and after that to certain other designated purposes. A transfer to Chapman of this security was embraced in Bradley, Wilson & Co.'s proposition for a settlement with him, as Prewitt was known to be insolvent, and the only value of his notes and indebtedness consisted in this supposed security.

Chapman consulted on the subject of said proposition L. P. Walker, Esq., of Huntsville, Ala., a lawyer of standing and character, who had previously at

various times been the attorney of both parties, and who on this occasion (as he testifies) acted as a mutual friend of both, but not as the attorney for either. He gave it as his opinion that the security was a valid one, he having drawn up the marriage settlement and being acquainted with the entire transaction, and being himself thereby secured in reference to a debt due from Prewitt to him. Chapman thereupon consented to the proposed arrangement and the transfer was made accordingly, the notes being indorsed to Walker as agent of Chapman at the latter's request, but indorsed "without recourse except as to the consideration;" and the interest of Bradley, Wilson & Co. in the security created by the marriage settlement, and in the open account against Prewitt, being assigned to Walker in like capacity as agent for Chapman; and the latter, in consideration of said transfers and assignment, executed a paper releasing and discharging Bradley, Wilson & Co. from all liability in reference to their indebtedness to him. The present suit is brought to set aside this settlement, and to make the estate of Wilson (one of the firm of Bradley, Wilson & Co., now deceased) liable for the whole amount due, as though no settlement had been made. Chapman never received any money from the securities transferred to him. The Nimmo note was worthless at the time, Nimmo being at the time insolvent, and dying soon afterwards. The marriage settlement, which was the principal thing relied on, was attacked by the other creditors of Prewitt, and sought to be set aside as being fraudulent and void as against them.

A suit for this purpose was brought by one Lile, in December, 1866, in the chancery court of Lawrence county, Alabama, against Prewitt and his wife, Bradley, Wilson & Co., and Walker and others. This suit was pending when the settlement with Chapman was made, and the defendants had filed their answers therein. A decree was rendered in 1874 sustaining the marriage settlement, and dismissing the bill. In December, 1870, another suit was commenced for the same purpose by one Robert H. Wilson, Prewitt's assignee in bankruptcy, in the circuit court of the United States for the northern district of Alabama; and that court, in April, 1878, made a decree declaring the marriage settlement fraudulent and void. Both of these decrees were appealed, the former to the supreme court of Alabama, and the latter to the supreme court of the United States, and these appeals are still pending; so that the ultimate fate of the security which was assigned to Chapman in May, 1867, is yet undetermined. The bill in this case was not filed until the 15th day of October, 1879, more than twelve years after the transaction took place which it assails. It seeks to set aside the settlement on the grounds of fraud, mistake, and want of consideration. It alleges that Bradley, Wilson & Co., at the time of the settlement, and as an inducement thereto, represented themselves to be insolvent, when, in truth, they were not insolvent; that they represented the security contained in the marriage settlement to be good and valid, when, in fact, it was fraudulent and void; and that they concealed the fact that a suit had already been instituted against Prewitt and themselves to set the marriage settlement aside. It alleges that the complainant Chapman was ignorant of the facts, and was deceived by these representations and concealments, and was thus induced to make the settlement, which he would not have done had he known the truth. The bill is filed against the succession of Wilson, as before stated, and prays that the settlement of May, 1867, may be set aside, and that the complainant may be admitted as a creditor of the succession, and may have a decree for the payment

of his entire claim against Bradley, Wilson & Co., with the accumulated interest.

The defendants, who are the widow and executors of Wilson, have filed an answer denying all the charges of the bill, and setting up the defense of prescription of ten years. Formerly, by Civil Code of Louisiana (art. 3507), the action for nullity or rescission of contracts, testaments, etc., was prescribed by five years, where the party entitled to sue was in the state, and by ten years if he were out of it. But by the Revised Code of 1870 (art. 3542) the time is reduced to five years in all cases, without regard to plaintiff's residence, subject, of course, that the time commenced to run only from the date of discovering the error or deception complained of as the cause of nullity or rescission.

§ 207. *Stale claim—lapse of twelve years. Rule of equity in analogy with statute of limitations.*

Although courts of equity are not strictly bound by the local laws of prescription or statutes of limitations, yet they generally follow the analogy of those laws, and refuse to enforce claims that have become stale by the lapse of the prescribed period. In cases, however, of cognizance peculiarly equitable, regard is always had to the force of special circumstances. "There are cases," says Mr. Justice Story, "in which the statutes would be a bar at law, but in which equity would, notwithstanding, grant relief; and on the other hand, there are cases where the statutes would not be a bar at law, but where equity, notwithstanding, would refuse relief. But all these cases stand on special circumstances, which courts of equity can take notice of, when courts of law may be bound by the positive bar of the statutes." Eq. Jur., § 64a. Again: "It is a most material ground, in all bills for an account, to ascertain whether they are brought to open and correct errors in the account *recenti facto*, or whether the application is made after a great lapse of time. . . . In matters of account, although not barred by the statutes of limitations, courts of equity refuse to interfere after a considerable lapse of time from considerations of public policy, from the difficulty of doing entire justice when the original transactions have become obscure by time and the evidence may be lost, and from a consciousness that the repose of titles and the security of property are mainly promoted by a full enforcement of the maxim, *vigilantibus non dormientibus jura subserviunt*." Id., § 529.

These remarks are as applicable to bills for setting aside a settlement on the ground of fraud and concealment as they are to bills for opening a stated account. They are strongly applicable to the present case. The complainant in his bill, in order to obviate the objection of lapse of time, places himself on the ground that he did not discover the fraud practiced on him until December, 1870, when the assignee in bankruptcy of Prewitt filed his bill to set aside the marriage settlement, and made the complainant a party to it. And yet, after this, he waits nine years longer before filing his bill; and now, at the end of twelve and a half years after the transaction took place, after the death of the parties and witnesses, and all the changes that are consequent upon the lapse of time, he comes into court and asks its equitable relief.

The allegation that he did not discover the fraud until 1870 (even if it could avail), as might be expected after this long delay, is only sustained by the complainant's own testimony. Mr. Walker testifies that he does not know when Chapman first learned of the pendency of the first suit (brought by Lile), but his recollection is that he knew of it before the commencement of the second suit (by the assignee). Mr. Bibb, one of the firm of Bradley, Wilson &

Co., being examined as a witness in reference to the settlement with Chapman, denies that any suit was pending on the subject of the marriage settlement, or that he made any representations in regard to it. What else but the utmost vagueness of recollection could be expected, even in those who participated in the transaction, after the lapse of so many years? The complainant himself is responsible for this state of things. He admits that he waited nine years after discovering the alleged fraud before taking any steps to substantiate it, or to procure the redress to which it entitled him. His excuse is that the question of the validity of the marriage settlement was pending and undecided in the courts during that period, and he could not be expected to proceed in the assertion of his rights until that question was settled. This plea cannot avail the complainant. The fraud which he alleges was practiced on him did not depend on the decision which the courts might make as to the validity of the marriage settlement. He says he discovered the fraud in 1870. He should have repudiated the settlement at once and taken proceedings to have it set aside whilst the facts were still fresh in the minds of all parties. He evidently preferred to speculate on the result. If the marriage settlement was sustained he would stand by the settlement with Bradley, Wilson & Co.; if not sustained he would fall back on the charge of fraud and concealment. By electing to await the results, and postponing for so many years any proceedings for establishing the fraud and setting aside the settlement, the complainant has allowed his claim to become stale, and has waived his right to assert it.

§ 208. *Insufficient evidence of fraud.*

But I am not satisfied from the evidence that any misrepresentation or concealment was practiced on the complainant. As to the alleged representation of insolvency, the weight of evidence is that the pecuniary affairs of Bradley, Wilson & Co. were in such a state of embarrassment and uncertainty in May, 1867, that they might well have supposed, as Mr. Bibb, one of the partners, testifies they did suppose, that they were really insolvent, and could only hope to settle with their creditors by compromise and the transfer of such assets as they had. If, by such compromises and a favorable turn in the value of their property, they afterwards succeeded in saving a considerable surplus, this circumstance would not only not be sufficient to set aside the compromise made by them when they really supposed they were insolvent, but it would not be a just ground for any reflection on their conduct as men of business. If this view is correct, the case upon its merits is reduced to a consideration of the questions relating to the Prewitt security contained in the marriage settlement. The question of the alleged concealment in not disclosing the fact that a suit was pending at the time of the settlement, calling in question the *bona fides* of the Prewitt marriage settlement, has already been adverted to. We have only the evidence of Governor Chapman himself to establish such concealment, and that evidence only amounts to this: that he was not aware of the existence of the suit, and that it was not mentioned in the transaction. This does not show that there was any concealment. The matter may not have occurred to the parties. Mr. Walker seems to have been perfectly confident of the validity of the marriage settlement, and of the futility of any efforts to assail it, and he may not have regarded Lile's suit as of any importance. If mentioned, he may have so expressed himself to Governor Chapman when consulted about the marriage settlement; if not mentioned, it may not have occurred to him. A reference to it may have been made, and may easily have escaped the complainant's memory. If satisfied with Walker's views at the

time, the details of their conversations may have passed out of his memory. The lapse of time comes in here as an important factor on the question of recollection and the weight of evidence.

§ 209. *Misrepresentation of a matter of opinion, when immaterial.*

Then, as to the alleged representations about the validity of the marriage settlement, there is not a particle of evidence to show that any representations were made which the parties did not at the time honestly believe to be true, or that any facts were represented different from what they were. The validity of the marriage settlement as against creditors of Prewitt, not provided for in it, was a question of law resting in opinion, and not a question of fact resting in evidence and representation. When it was alleged to be valid, it was so alleged as a matter of belief only. No misrepresentation of facts is set out in the bill, and none is established by the proofs.

As Mr. Walker acted as the mutual friend of both parties in the settlement his testimony is important, and an abstract of it will perhaps give a clearer view of the transaction, as it actually occurred, than any statement which can be made,—somewhat fragmentary, it is true, being drawn out by interrogatories, but, nevertheless, clear and to the purpose. Speaking of the settlement of May 12, 1867, Mr. Walker says that he did not consider that he represented either of the parties in a professional capacity; that the assignment of the security was made to him as agent at Governor Chapman's request, but for what reason he does not know; that he thought it a good settlement for both of them, and probably so expressed himself to both; that his belief is that Governor Chapman took the transfer because he considered Bradley, Wilson & Co. to be financially embarrassed, and in doubtful condition; that he drew the marriage settlement himself, and believed it valid, and still thinks so, and when the settlement was made he expressed that opinion to Governor Chapman; that he has cognizance of no fact impugning the settlement between the parties.

On cross-examination he testifies that he had been the counsel for Bradley, Wilson & Co. for many years; that he had also often been counsel for Governor Chapman, and is still his counsel in some pending cases; that, as he understood the adjustment of the debt due from Bradley, Wilson & Co. to Governor Chapman, as it was made, was upon the idea that Bradley, Wilson & Co. were financially embarrassed, and not otherwise able to arrange it; that the proposition of the settlement came from them, and the reason assigned by them for the proposition was their inability to pay the debt in money; that Bradley and Bibb, who were then in Huntsville, where the settlement was made, represented the firm to be in embarrassed circumstances and unable to pay their indebtedness in cash, and that this was the best settlement they could make; and that Governor Chapman believed this to be so, or he would not have made the settlement, as he was desirous of collecting the debt; that Bradley, Wilson & Co. were reputed in Huntsville to be in great financial embarrassment; that Richard Prewitt was largely insolvent at the time the settlement was made, and the only value attached to his notes and account, which were transferred to Governor Chapman, grew out of the provision made for his indebtedness to Bradley, Wilson & Co., in the marriage settlement of May, 1866; that he does not remember that any representations were made by Bradley, Wilson & Co. to Governor Chapman, at the time of the settlement, in regard to the lien created by the marriage settlement, as to its *bona fides* and validity, but that he, Walker, told both parties that, in his opinion, said lien was

bona fide and valid, and that it protected Prewitt's indebtedness to Bradley, Wilson & Co. to the extent of the value of the land specifically dedicated to that purpose; that he is satisfied Governor Chapman would not have made the settlement but for the belief that said debt was thus protected; that the marriage settlement has been sustained in a chancery court of Alabama, and an appeal from that decision is now pending, and has been pronounced fraudulent and void by a decision of the circuit court of the United States, and an appeal from that decision is also pending; that he, Walker, does not know when Governor Chapman first learned of the pendency of the former suit, but his recollection is that he knew of it before the commencement of the latter suit; that in the settlement he acted as the mutual friend of both parties, and not as attorney of either, and that, from his belief in the validity of the marriage settlement, he should have advised Governor Chapman to accept the settlement, notwithstanding the pendency of the chancery suit, had that been adverted to. If to this evidence of Mr. Walker we add that of Mr. Bibb, one of the firm of Bradley, Wilson & Co., who testified very fully as to their embarrassment and supposed insolvency; of their efforts to compromise with their creditors in good faith; of their desire to secure Governor Chapman in particular, and their offer to turn over to him the Prewitt claim, and of their firm belief in the validity of that claim,—it would be asking the court to go a great way to make a decree declaring the transaction void on the ground of misrepresentation, upon the evidence of the complainant alone, given so many years after the happening of the events, however upright in motive and free from all intention to distort the facts we may concede that evidence to be.

§ 210. *Failure of consideration. Rescission of contract.*

- The remaining ground of relief is the failure of the consideration of the compromise. *First*, Bradley, Wilson & Co. did not guaranty the claim against Prewitt, but expressly declined doing so. Chapman took it at his own risk. The notes were indorsed “without recourse,” showing that the transfer was made and accepted without any guaranty, at least so far as relates to the responsibility of Prewitt. Besides, the evidence shows that Prewitt was notoriously insolvent, and therefore it is not reasonable to suppose that Bradley, Wilson & Co. intended to guaranty the payment of his notes. But it is contended that the validity of the marriage settlement, by which the payment of the notes was secured, was guarantied in law by the mere transfer thereof. It is now laid down as a general rule that the sale of a chattel by the English law implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold. Benjamin on Sales (2d ed.), 523. Formerly the rule of *caveat emptor* was stated to be the general one, and it may be so still, theoretically; but slight circumstances have always sufficed to raise an assertion of ownership, amounting in effect to a guaranty of title, and it has been justly said that in all ordinary sales the party who undertakes to sell exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and thereby is understood to affirm that he is the true owner. Erle, C. J., in *Eichholtz v. Banister*, 17 C. B., N. S., 708. And it may be conceded that, in ordinary cases of delivery and acceptance of a specific thing in satisfaction or compromise of a debt, there is an implied understanding or condition that the debtor guaranties his authority to dispose of the thing in that way, and that a failure in this behalf will place the parties back in their orig-

inal relations to each other. But there can be no doubt that when a contrary understanding is had a different consequence will follow.

The question in each case will be, did the creditor take the thing out and out, or did he only take it conditionally? In the present case, Bradley, Wilson & Co. were seeking to compromise with their creditors. They had various assets to dispose of, some good, some doubtful, some bad; though which were good, which doubtful, and which bad was in many cases unknown. These were all they had to offer. Their object was to get a discharge from their obligations. It is not presumable, to begin with, that they meant to guaranty the validity or value of the various assets which they turned over to their creditors. If they so intended, there would be something to indicate such intention; but if they took an absolute discharge, as was done in this case, the contrary must be inferred. The fact that in transferring the notes they did it "without recourse, except as to the consideration," and that this is taken notice of in the transfer of the marriage settlement, is a clear indication of what they intended in the whole transaction. They evidently intended to guaranty nothing except the consideration. They offered Governor Chapman the claim against Prewitt as it stood. He must judge for himself as to its validity and value; so far as they were concerned, it was all right. He evidently understood the matter in this light. He investigated the claim. He consulted Mr. Walker in regard to it; satisfied himself as to its validity and value, and agreed to accept it. It seems clear to me that Governor Chapman took the claim with its collateral security at his own risk, and that his discharge of Bradley, Wilson & Co. was intended to be in fact, as it was in form, absolute and unconditional. But, aside from this consideration, it does not yet appear that the security is not valid. The decree of the circuit court has been appealed from. The litigation is not ended. On the question of failure of consideration, the eviction or decree of nullity must be complete before it constitutes a ground of rescission.

Looking at the whole case, as it is presented by the pleadings and proofs, it seems to me that the bill must be dismissed with costs. Let a decree be entered accordingly.

§ 211. *Opinion or belief.*—A statement by the vendor of a note that he believes the maker and indorser to be good is equivalent to a positive assertion that they are good, where it is meant to impress the vendee, and does impress him, with the conviction that the note is good, and the vendor has sufficient reason to believe that it will never be paid. *Foster v. Swasey*, 2 Woodb. & M., 217.

§ 212. *Averments by a vendor of the value of the goods are not regarded with so much jealousy and strictness as those in respect to particular facts as to title and quality and other matters more exclusively within his own knowledge.* *Simpson v. Wiggin*, 3 Woodb. & M., 413.

§ 213. *Where false representations are relied on by the maker in defense to an action on a note, statements made by way of expressing an opinion or a simple recommendation must be distinguished from statements of facts which the defendant would not be presumed to know and had not the means of knowing, with the view of inducing him to execute the note.* *Cooper v. Lober*, 1 Biss., 539.

§ 214. *A fraudulent misrepresentation of one's own opinion is in law just as reprehensible as a misrepresentation of any other fact. But the want of good faith is to be shown, not by proving that the opinion was erroneous, but that it was fraudulently misrepresented to the injury of the person relying on it.* *Stebbins v. Eddy*, 4 Mason, 414 (§§ 298-302).

§ 215. *Statements not known to be true.*—False representations vitiate a contract, whether believed to be true by the party making them or not, provided they are material and influential. *Smith v. Babcock*, 2 Woodb. & M., 246 (§§ 309-17).

§ 216. *An honest but mistaken assertion of a fact, to another's loss and to his own gain, by a vendor or his agent, may be a constructive fraud; but this principle does not extend to what*

are known to both to be matters of opinion only. An assertion may appear to be a matter of opinion either from its being made in that form, or from the very nature of the thing asserted. *Fisher v. Boody*, 1 Curt., 206.

§ 217. Agents of a ship-owner who had agreed to procure a cargo of goods as freight for a certain voyage, at specified rates of freight, payable in money on the transportation of the goods, procured a part of the cargo to be shipped upon the terms of one-half the net profits over costs and charges. They sent to the owner, on the departure of the ship upon her voyage, a freight list and bills of lading prepared as if the whole cargo had been shipped at specified rates, and upon this basis their account for commissions was made out, sent with the freight list, and paid by the ship-owner. *Held*, that this amounted to a misrepresentation. *Delano v. Winsor*, 1 Cliff., 501.

§ 218. Assent by party interested.—Statements made by one party to a fraud, in the absence of the other, are evidence against the latter, if afterwards assented to by him, or if a part of the *res geste*. *Rea v. Missouri*, 17 Wall., 532.

§ 219. By a partner.—A firm of commission merchants are liable to the owner of the goods they have for sale, for any false and fraudulent representations, made to him by one of the firm, as to the solvency of the person to whom they intend to sell, if such representations are acted on by the owner to his damage. *Castle v. Bullard*, 28 How., 172.

§ 220. By a third party.—If a contracting party has not made false representations, but was present when another made them, and has taken the benefit of them, it vitiates the transaction. He cannot adopt a part and repudiate a part when the other contracting party has acted on the whole. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-86).

§ 221. If a contract is induced on the fraudulent representations of third persons, there can be no relief on the ground of fraud. *Fisher v. Boody*, 1 Curt., 206.

§ 222. A deed of release procured by fraudulent misrepresentation cannot be permitted to have the slightest validity to bar rights in a court of equity. *Phetiplace v. Sayles*, 4 Mason, 312 (§§ 560-65).

§ 223. Insurance.—Fraudulent overvaluation and misrepresentation of the value of the subject-matter of insurance will avoid a policy. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

§ 224. If, in procuring insurance upon a vessel, it is represented, whether fraudulently or otherwise, that she will not sail until four days after another vessel, and she sails four days before, and the difference is material to the risk, the misrepresentation avoids the policy. *Baxter v. New England Ins. Co.*, 3 Mason, 96.

§ 225. An insurance company may recover back money paid on the false and fraudulent representations of the death of the insured, although the contract of insurance is illegal. *Northwestern Ins. Co. v. Elliott*, 7 Saw., 17.

§ 226. Reducing an agreement to writing, though in most cases an argument against fraud, does not prevent its rescission on the ground of fraudulent misrepresentations. *Boyce v. Grundy*, 3 Pet., 210 (§§ 303-308).

§ 227. Subscription to stock.—Where persons having a full opportunity to examine into the affairs of a corporation subscribe to its stock, pay their first instalments, and make no objection until they find that nearly all its capital will be needed to pay its losses, it is too late for them then to object to the payment of their subscriptions that the representations as to the affairs of the corporation made by the agent who took the subscriptions were false. *Ogilvie v. Knox Ins. Co.*, 23 How., 380.

§ 228. Rescission.—Where fraudulent misrepresentation or concealment is set up as a ground for rescinding a contract, where many things have been performed on both sides, and where a rescission would involve the upsetting of many large and important transactions, the proof should be very clear. It should be very clearly proved that the party was misled by those misrepresentations, and promptly availed himself of the objection as soon as it was discovered. *Morgan v. New Orleans, Mobile, etc., R. Co.*, 2 Woods, 244.

§ 229. Warranties and representations.—There is a clear distinction between a warranty and a fraudulent misrepresentation. The former is a contract, and an action thereon is an action on a contract. The latter is a fraud, a wrong for which an action *ex delicto* lies. *Bank of Montreal v. Thayer*, 2 McC., 1 (§§ 318-23).

§ 230. Averment of fraudulent intent.—An allegation that the defendant wrongfully, fraudulently and falsely certified and represented that certain things were true, whereas none of them was true, is a sufficient averment of fraudulent intent. *Ibid.*

2. *As to Credit of Another.*

SUMMARY — *Writer of a letter liable, when, § 231.— Letter written in one state to be used in another, § 232.— Confidential letter to agent, § 233.— Statute of frauds; parol evidence, § 234.— Gist of the action, § 235.*

§ 231. The writer of a letter containing a representation concerning the credit of another is not to be held responsible unless the letter did mislead and was intended to mislead the person to whom it was addressed. But if an impression, not only of the person's solvency but of his success in business, so that by selling largely to him more than ordinary risk of business is incurred, is made and authorized by the letter, while the true condition of such person was known to the writer, which condition did not authorize such representation, and the intention was to mislead and deceive, the writer is responsible for any loss incurred by the other from acting on such representation. *Iasigi v. Brown*, §§ 236-41.

§ 232. A letter of representation as to the credit of another, written in New York, but intended to operate in Massachusetts, is governed by the law of the latter state. *Ibid.*

§ 233. In an action for a false representation as to the pecuniary ability of another, contained in a letter marked "confidential," which the defendant had written to his agent, which had been shown by the agent to the plaintiff, and upon which the plaintiff had extended credit and lost the debt, it was held that it was for the jury to say whether the defendant intended the letter for the eye of the agent only. *Ibid.*

§ 234. Notwithstanding the statute of Massachusetts providing that "no action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, trade or dealings of any other person unless such representation or assurance be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized," when there is a misstatement of facts in relation to the pecuniary ability of an individual or company, especially if made through interested motives or a fraudulent intent, by reason of which a credit is given and the debt is lost, the facts which conduce to establish the liability must be outside of the writing; and all facts which conduce to show that the party acted in bad faith in making the written statement are proper for the consideration of the jury. *Ibid.*

§ 235. Fraud on the part of the defendant and damage to the plaintiff is the gist of an action for false representations as to the credit of a third person. Fraud means intention to deceive. If there is no such intention and the statement is honestly made, there is no liability, though the statement turns out to be utterly untrue. An instruction that, if the person making the representation did not make due inquiry into the credit of the third person, and made the statement ignorantly and regardless of the fact whether the person recommended was entitled to credit or not, he should be held responsible, is held to be evasive of the true rule and calculated to mislead the jury. *Lord v. Goddard*, § 242.

[NOTES.— See §§ 243-247.]

IASIGI v. BROWN.

(17 Howard, 188-203. 1854.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.— This case is brought before us by a writ of error to the circuit court of the United States for the district of Massachusetts.

The plaintiffs are merchants in Boston, and deal largely in wool, and prior to the 4th of April, 1851, sold, occasionally, to two corporations in the state of Connecticut, called the Thompsonville Company, and the Tariffville Company, and received therefor their notes, indorsed by Orrin Thompson. And, with the view of making further sales to them, having become doubtful of their pecuniary means and ability to make payment in future, the plaintiffs applied to Thomas B. Curtis, of Boston, the agent of defendant, to ascertain his opinion as to any possibility of loss, by selling largely on credit to said corporations or to Thompson; the plaintiffs knowing that the defendant was friendly to the companies, and intimately acquainted with their pecuniary condition. A letter was written to defendant, by his agent, Curtis; and an answer was received, as alleged in the declaration of the plaintiffs, which in-

duced them to give large credits to the two companies and Orrin Thompson, when at the time they were insolvent, which fact was known to the defendant.

The points in the case are stated in the bill of exceptions, and arise on the construction of the above letter and one of a subsequent date, and on facts proved and offered to be proved, which conduced to show, as plaintiffs insist, the fraudulent intent with which the letters were written. The first letter, from Curtis to Brown, bears date the 5th of April, 1851, and reads as follows: "Dear Sir—I have your note of yesterday, but have scarcely had a moment to peruse it this morning. My object, at the moment, is to ask your opinion as to any possibility of loss, by selling largely to the Thompsonville Company or Orrin Thompson. Whatever that opinion may be, it will be discreetly used by myself."

The reply to this letter is marked "confidential," and dated "New York, 7th April, 1851." T. B. Curtis, Esquire. Dear Sir—With respect to Thompson & Co. and Orrin Thompson, I have to say, that our house done business with them for some twenty years or more; they have always met their engagements promptly, and we feel are men of strict integrity. They have unquestionably laid out too much money in the Tariffville Manufacturing Company, and the Thompsonville Carpet Manufacturing Company, and my house has been for years in the habit of loaning them either paper or money to a considerable extent on security. On the failure of Austen & Spicer, they were unfortunately on their paper (received for sales of carpets) for \$183,000; this threw, suddenly, so heavy a burden on Thompson & Co., that Messrs. Hicks & Co. and ourselves looked into their affairs, and feeling that they had an abundance to pay every one, and have a handsome sum left, if they continued their business, we jointly advanced the money to pay their indorsements as they came round, for which advances we have security. In order, however, to relieve them from the necessity of borrowing, and needing more cash capital to carry on the business comfortably, both the companies alluded to owing Messrs. Thompson & Co. each about \$375,000, making, together, \$750,000, executed a mortgage to John H. Hicks, W. S. Wetmore, and James Brown, for \$750,000, to secure the payment of those bonds, which are payable in six, eight and ten years. A gentleman goes out to Europe this month to negotiate these bonds, which he feels confident of doing on favorable terms. The negotiations of these bonds, and the securities held, would pay off all the advances made by ourselves, Messrs. Hicks & Co., and of W. S. Wetmore, who also made them some advances. From Thompson's statement of the business of the factory, they are doing a good, nay, a very profitable business, and I feel that in making sales to them now, no more than the ordinary business risk would be run.

"If the bonds are negotiated, which is confidently expected, they would be enabled to conduct their business with more facility and comfort than they have ever yet done, and as I will recommend brother William to take from sixty to one hundred thousand dollars for himself and for me, whatever they are negotiated at, the confidence shown will probably help the negotiation. Messrs. Hicks will also take some of them. Since the failure, Thompson & Co. have laid their hands on Austen & Spicer's property, to the extent of \$50,000, reducing the risk to \$123,000, and out of this they will get a dividend. As Mr. Orrin Thompson considers himself fully worth \$400,000, any loss that can now occur by Austen & Spicer does not hurt him much. All they want is the ne-

gotiation of the bonds, to make them move on with perfect comfort. (Signed) JAMES BROWN."

The next letter from Curtis to Brown is dated "Boston, 26th June, 1851. A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now I wish to know what your present feelings are in respect to that concern; there being several among my friends here who have heretofore sold them wool and wish to continue to do so."

The answer to this letter was: "Dear Sir — We are in receipt of yours 26th instant; contents noted. We continue to have a favorable opinion of the concern you allude to. (Signed) BROWN, BROTHERS & Co."

Mr. Curtis, being called as a witness, said he was agent for Brown, Brothers & Co., who carried on in the city of New York an extensive banking business. He wrote his first letter at the request of Iasigi, and never showed the reply except to him and his friend Mr. Skinner, until after the failure of the Thompsons. When he wrote to Brown, he did not let him know that the information requested was for any other person than himself. On the day his first letter was written, Iasigi said to him that he held a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson, of New York; that by the recent failure of Austen & Spicer they had lost money, and he was solicitous about the paper he held. Witness supposed it amounted to about the sum of \$40,000. He said Brown was the friend of Thompson, and witness was requested to ascertain his standing by writing to Brown.

As the answer was marked confidential, the witness, when Iasigi first read the letter, declined handing it to him to show to his partner, but on his calling, it was shown to him also. Witness expressed a favorable opinion as to Iasigi's getting his money. Mr. Brown never authorized the witness to show his letter to any one. After the failure of Thompson, Iasigi stated he had collected his debt, but that he again trusted them. The witness remarked, that on that letter you should not have trusted them. He asked to see the letter, and on reading it he said, if you had not stated this to be the same letter, I should not have believed it.

The witness stated, some of our clients prior to this had been in the habit of selling wool to Thompson & Co. There were five or six firms, importers of wool, who had credits with me. It was highly important to me and my principals that I should know the standing of this great concern, because large amounts of credits were being invested in wool, by houses which might or might not be jeopardized by selling to that concern; I mean invested by correspondents of Brown, Brothers & Co., who had credits for them.

Mr. Grant, a witness, stated that he, Iasigi, and several others who had sold wool to the two companies and Thompson, had an interview with the defendant at his office in the city of New York, where a conversation respecting the letters was had, principally between Iasigi and Brown, who replied that the letter of the 7th of April was a guarded one, and as to the second letter, it was only a statement that "we continue to have a favorable opinion of the concern." He proceeded to say that the connection of Brown, Brothers & Co. with Mr. Thompson had been of long date; that they had a great number of transactions together, and that at the time the April letter was written, they intended to carry Mr. Thompson through; but that Thompson had deceived them. He repeated several times that this was a guarded letter, and as it was

written in entire good faith, and as they had lost much more than we had subsequently to the writing of the letter, they did not see how there could be any responsibility resting on them.

As the company was about separating, Mr. Stewart Brown observed: "If you had called on us, gentlemen, and conversed with us instead of writing, you would not have sold this wool. That the letter was a guarded one, was several times repeated. That they had great confidence in Thompson; that at the time the letter was written they had lost their confidence, but still meant to carry him through in good faith; but being unable to do so, and having lost their confidence, the letter was guarded." On being asked by witness, if, at the time the first letter was written, he had all the property of Orrin Thompson conveyed to him, he replied: "No, sir, not all his property, but his real estate." There was no objection at this time, by any one, that the letter was confidential. The Browns refused to acknowledge any responsibility.

After this evidence had been given, the plaintiffs offered evidence, not objected to or excluded, except as hereinafter stated, tending to prove that certain statements in the letter of April 7, 1851, material to show the property and credit of the two companies, and of Orrin Thompson, and the safety and expediency of selling them goods on credit, and material to influence and determine the judgment of one who should read the letter, in regard to the safety and expediency of so selling goods on credit, were false at the time the letter was written, and were then known to the defendant to be false. And that the defendant, prior to the 7th of April, alone and jointly with one Hicks, had taken conveyances, in mortgage or absolutely, of all Orrin Thompson's property, real and personal, with some small exceptions, to the amount of \$188,000, as security for the debt and liabilities of the house of Thompson & Co. to defendant's house and said Hicks, amounting to over five hundred and nine thousand dollars. And also offered evidence to prove that defendant had an interest of a pecuniary kind to sustain the credit of said Thompsonville Company, said Tariffville Manufacturing Company and Orrin Thompson, and to induce extensive sales of goods on credit to them.

And other evidence was offered conducing to show that the letter was written with a fraudulent intent, and that it was intended for other persons than Curtis. And the plaintiffs proved that they made the sales stated in the declaration, relying on and trusting to the statements in said letter. But the evidence, as above offered, was rejected as immaterial and as insufficient, when taken in connection with the other evidence above set forth, to authorize the jury to find a verdict for the plaintiffs. And the court thereupon ruled and held that the plaintiffs had not maintained their action, and directed a verdict for the defendant. And a verdict was accordingly so rendered. To which rulings and direction the counsel for the plaintiffs excepted.

§ 236. *Where a letter, in reference to the credit of another, is written in one state, with the intention that it shall operate in another, quære, as to the operation of the statute of frauds of the latter state.*

The third section of the act of Massachusetts to prevent frauds and perjuries in contracts and actions founded thereon, published in the Revised Statutes of 1836, provides that "no action shall be brought to charge any person upon or by reason of any representation or assurance made concerning the character, conduct, credit, trade or dealings of any other person, unless such representation or assurance be made in writing, and signed by the party to be

charged thereby, or by some person thereunto by him lawfully authorized." As the letter was written in New York, a doubt has been suggested whether this statute can apply to the case. The letter was intended to operate in Massachusetts, and, consequently, the law of that state applies to it. But it is not perceived that the statute can have any other effect than to require the representation, on which the defendant is charged, to be in writing.

§ 237. — *liability for false statements as to the pecuniary liability of another, and whether the motive can be proved by parol.*

No one controverts the power and duty of the court to construe all written agreements or papers which are given in evidence. This is not the question involved in this case. No individual can be held responsible for a statement of facts, however injurious they may be to an individual or company. But when there is a misstatement of facts in regard to the pecuniary ability of an individual or company, and, especially, if this be done through interested motives or a fraudulent intent, by reason of which a credit is given and the debt is lost, the facts which conduce to establish the liability must, as in this case, be outside of the writing. And if these facts may not be established by parol evidence, there can be no remedy in such cases, however gross the fraud or ruinous the consequences may be.

§ 238. — *where such a letter is written to one's agent, and marked confidential, it is for the jury to say whether it was intended only for the eye of the agent.*

It is contended that the letter of the 7th of April, being marked confidential, could have been intended only for Curtis, the agent, and that he was not authorized to show it to the plaintiffs. In his testimony, Mr. Curtis says Brown never authorized him to show the letter. There may have been no express authority to show the letter, but the intention of the writer, in this respect, can be best ascertained by reference to the facts and circumstances under which it was written.

In his letter of April the 5th, Mr. Curtis requested to know "the opinion of the defendant as to any possibility of loss by selling largely to the Thompsonville Company or Orrin Thompson; and he remarks, whatever that opinion may be, it will be discreetly used by myself." Mr. Curtis states, when under examination as a witness, that he was then, and had been for several years, acting as the agent of the Browns, and that was his principal business. He said that he was not, at any time, a seller of wool to the factories of Orrin Thompson. This employment of the agent must have been known to his principal, and it appears in the proof that when the plaintiffs and others had an interview with the defendant, in New York, he spoke of the letter being guarded, but made no objection that it had been written to his agent in confidence, and ought not to have been shown to the plaintiffs.

In view of these and other facts, it might have been submitted to the jury whether the defendant, in marking his letter "confidential," intended it for the eye of his agent only. The terms of the letter, independently of the above facts, would scarcely authorize such an inference. The "opinion will be discreetly used by myself." This was notice to Brown that the opinion was to be used, and how could it be used by the agent, who made no sales of wool to Thompson on his own account, without imparting the opinion to others; but "the opinion will be discreetly used by myself." It shall not be made known by any other person than myself, and you may rely on my discretion. In view of the facts, the jury should consider whether the word "confidential" might be construed to mean, in confidence that you will use my opinion

discreetly by yourself, as you propose, or whether it restricted the letter to the agent only.

This seems to have been the construction given to the letter by the agent. He suffered Isagi to read it, but refused to give it into his hands to show to Skinner. Had the writer intended that no one should read the letter but Curtis, he would probably have said so. Such a restriction was not necessarily imposed by the terms of the letter in view of the facts proved. Its detailed statement of facts in regard to the embarrassments of the two concerns and of Orrin Thompson, and how they had been relieved by himself and others and enabled to do a good, nay "a profitable business," etc., would be a matter, in connection with other facts, for the jury to consider, and to determine whether the letter could have been written for the eye of the agent only, who at no time sold wool to Orrin Thompson.

In another letter written to the defendant by Curtis, he says: "A friend of ours desires me to inform him how far it would be satisfactory to me (you) to have him sell to the Thompsonville Company. I replied that I believed you thought favorably of the concern. Now, I wish to know what your present feelings are in respect to that concern, there being several among my friends who have heretofore sold them wool, and wish to continue to do so." To this Brown, Brothers & Co. reply: "We continue to have a favorable opinion of the concern you allude to." This letter sheds some light on the first letter of Brown. It was on the same subject, and was a reiteration of what had been stated more particularly and at large in the first letter. In fact, the words, "we continue to have a favorable opinion of the concern you allude to," refer to an opinion before expressed.

As the court instructed the jury to find for the defendant, on the ground that the plaintiffs had not sustained their action, if the plaintiffs gave, or offered to give, any evidence which was fit to be considered by the jury, the judgment must be reversed. Any evidence conducing to prove that the statements of the defendant, in the letter of the 7th of April, in regard to the condition of the Thompsonville Company and Orrin Thompson, and their ability to meet their engagements, and in regard to the value of Thompson's property, were false, was competent evidence as tending to prove the facts. And especially was the testimony of Grant admissible, who heard the defendant say, if the plaintiffs had called on them personally they would not have sold their wool to the company; also the statement that before the letter was written, Brown admitted that he had lost confidence in Thompson, and therefore the letter of the 7th of April was guarded. These, and all other facts which conduce to show that the defendant acted in bad faith in writing that letter, are proper to be considered by the jury.

§ 289. *No matter by what motives a party was actuated, he is not to be held responsible for statements as to the credit or standing of another, unless they did mislead, and were intended to mislead.*

By whatever motives the defendant may have been actuated he is not to be held responsible, unless his letters did mislead, and were intended to mislead the plaintiffs. And it will be for the jury to say, on a thorough examination of the letters, and the facts and circumstances connected with them, whether they were calculated to inspire, and did inspire, a false confidence in the pecuniary responsibility of the Thompsonville Company and Orrin Thompson. If an impression, not only of their solvency but of their success in business, so that by selling largely to them no more than the ordinary risks of

business were incurred, was made and authorized by the letters, while, at the same time, their true condition was known to the defendant, which did not authorize such a representation, and which was intended to deceive and mislead the plaintiffs, the defendant may be justly held responsible. But of this the jury are to judge, they being the triers of the facts outside of the letters, and which should be submitted to them for their consideration and decision.

We have necessarily referred to the leading facts stated in the bill of exceptions, in order to show that the circuit court erred in withdrawing them from the jury; but we express no opinion on the merits of the case. The judgment of the circuit court is reversed, and the cause is remanded for a *venire de novo*.

§ 240. *False representations as to the credit of a person, to give a ground of action for damages, must be productive of injury with reference to the transactions contemplated or inquired about.*

Dissenting opinion by MR. JUSTICE CAMPBELL.

The importance of this cause renders it proper that the reasons for a dissent from the judgment should be placed on the record. The charge of the plaintiffs is, that in anticipation of large sales of merchandise to two manufacturing corporations of Connecticut, on a credit, and distrustful of their condition to govern and direct their conduct, they sought of the defendant, through his agent, an opinion and information of them and their indorser, Orrin Thompson, as to the risk they would encounter. That the defendant was intimate with their affairs, and knew they were untrustworthy; but well knowing the motives of the plaintiffs' inquiry, they wrote to their agent a letter, for exhibition, containing false and fraudulent statements and representations, calculated and designed to increase the credit of the corporations and Thompson, and to induce the plaintiffs and others, who, like them, should see the letter, to sell their property to them. These averments, describing the circumstances under which the information was obtained, and the knowledge of the defendant of the aims of the plaintiffs, are, in my opinion, material, and should be substantially proved.

In *Pasley v. Freeman*, 3 T. R., 51, Justice Ashhurst, replying to the argument that, should the principle of that suit be supported, actions might be brought against any one for telling a lie by the crediting of which another sustains damage, said "No; for, in order to make it actionable, it must be accompanied with the circumstances averred in the count, namely, that the defendant, intending to deceive and defraud the plaintiff, did deceitfully encourage and persuade them to do the act and for the purpose made the false affirmation, in consequence of which they did the act." And Lord Kenyon said two grounds of the action concur: "The plaintiffs applied to the defendant, telling him that they were going to deal with Falch, and desiring to be informed of his credit, when the defendant fraudulently and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage."

The case of *Pilmore v. Hood*, 5 Bing. N. C., 97, was that of a defendant about to sell a public house to one who had agreed to purchase. He fraudulently misrepresented to him its receipts. The bargain having failed, the sale was made to another, who had heard these representations and acted upon them with the knowledge of the defendant. Lord Chief Justice Tyndal

said that notice to the defendant was "an important ingredient in the case," and adopting the terms of *Langridge v. Levy*, 2 M. & W., 532, he says: "We do not decide whether the action would have been maintainable if the plaintiff had not known of and acted upon the false representation. Nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

In *Gerhard v. Bates*, 2 Ell. & Black., 476, the misrepresentation was contained in the prospectus of a bubble company, of which the defendant was a director. Lord Campbell said, "that had the plaintiff only averred that afterwards, having seen the prospectus, the plaintiff was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the defendant, and the act of the plaintiff, from which the loss arose; but the second count goes on expressly to charge the defendant, that by means of the said false, fraudulent and deceitful pretenses and representations, he wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer, and plaintiff did then and by reason thereof actually become the purchaser and holder of the shares, and alleges the loss sustained to have been the direct consequence of the defendant's act. Thus the wrong and the loss are clearly concatenated as cause and effect."

The allegations, therefore, being essential to the action, the question is, was there any evidence to go to the jury for their support? I leave out of consideration, for the present, the statute law of Massachusetts. The charge of the declaration is that the letter was written for exhibition to the plaintiffs, and among dealers like the plaintiffs, and to deceive those who should see it. The proof of the plaintiffs is that until after the failure of the corporations, only two persons were permitted to see it, or heard of its contents from Mr. Curtis. One of these was Skinner. The proof in regard to the exhibition to him is: "Iasigi asked me (Curtis) to let him take the letter to his friend Skinner, with whom he always advised. I (Curtis) again said the letter was confidential, and that I could not suffer it to go from my office. He then said, will you let Skinner see it here, repeating that he always advised with Skinner on matters of importance, and that he wanted him to see it. Upon this solicitation I consented, and Skinner came with Iasigi, and read the letter."

There is no evidence that Skinner ever had a transaction with the corporations of Connecticut, or conducted a business which could bring them into any contact or connection. And surely this evidence can afford no support to the averment of a purpose to defraud or injure him or others through him.

The charge in the declaration, by this evidence, loses its generality, and is reduced to the imputation of a mischievous and fraudulent design upon the plaintiffs alone. The only use, "the discreet use," of the opinion contained in the defendant's letter, consisted in communicating its contents to Iasigi himself, and to his confidential friend, at his solicitation, and that he might advise intelligently with him. It then becomes necessary to inquire of the circumstances under which that communication was made to him. It was not told to the defendant that the plaintiffs had asked for information of Mr. Curtis, nor that his letter was written at his request, nor was he advised until several months afterwards that any use had been made of the letter. I do not think

it necessary to consider how much the power of the agent was limited by the mark "confidential," on the face of the letter, but I will suppose that it was nothing more than a repetition of the caution that it should be "discreetly used" by Mr. Curtis, and that the defendant is liable for the use he made.

The evidence on the record comes from the plaintiffs; and in reference to the circumstances of the exhibition, from a single witness. The agent of the defendant was the near neighbor and friend of the plaintiffs, but had never had any intercourse of business with them, either for himself or for his principal.

Such being their relations, Iasigi, on the 5th of April, came to him as a friend and neighbor, and stated that "he had a large amount of notes of certain factories in Connecticut, indorsed by Orrin Thompson; that there had been a failure recently, in New York (Austen and Spicer), by which he thought the factories, or Orrin Thompson, or all of them, would lose money; and that he felt anxious as to the fate of the paper he held. He did not state the amount he held exactly, but Curtis was led to believe it was about \$40,000. He proceeded to say that Mr. James Brown was a friend of Orrin Thompson, and that he, Iasigi, had himself heavy dealings with him, and that he wished him (Curtis) to write to Mr. James Brown, and ask him about the standing of Thompson and his property. Curtis accordingly wrote, but did not state that he wrote at Iasigi's request." Upon this statement, the particular form of the inquiry is open to and will be the subject of remark hereafter. The question to Mr. Brown is: "What is your opinion as to any possibility of loss to the Thompsonville Company or Orrin Thompson?" The witness proceeds: "I was led to ask the information and to communicate the result to him in consequence of the friendly relations that had long existed between us, and further, because I thought it would tend to relieve Mr. Iasigi's mind, and not with a view to future sales." He says further: "At these interviews about my letter, and Brown's reply, there was nothing said about any anticipated or prospective operations by Iasigi. Mr. Iasigi said the credits were due to him." The witness "never knew that he had sold his notes," but was asked if he would guaranty them.

This statement of the circumstances of the exhibition of the letter to Iasigi contains the whole case. No other letter of the defendant was seen by him, no other communication was made to him, nor was this letter after this produced to any other person before the failure of the corporations. Now the proof of the plaintiffs is, that they held but a single note, of less than \$800, running on time, at this date; the others had been sold in the winter previously, in the New York market, without indorsement or guaranty. They had a book debt then due upon which a large payment was made within ten days after, all of which has been collected, and about which no solicitude was expressed. It likewise appears that Iasigi did contemplate further operations, for in January, Thompson had taken samples of wool to arrive, and which did arrive, and was sold about six weeks from this interview.

Before closing this statement of the evidence, it is proper to note the impression that the defendant's letter made upon those who read it, as an accrediting document. Curtis reading it with the object of deciding whether the corporations and Thompson would meet their negotiable notes for two or three months, was willing to guaranty the debt for the usual commission; but when told that credits on sales were given afterwards, he "expressed his surprise that Iasigi should have sold after reading that letter." Skinner, who

probably knew the secret purpose of Iasigi, and interpreted the letter accordingly, was not "favorably impressed." Iasigi, in reply to the expression of surprise by Curtis, quoted above, asked to see the letter again, and after reading it said: "If you did not say that this was the same letter I read in your office, I should say that I had never seen this letter before;" and the Browns, when interrogated upon it after the failure of these parties, said that the letter was a guarded one, and did not warrant credits on sales to them. Having collected the facts important to the issue, the question arises, do they constitute a case to go to the jury upon this declaration? The evidence is that the plaintiffs, anticipating consignments of wool, and sales to these Connecticut corporations, and desiring the defendant's information and opinion of them, through Iasigi, approached his neighbor and friend, Mr. Curtis, the confidential agent of the defendant, to engage him to procure this opinion and information from his principal in New York. He approaches Curtis with a statement of anxieties for debts, existing in the form of negotiable notes running on time.

These statements were certainly not accurate, and are, apparently, insincere; and it will be noticed that the motive alleged in the declaration, as prompting the plaintiffs, was not revealed, and if it existed, was disguised under the apprehensions that were then expressed. The evidence shows the plaintiffs did not have notes of the amount spoken of, and that the book debt was then due. There is a discordance between this evidence and the inquiry proposed in the letter of Curtis. That inquiry discloses no apprehensions of loss upon existing debts, but refers to perils to arise on future transactions. If Iasigi suggested the form of the inquiry with a view to obtain information to guide his conduct, as the declaration avers, and concealed his aim, and, by affecting an alarm he did not feel, covered that aim from Curtis, it has the appearance of circumvention. Curtis says he wrote his letter in consequence of his friendship for the plaintiffs, to calm their fears, and without an intimation of prospective operations. Curtis gave a pledge that he would use the letter of the defendant discreetly. Before the letter was placed in the hands of the plaintiffs, they were informed it was "confidential," and Iasigi read that upon the letter itself. Iasigi again confirms the impression of Curtis, that apprehensions of loss upon his notes were still moving him, by addressing queries as to the probabilities of his getting his money, and importunes Curtis to exhibit the letter to his friend, that he might profit from his counsel. The declaration avers that this letter, exhibited under such circumstances, was written for exhibition to inquiring dealers to encourage and persuade them to give credit to these corporations, and was shown to the plaintiffs with that design. That when it was written and exhibited, the anticipated transactions from which loss has followed were known to the defendant, and the object of the exhibition was to induce the plaintiffs to make them.

§ 241. *The provision of the statute of frauds, requiring that representations as to the character, etc., of another shall be in writing, considered.*

I find no support for these averments, but a direct and palpable contradiction of them. This conclusion upon the evidence renders a discussion of the statute of Massachusetts (R. S., ch. 74, § 3), requiring that representations of the character, ability and conduct of another person should be in writing to support an action, unnecessary. But the discussions upon a similar statute fortify the conclusions contained in this opinion. "The true construction of the statute," says Lord Abinger, "is, that the representation or assurance

should concern or relate to the ability of the other person effectually to perform and satisfy the engagement, of a pecuniary nature, into which he has proposed to enter, and upon the faith of which he is to obtain money, credit, or goods." 1 M. & W., 101, 123. "He who has money to lend or goods to sell on credit, and doubts the ability of the borrower, or buyer," says Baron Gurney, "may exact his own terms; he may insist on having a representation or assurance in writing of the ability, from a third person; and if that be refused, he may keep his money and goods. If he thinks fit to trust without that, he has no right to resort to the responsibility of the person of whom he inquires." S. C., 107. Baron Alderson says: "If we refer to the cases which had occurred before the legislative provision, I think it will be found that the decision in the class of cases commencing with *Pasley v. Freeman* had raised a well founded complaint in the profession of having virtually repealed the statute of frauds, by which a guaranty was required to be in writing, and that the object Lord Tenterden had in view was to place both on the same footing, and to provide that a written document should be equally required in both. The two cases are, I think, identical in principle. He adds, "that fraud, in substance, amounts to an implied guaranty of the plaintiff's solvency."

Had Curtis given a guaranty to the plaintiffs of their debt, either for or without a commission, and accompanied the act with statements of the pecuniary condition of the debtors, and expressions of confidence in his solvency wholly unwarranted, it is clear that it would have imposed no responsibility for sales not then spoken of or alluded to, which were not made for several weeks afterwards, which were not contemplated by one of the parties, and if by the other, were concealed in all the intercourse that then took place. The statute was designed to reduce the liabilities, for the representations it describes, to some definite and appreciable limit; that the representations should be evinced in a written document, and that those who were to derive a benefit from it as a security should be ascertained from its contents; and that the liability on the document should not be extended beyond the engagements to which it had reference.

The questions embraced in this case are exhibited in a short conversation detailed in the evidence of the plaintiffs. Curtis says: "After the failure of the corporations, in September, I had an interview with Mr. Iasigi. I met him in the street; he accosted me in a state of excitement; he said: 'Mr. Curtis, Thompson has failed, and the Thompsonville Company has failed.' I said: 'I am sorry, but you have got your money.' He said: 'Yes, I have got the money that was owing to me, but I have trusted them again.' I expressed surprise that he should have trusted them again."

It was not with a declared purpose of trusting them again that Iasigi sought information of Curtis; nor was the confidential letter of Mr. Brown to his agent read, with the avowal that future operations were to be affected by the impression it made; nor was the questionable act of its exhibition superinduced by any suggestions of the existence of pending negotiations.

The objections disclosed by Iasigi were wholly incompatible with, and exclusive of, the notion of any legal responsibility for the accuracy or sufficiency of the letter, or even for a wilful misrepresentation. He did not ask for information, proposing action, even in regard to the notes of which he spoke, nor did any alteration of his debt take place in consequence. He simply inquired of Curtis, that anxieties might be relieved and his apprehensions quieted.

The liabilities incurred in cases like that described in the declaration are for a fraud productive of damage; of damage directly consequential and in the contemplation of the parties, as a result of the act done, and not for consequences remote, contingent, and arising from acts unconnected with the objects disclosed or comprehended by them.

JUSTICES NELSON and CURTIS dissented.

LORD v. GODDARD.

(13 Howard, 198-211. 1851.)

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—Goddard sued Lord and Jenness in the circuit court of New Hampshire, alleging that the defendants, by letter, recommended West and Daby as men well worthy of credit and good for what they wished to purchase; that they were dealers in coal, lumber, lime, etc., and that West, one of the firm, was visiting Bangor, Maine, for the purpose of purchasing lumber for the New York market.

The letter set forth in the declaration was dated at Portsmouth, New Hampshire, and directed to Goddard, at Bangor, Maine. West and Daby resided in New York. On the faith of this letter Goddard credited West and Daby for a cargo of lumber worth nearly \$2,000, giving them four months' time; for which lumber West and Daby never paid, having been insolvent when the letter of recommendation was given, and so continued afterwards. It is clear that they were mere insolvent adventurers, without property, and entitled to no credit or confidence.

The declaration alleges that the letter was given by Lord and Jenness with an intention to deceive and defraud Goddard; and that they did procure credit for West and Daby falsely and fraudulently. On the plea of the general issue the parties went to trial, when it appeared that Lord had a son residing in New York who, on the 28th of October, 1847, gave a letter of introduction to West, dated at New York and directed to Lord, the father, at Portsmouth, N. H. The letter recommended the firm of West and Daby as fully worthy of credit, and requested that Lord, the defendant, should recommend West and Daby to others. West delivered this letter, and on the same day got the one on which the suit is founded. It was written by the wife of the younger Lord, who was in Portsmouth, at the instance of West, he being known to her but not known to Lord or Jenness, the defendants. They seem to have acted on the information contained in the younger Lord's letter, and on the representations of his wife.

On this state of facts the court charged the jury: 1. That as a general rule it must be proved that the representations made were false; and that the defendants made them knowing they were false, and intended to defraud the plaintiff; and if the defendants made the representations, believing them to be true, they were not liable. "But a party, if stating positively that a person is entitled to credit, should do it from his own knowledge, or from full and proper inquiries; and then he is not liable, if the debtor is insolvent, unless the jury see circumstances in the case of real fraud. But if a party states this positively as to the credit of an individual, and does it ignorantly, not knowing the credit of the person recommended, and without making full and proper inquiries, and the statements turn out to be false, the jury may infer

that those so recommending did wrong and deceived, because they must know that third persons are likely to rely on their stating what they personally know, or had duly inquired about, or that they had good reason to suppose their information as to it was sufficient and true. If the defendants in this case did not make the recommendation upon such authority or information as you may think under the instructions they ought to have acted upon, you will charge them." The jury found for the plaintiff on this charge, and the only question is, whether it was proper.

§ 242. *Gist of the action for false statements as to the credit of another.*

The gist of the action is fraud in the defendants and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. Since the decision in *Haycraft v. Creasy*, 2 East, 92, made in 1801, the question has been settled to this effect in England. The supreme court of New York held likewise in *Young v. Covell*, 8 Johns., 23. That court declared it to be well settled that this action could not be sustained without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of making representations, which turn out not to be true, unconnected with a fraudulent design, is not sufficient. This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts.

Taking the foregoing instruction together, we understand it to mean this: That, if the jury believed due inquiry as to the credit of West and Daby had not been made by Lord and Jenness, and that they had signed the letter ignorantly, and regardless of the fact whether the persons recommended were or were not entitled to credit, then the jury should charge the defendants. The real test of conduct, according to the charge, obviously being whether Lord and Jenness ought to have accorded confidence to the younger Lord's letter, and to its sanction by his wife; and whether this information was of such a character as to justify them in writing the letter to Goddard without further inquiry. That this instruction, taken in its proper sense, was evasive of the true rule, and calculated to mislead the jury, is manifest, and therefore the judgment must be reversed, and the cause sent down for another trial.

§ 243. A recommendation as to the credit and character of another, if known at the time to be untrue by the person making it, is deemed to be fraudulent. *Russell v. Clark*, 7 Cr., 69.

§ 244. A fraudulent recommendation as to the standing and credit of another will subject the person giving it to damages sustained by the person trusting it. *Ibid.*

§ 245. A representation of the solvency of a mercantile house apparently prosperous, made under a mistake of fact, without any interest or fraudulent intent, will not subject the person making it to the loss sustained by the person trusting it, on its proving to be untrue. *Ibid.*

§ 246. Fraud is the gist of an action for a false affirmation as to the credit of another, and fraud must be proved. If the representation is true in substance according to the defendant's knowledge and belief, the action cannot be maintained. *Tappan v. Darling*,* 3 Mason, 101.

§ 247. An action on the case for a false and fraudulent representation as to another's credit does not, on the death of the defendant, survive against his executor, under the laws of Virginia. *Henshaw v. Miller*, 17 How., 212.

3. In Sales of Property.

SUMMARY—*What necessary to vitiate contract of sale, §§ 248, 250.—Means of information open to both parties; non-reliance on statements, §§ 248, 250.—Sale of property not present, § 249.—As to matters of opinion, § 250.—Reckless or negligent statements, §§ 251, 256.—Mistake, §§ 251, 252.—Party liable by reason of subsequent assent, § 253.—Sale by agent, § 254.—As to quantity and quality of land, §§ 255, 257.—Relief if statements false in any material circumstance going to the inducement or essence of the bargain, § 256.—Sale of so many acres, "more or less," § 258.—Rescission in case of mistake as to quantity of land, § 259.—As to vendor's title and quality of land, § 260.—Implied representations as to title and right to convey, § 261.—Party in a position to be tempted into misrepresentations, § 262.—Test as to whether statements were false, § 263.—False statements in receivers' certificates, § 264.*

§ 248. The misrepresentation which will vitiate a contract of sale and prevent a court of equity from aiding in its enforcement must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. The same rule obtains where the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained. These principles were applied in this case, where a purchaser of a boat to ply on a specified route sought to resist the enforcement of the contract on the ground of misrepresentations on the part of the vendor as to the draught of the boat, the purchaser having, previous to the execution of the contract, measured the draught and accompanied her on one of her trips. *Slaughter v. Gerson*, §§ 265-66.

§ 249. Whenever a sale is made of property not present but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representations of the seller, relying on their truth, the seller is bound by such representations if false, though it is stated that the property is sold for what it is. *Smith v. Richards*, § 267-76.

§ 250. To avoid a contract of sale on account of misrepresentations made by the vendor, such misrepresentations must be of matters of fact, must be of something material constituting an inducement or motive to the other party to purchase, and by which he has actually been misled to his injury, and must also be of something in which the purchaser places a known confidence and trust in the seller, and not a mere matter of opinion equally open to both parties for examination and inquiry where each party is presumed to rely on his own judgment. *Ibid.*

§ 251. A party selling property must be presumed to know whether the representation which he makes of it is false or true. If he knows it to be false, that is a fraud of a positive kind; but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, a representation founded on mistake, resulting from such negligence, is fraud. It is immaterial to the purchaser whether the misrepresentation proceeds from fraud or mistake, since the injury to him is the same. *Ibid.*

§ 252. Representations false by mistake vitiate a contract as fully as if false by design, if material and influential. *Warner v. Daniels*, §§ 277-86.

§ 253. In an action against two defendants for obtaining the goods of the plaintiff by false and fraudulent representations, where the declaration alleges that the fraud was a matter of prearrangement between them, and the fraud is proved as to one, it is sufficient to charge the other to show that he subsequently, with knowledge of the fraud, became a party to it, and participated in its fruits. *Lincoln v. Clafin*, §§ 287-92.

§ 254. A purchaser is not bound by a sale made by an agent who falsely represents the quality and quantity of the thing sold, where such sale is ratified by the principals. The principals cannot avail themselves of the contract and repudiate the accompanying representations. *Doggett v. Emerson*, §§ 298-97.

§ 255. If a purchaser buys land relying upon representations of the seller as to its quantity and quality, and the representations prove to be false, a court of equity will set aside the sale, although the seller is at the same time the deceiver and the deceived. *Ibid.*

§ 256. A vendor must act with the utmost good faith. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the

vendee is thereby misled, the sale is voidable. And it is usually immaterial whether the representation be wilfully and designedly false, or ignorantly and negligently untrue. *Ibid.*

§ 257. Where, in a sale of land by the acre, a misrepresentation as to the quantity is innocently made, equity will correct the mistake, and the purchaser will be entitled to take the land and have compensation for the deficiency. *Stebbins v. Eddy*, §§ 298-302.

§ 258. Where a contract for the sale of lands by the acre contains the qualifying words "more or less," there is no general rule allowing the parties compensation either for deficiency or overplus, if the mistake has been innocent on both sides. But if there have been fraudulent misrepresentations as to the quantity, equity will relieve. *Ibid.*

§ 259. In a purchase of nine hundred and fifty acres of land at \$20 an acre, such a discrepancy between the facts and the representations as will add thirty-three and a third or perhaps fifty per cent. per acre to the cost is not a case for mere compensation but may be rescinded in equity. *Boyce v. Grundy*, §§ 303-308.

§ 260. Where a bill filed to obtain the rescission of a contract for the sale of lands set out fraudulent misrepresentations as to the vendor's title, as to the liability of the land to inundation, and as to the general description of the character and quality of part of the land not examined by the complainant, it was held that the allegations were material, and such as to entitle the complainant to relief if substantiated. *Ibid.*

§ 261. If an agreement to make a present sale of land, for which there is to be made present and successive payments to a large amount within four years, does not imply a present title or a present power to sell, it certainly amounts to a representation that, at the end of four years, the seller will be able to make a clear title. *Ibid.*

§ 262. In a suit to rescind a sale for fraud, the party most interested, and who is the great gainer by the sale, is in the situation to be most tempted into misrepresentations. *Smith v. Babcock*, §§ 309-17.

§ 263. To determine whether the representations which induced a purchase were false, there is no better general test than the failure of the seller to fulfill his guaranties concerning them, during four or five years after, when the purchaser contended that they had turned out to be false, and where the seller swears that he had during that time ample means for that purpose. *Ibid.*

§ 264. A receiver of a railroad company issued certain debentures or certificates payable to the Joliet Iron and Steel Company or bearer. A purchaser before maturity of such certificates brought an action of deceit against the receiver, alleging that he had fraudulently and falsely certified and represented in the certificates that they were issued in pursuance of an order of the court, that they constituted a first lien, and that they were given for iron rails furnished for constructing the road; and further alleging that none of these things were true. It was held that it must be assumed that these representations, if made with intent to deceive, were made with intent to deceive whomsoever should purchase the paper; that it was not necessary to allege or prove that they were made with intent to deceive the Joliet Iron and Steel Company, or any particular individual; but that it was necessary for the plaintiff to show that he acted upon the false representations, and had a right to act upon them. *Bank of Montreal v. Thayer*, §§ 318-23.

[NOTES.— See §§ 324-349.]

SLAUGHTER'S ADMINISTRATOR v. GERSON.

(13 Wallace, 379-386. 1871.)

APPEAL from U. S. Circuit Court, District of Maryland.

STATEMENT OF FACTS.—Slaughter bought a steamboat for a special purpose. He gave a mortgage on her and another boat to secure part of the purchase money, and this bill was filed to foreclose the mortgage, Slaughter declining to pay on the ground that false representations had been made to him of the draught of the boat, as he wanted one that drew only three and a half feet of water. There was conflicting evidence on the subject of the draught of the boat. There was a decree for the complainant.

Opinion by MR. JUSTICE FIELD.

A large amount of evidence was taken in this case bearing upon the averments in the answer of misrepresentation and fraud on the part of the complainant; and it is, in many respects, conflicting. But the rules of law

applicable to cases of alleged misrepresentation by a vendor with respect to property sold are well settled, and render of easy solution the questions upon which this case must turn.

§ 265. *What misrepresentations will vitiate a sale.*

The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.

The facts disclosed by the uncontradicted testimony of both parties bring this case clearly within the principle here stated. Previous to the execution of the contract of purchase, and with the view of examining the steamboat, the defendant went from Baltimore to New York, taking with him his son, who subsequently became captain of the boat, and two ship-carpenters, and a square to measure her draught of water. Whilst there every opportunity was given him to examine the boat, with his carpenters, and a most thorough and careful examination was made by them. On two occasions they measured the draught of the boat, and they witnessed her speed by accompanying her on one of her trips. The owner went with them to the boat on their arrival in New York, and told them to look for themselves, and to go anywhere they pleased about her. If, under these circumstances, the defendant did not learn everything about her, and ascertain her true draught, it was his own fault, and it would be against the plainest principles of justice to allow him to set up, in impeachment of the validity of his contract, loose statements respecting the draught before its execution, even though they were false in point of fact.

In *Attwood v. Small*, 6 Cl. & Fin., 232, a case which received great consideration in the house of lords, the defendant had sold to the complainants, constituting a company of numerous persons, certain freehold and leasehold property, including mines and ironworks, and had made certain statements respecting the capabilities of the property. The purchasers, not relying upon these statements, deputed some of their directors, together with experienced agents, to ascertain the correctness of his statements. These persons examined the property and works and the accounts kept by the defendant, receiving from him and his agents every facility and aid for that purpose, and they reported that the defendant's statements were correct. Upon a bill filed to rescind the contract, on the ground of fraud, the house of lords decided that

the contract could not be rescinded, reversing, in that respect, the decree of the court of exchequer, not merely because there was no proof of fraud, but because the purchasers did not rely upon the vendor's statements, but tested their accuracy; and, after having knowledge, or the means of knowledge, declared that they were satisfied of their correctness, holding that if a purchaser, choosing to judge for himself, did not avail himself of the knowledge, or means of knowledge, open to him or to his agents, he could not be heard to say he was deceived by the vendor's representations, the doctrine of *caveat emptor* applying in such case, and the knowledge of his own agents being as binding as his own knowledge.

§ 266. *Where the means of information are equally open to both parties, equity will enforce the contract.*

The doctrine, substantially as we have stated it, is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief.

We have thus far assumed that the evidence in the case before us discloses false representations on the part of the vendor, but justice to him requires us to say that the evidence is insufficient to warrant this conclusion. The vendor stated to the purchaser that he was not a steamboat man, meaning evidently, from the context, that he was not familiar with the particulars in regard to which the purchaser desired information, and referred him to the statements of the captain, at the same time inviting him and his party to examine the boat in every particular. The measurement made by one of his carpenters showed that the boat drew four feet and six inches of water at midships whilst lying unloaded at the dock. The measurement by the other carpenter showed that the boat then drew, forward and aft, three feet and six inches, and both of these measurements were reported to the defendant, and the latter was accompanied by the declaration that the boat drew too much water for his purpose. The captain of the boat also took the defendant on to the dock, by which the boat was lying, and pointed out to him that she was coppered three feet and nine inches from the keel, and that she then showed only three inches out of water, and, of course, that she then drew, forward and aft, unloaded, three feet and six inches. The purchase was thus made by the defendant, with his eyes open, after every opportunity had been afforded him for the inspection of the vessel.

Decree affirmed.

SMITH v. RICHARDS.

(18 Peters, 26-44. 1839.)

Opinion by MR. JUSTICE BARBOUR.

STATEMENT OF FACTS.—This case comes before us by appeal from a decree of the circuit court for the southern district of New York. It was a suit in equity, brought by the appellee against the appellant, to set aside a contract for fraud. It appears that in December, 1832, a tract of land, embracing a gold mine, called the Goochland mine, lying in the county of Goochland, Virginia, was purchased by the appellant, one-third for himself, and two-thirds

for Nathaniel Richards, of the city of New York, at the price of about \$14,000. In May, 1833, the appellant sold one-half of his third to Nathaniel Richards for \$15,000. In June, 1833, he sold five-sixths of the other half to the appellee and others, at the rate of \$45,000 for the whole of that half.

The interest which the appellee acquired in this property was one-eighth part of one-sixth, at the price of \$5,625; as evidence of which he received from Nathaniel Richards, who acted as the appellant's agent in making the sale, a writing dated July 4, 1833, acknowledging the receipt of the purchase money, in cash and several notes of hand. This paper described the property thus sold and bought, as one-eighth part of one-sixth of four hundred and fifty-six acres of land, and of one hundred acres purchased of David Moss, the deeds bearing date 17th of May, 1833; both parcels lying in the county Goochland, and state of Virginia, and called the Goochland mine. It declares that the receipts (that is, of the cash and notes) entitle Guy Richards (the appellee) to the one-eighth portion of one-sixth part of said property; and it assumed that form, as the paper shows, because the title to all was in Nathaniel Richards, although one-sixth part belonged to the appellant.

In the same paper is contained the following provision: "It is hereby expressly understood and agreed to by the said Guy Richards, that he is to contribute his full proportion of any expenses already incurred, or which may be incurred hereafter on the said premises, in searching for or developing any mine, or mines, in the erection of buildings, the purchase of machinery, and any other expenses for the above general object, which I may deem necessary. Signed by Nathaniel Richards."

This is the contract which the bill seeks to set aside; it alleges that the appellee was induced to make it by various representations and declarations of the appellant, especially those contained in certain letters, particularly referred to in the bill, written by the appellant to Nathaniel and Charles H. Richards, which the bill charges to have been false, fraudulent and deceptive, and made for the purpose of deluding and deceiving the appellee and other persons, and inducing them to purchase at an exorbitant and unconscionable price; and by specimens of washings of said gold mine, which were exhibited to the appellee, as fair specimens and samples of the Goochland mine, which the bill charges were not fair samples; and that the appellant knew that they were not fair samples, and that he caused them to be exhibited to the appellee as fair specimens and samples of said mine for the express purpose of defrauding him, by inducing him to purchase a part of his interest in said mine, upon the faith of said specimens, as well as the false, fraudulent and deceptive representations. The bill further charges that one of the letters of the appellant to Nathaniel Richards, dated January 21, 1833, containing a description of the Goochland mine, was read to him, and the specimens exhibited to him, at the express request of the appellant, by Nathaniel Richards, in the month of June, 1833, a short time before his purchase.

It further charges that the appellant had represented to the appellee that he was well skilled in the business of mining, having been employed in that business in South America; that he understood the directions of veins in a mine, and the cost and expense of extracting gold from the foreign materials by which it is surrounded, and in which gold is most usually found. That the Virginia Mining Company, relying upon the fitness of the appellant for the business aforesaid, and his skill in the principles and process of mining, employed him as their agent; and that, during the whole time of negotiations

and representations concerning the Goochland mine, he was the agent of the Virginia Mining Company. That the appellee never was at the Goochland gold mine, nor did he ever visit the tract of land in which it was represented by the appellant to be situated; but that in the months of June and July, 1833, believing the appellant to be a man of strict honor, honesty, truth and veracity, he reposed the most implicit faith in his declarations with regard to said gold mine, and relied exclusively upon his representations, especially his letter of the 21st of January, 1833, to Nathaniel Richards, and his several letters to Charles H. Richards, as containing accurate, fair and correct descriptions of the Goochland mine.

The bill then proceeds to charge certain specific misrepresentations in the following particulars, to wit:

1. That there are not, and never have been, any veins of gold whatever in the Goochland mine, and that that fact was well known to Smith at the time when he wrote the letters and made the representations before stated; and that neither one hundred nor any other number of feet, on a vein in said mine, was or were, at the date of the letter from the appellant to Nathaniel Richards, or at any other time, opened or developed.

2. That so far from there being rich veins of gold in the mine, as the appellant in the last-mentioned letter (that is, as we understand it, of the 21st of January, 1833, to Nathaniel Richards) asserted, that there were cuts, and searches which had recently, and since his purchase, been made at the said mine in various directions, and no veins of gold whatever could be discovered; and that the purchasers thereof, including the appellee, had been compelled, after many searches, sinking shafts, making cuts and experiments, and expending a great deal of money in the enterprise, to abandon the search after gold in said mine, to dismiss their workmen, and give up the project of mining altogether.

3. That there are, and were at the time of the appellant's representations in relation to said mine, fine particles of gold to be found on the premises, included within the bounds of the Goochland mine. But that such particles are and were so minute, so few, and so mixed up with sand and other foreign substances, that the cost of extracting the gold from such materials would far exceed the value of the gold when extracted; and that the four hundred and fifty-six acres, and the one hundred acres of land specified in the receipt of Nathaniel Richards, before stated, are utterly worthless as a gold mine; and the appellee's interest therein is of no value whatever.

4. That the specimens of washings of said gold mine, exhibited to the appellee and others, by the order and direction of the appellant, as fair specimens and examples of said gold mine, are not, and were not at the time when they were forwarded by the appellant to Nathaniel Richards, fair samples or specimens of said mine; and the appellee expresses his belief that they were not taken from the Goochland mine.

5. That the Goochland premises do not contain veins of gold, nor any considerable deposits of gold; nor are they rich in gold, or of any value whatever, for any purpose of mining, either for gold or any other metal.

The answer of the defendant, in various parts of it, utterly and unqualifiedly denies any intention or purpose to deceive or delude the appellee, or that he had ever done, or permitted to be done, anything to produce that effect. It denies that he ever made any inflated representations, or false descriptions of the mine, to induce any person to give an inordinate price for his interest

therein. It insists that in the letter of the 21st of January, 1833, to Nathaniel Richards, his object was to give a true and accurate account of the Goochland mine, so far as the facts could be ascertained by his own observation and from the information of others on whom he could rely; and that in those addressed to Charles H. Richards, no fact was stated as being known to him, which was untrue so far as facts are given in reference to the Goochland mine; and that as well in the before-mentioned letter to Nathaniel, as in those to Charles H. Richards, as far as opinions were expressed, they were honestly entertained, without any intention, motive or purpose to deceive the appellee, or any person whatever. It insists that the specimens of gold ore sent by him to Nathaniel Richards were fair samples of the mine; and denies that these specimens were directed by him to be exhibited to the appellee, or any other person, with a design of deceiving or defrauding any person to whom they might be shown.

It insists, in general, that in all the statements he ever made, at any time, to any person concerning the Goochland mine, whether in writing or verbally, so far as facts were given within his knowledge, they were strictly true; so far as the information derived from others was given, he believed it to be true; and so far as his opinion has been expressed on the subject of the Goochland mine, such opinion was honestly entertained, without any interest, motive or view, directly or indirectly, to deceive the appellee or any other person. It insists that there are and were veins of gold in the Goochland mine, and that from personal examination, before any representation was made, he knows that the Goochland mine contains veins of gold of extraordinary richness, and of great intrinsic value. It insists that at the time he wrote the letter to Nathaniel Richards, there were an hundred feet or upwards, according to his best judgment, developed on the vein in said mine.

The answer admits that the appellant may have been informed by Nathaniel Richards that he had shown or read the letter of the 21st of January, 1833, to the appellee and others, but at what time he is unable to state; that he was informed by Charles H. Richards that said letter had been read to him and others, including the appellee, before the purchase made by him and them of his interest in the Goochland gold mine; that he had been informed, and believes it to be true, that about the month of June, 1833, Nathaniel Richards did exhibit to the appellee and others the specimens or washings of gold ore, forwarded by the appellant, as specimens of the Goochland mine, and its productions of gold; that in June, 1833, the appellant wrote several letters to Charles H. Richards; that in describing the Goochland mine in those letters, he used language of a very decided character, as being the very richest mine in Virginia, or in the United States; that the appellant esteemed himself well skilled in the business of mining, and that the appellee relied on such skill in making the purchase; that during the whole time of the negotiation and representations concerning the Goochland mine, he was employed as the agent of the Virginia Mining Company; that the appellee did not visit the mine, or the tract of land on which it was, before he bought an interest therein; that the negotiation for the purchase of the mine was carried on principally through Nathaniel and Charles H. Richards; that he believes the appellee, when he purchased an interest in the gold mine, fully believed the declarations and representations and letters of the appellant to be true, so far as he may have been informed thereof; and that he purchased an interest therein in the full reliance that whatever this defendant had said, declared or written on the sub-

ject of the Goochland mine, was strictly true; but does not admit that the appellee purchased solely on the faith of his representations, declarations and letters.

Having thus stated the material allegations in the bill, and as well the denials as the admissions in the answer, we are enabled to see what the questions are which we are called upon to decide. But before we state them, we will present, in a condensed form, those parts of the representation, the alleged falsehood of which constitutes the *gravamen* of the appellee's bill. In the letter from the appellant to Nathaniel Richards, under date of January 21, 1833, in which he professes to give an account and his views of the Goochland mine, amongst other things he states that there have been upwards of one hundred feet on the vein developed, which proves to be very rich indeed, much richer than anything yet discovered in the United States, and the quality of the gold surpasses any heretofore discovered in any country; that the surface is rich in gold. In regard to the formations in which the ore is found, he says: It is quite wide, a distance in one place of twelve feet has been cut, and the veins are disseminated throughout the whole formation, in threads of from two to six inches wide, and in many have several concentrated together; at another point it has been found to be several feet wider, and that there is ore from this mine that will, without doubt, give several hundred pennyweights of gold to the hundred pounds. This letter was written after the appellant had, as he himself says, made a careful personal examination of the vein as far as it had been developed, which he says was for a distance of one hundred feet lengthwise.

On the 11th of June, 1833, the appellant wrote to Nathaniel Richards, requesting him to show all the specimens, washings, plat, and description of the mine to Guy (the appellee), and others. This letter and these specimens, washings, etc., were shown to the appellee in compliance with this request. The representations in relation to the mine, then, consist in part of the statements above, extracted from the letter of the 21st of January, 1833, which was shown or read to the appellee; and in part of the specimens, washings, etc., exhibited to him at the appellant's request, whilst a negotiation was going on between the appellant and Charles H. Richards, for the purchase of the appellant's interest in the mine, for himself and others, of whom the appellee was one, and but a very short time before the purchase was made.

The first question in order is, were these representations true or untrue? We have examined the evidence in the record on both sides with much care. And we think it unnecessary to go into a detailed examination and comparison of that evidence here, inasmuch as it would extend this opinion to a useless length. We therefore will only state the conclusions of fact at which we have arrived. They are these: We think it not true that there were one hundred feet developed on the vein, which proved to be very rich indeed. We do not mean to say that a continuous exposure of the vein for one hundred feet was implied by the use of the term developed; on the contrary, we are of opinion, from the evidence, that the sinking shafts, or making cuts, at intervals for that distance would satisfy the meaning of this expression, and that we think was done. But we mean to say, that although there was a small quantity of ore found in part of this vein, which was rich, yet in one of the pits it was relatively a small proportion; that in some there was but little, and in one we think the weight of evidence is that there was none at all.

We think it is not true that the surface was rich in gold.

We think it not true that the formation was at any point twelve feet wide, or that the veins were disseminated throughout the whole formation in threads of from two to six inches wide, and in many had several concentrated together. We think it not true that there was ore from that mine that would give several hundred pennyweights of gold to the hundred pounds. We will not say that there might not be a small piece selected which would yield at that rate; but we think that this representation was calculated to produce the impression, and justify the belief, that an hundred pounds of ore might be gotten together which would produce several hundred pennyweights of gold. Any other interpretation of this language would, in our opinion, impute to the appellant the grossest deception.

We think that the specimens and washings which were forwarded to Nathaniel Richards were not fair samples of the mine. The only proper purpose for which they could have been exhibited was to enable purchasers to form an estimate of the richness of the mine; the appellant, therefore, in our opinion, ought to have caused to be exhibited, either specimens of the richest and poorest quality, so as to show the extremes, or some of an average quality, knowing that the persons to whom he requested them to be exhibited, and amongst them the appellee, had never seen the mine. Any other course, under the circumstances, could not fail to produce a false estimate of its value. Having come to these conclusions in relation to the facts of this case, the next inquiry in order is, what is the law of the case?

§ 267. *If one make false representations, whether knowingly or not, upon which another, relying on them, acts to his injury, he is bound to make them good.*

It is an ancient and well established principle, that whenever *suppressio veri* or *suggestio falsi* occur, and more especially both together, they afford a sufficient ground to set aside any release or conveyance. This ancient principle, thus expressed with so much sententious brevity, is laid down in terms somewhat more comprehensive, and having a direct bearing on the present case, by a modern text-writer on equity.

In 1 Maddock's Chancery, 208, it is thus stated: If indeed a man, upon a treaty for any contract, make a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake upon the terms of the bargain, it is a fraud, and relievable in equity. The doctrine thus laid down is almost in the very words used by the chancellor in the case of *Neville v. Wilkinson*, 1 Bro. Ch. Cas., 546, with the exception of the words, whether knowingly or not; and the part of the proposition embraced by these words is founded upon the case of *Ainslie v. Medlicot*, 9 Vesey, 21, which fully sustains Mr. Maddock. In this latter case the following strong language is used: "No doubt by a representation a party may bind himself just as much as by an express covenant. If, knowingly, he represents what is not true, no doubt he is bound. If, without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts, no doubt he is bound, though his mistake was perfectly innocent."

§ 268. *The doctrine as to misrepresentations.*

But the doctrine is laid down with more comprehensiveness and precision by a still more modern writer on equity; who gives us, in the form of distinct propositions, what he considers the result of the various cases on the subject,

and marks with particularity the modifications which belong to it. In 1 Story's Equity, 201, 202, it is thus stated: "Where the party intentionally or by design misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a positive fraud, in the truest sense of the terms; there is an evil act, with an evil intent; *dolum malum, ad circumveniendum*. And the misrepresentation may be as well by deeds or acts as by words; by artifices to mislead, as by positive assertions."

Whether the party thus misrepresenting a fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprise and imposition on the other party. Or, as Lord Thurlow expresses it, in *Neville v. Wilkinson*, 1 Bro. C. C., 546, "It misleads the parties contracting on the subject of the contract."

§ 269. — *modifications of the rule. As to matters of opinion.*

The author of the treatise last cited thus states the modifications of the doctrine: The misrepresentation must be of something material, constituting an inducement, or motive to the act, or omission of the other, and by which he is actually misled to his injury.

In the next place, the misrepresentation must not only be in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. It must not be a mere matter of opinion, equally open to both parties for examination and inquiry, and where neither party is presumed to trust to the other, but to rely on his own judgment.

§ 270. — *persons not parties to the contract may become liable.*

The doctrine of these text-writers is illustrated by the cases in the books, some of which present very strong applications of it; for it is held to extend not only to the parties to the contract, but also to others who, from gross negligence, are guilty of misrepresentation. Thus, for example, the case of *Pearson v. Morgan*, 2 Bro. Ch. Cas., 388, where A., being interested in an estate in fee, which was charged with £8,000 in favor of B., was applied to by C., who was about to lend money to B., to know whether the £8,000 was still a subsisting charge on the estate. A. stated that it was, and C. lent his money to B. accordingly. It appeared, afterwards, that the charge had been satisfied; yet it was held that the money lent was a charge on the lands in the hands of A.'s heirs, because he either knew or ought to have known the fact of satisfaction, and his representation was a fraud on C.

Of a similar character was the case of *Hobbs v. Norton*, 1 Ver., 136, where one entered into an agreement for the purchase of an annuity, charged on the lands of a third person, and was encouraged in the course of the transaction by the latter, who suggested his own title, and it afterwards appeared that such title was of a nature to have enabled the owner to avoid the annuity; yet he was, as to the purchaser, held under an obligation to confirm it. Cases of this class present the principle in its strongest aspect; because in these cases, the parties making the representation were bound by it to prevent a loss to others, although they themselves derived no advantage from it;

whereas, in those instances in which the parties to the contract made the representation, they would receive benefit to the amount of the loss which the misrepresentation would produce to the other party, who acted on the faith of it, if the court did not relieve against it.

This principle has been adopted in the courts of our own country. In *Fulton's Executors v. Roosevelt*, 5 Johns. Ch., 174, the case was this: Fulton was induced by the representations of Roosevelt, that he had discovered a valuable coal mine on the bank of the Ohio river, to contract for the purchase of a tract of land, stated by Roosevelt to embrace the mine; and besides giving to Roosevelt \$4,400, Fulton covenanted to pay him \$1,000 annually for twenty years; but the annuity was to cease, if, after the mine was faithfully worked by Fulton, it should not produce at least \$12,000, etc. And the land was accordingly conveyed to Fulton. It appeared that there was no coal mine within the boundaries of the land conveyed, although there was coal adjoining it, in the bed of the river, which was navigable, deep, and rapid; but the working of the mine, if practicable, would be very hazardous, expensive, and unprofitable. The contract on the part of Fulton was held to be founded in mistake and misrepresentation; and Roosevelt was perpetually enjoined from bringing any suit against Fulton, to recover the annuity agreed to be paid him.

In that case the chancellor says: Whether the defendant made the statements in his letter to Fulton through mistake, or under the delusions of his own imagination, or by design, I am not able to say. It is sufficient for the decision of this case, that the representations are not supported, but are contradicted by proof, and that the claim of the annuity, upon such a state of the case, is unconscientious and unjust. And this decree was affirmed in the court of errors, 2 Cowen, 129.

In the case of *McFerran v. Taylor and Massie*, in this court, in 3 Cranch, 281, the court, after remarking that there was a material misrepresentation, and that the defendant had contended that it originated in mistake, not in fraud, say: From the situation of the parties, and of the country, and from the form of the entry, it was reasonable to presume that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, must still remain liable for that variance.

§ 271. *A party selling property is presumed to know whether his representations are true or false. If he knows them to be false it is fraud, but if he does not know them to be false he is guilty of gross negligence, which is legal fraud.*

The principles of these cases we consider founded in sound morals and law. They rest upon the ground that the party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, representations founded on mistake, resulting from such negligence, is fraud. 6 Ves., 180, 189; *Jeremy*, 385, 386. The purchaser confides in it, upon the assumption that the owner knows his own property, and truly represents it; and, as was well argued in the case in Cranch, it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller.

§ 272. *The misrepresentation must be as to matters of fact, not as to matters of opinion.*

We will next inquire whether the misrepresentation in this case comes up to the rule which has been laid down. In the first place, it must be of matters of fact; and it has been argued by the appellant's counsel that the letter of the 21st of January, 1833, did not profess to state matters of fact, but to express opinions. It is certainly true that matters of opinion between parties dealing on equal terms, although falsely stated, are not relieved against; because they are not presumed to mislead, or influence the other party, when each has equal means of information. But we consider the representation in this case not the expression of opinion, but the statement of facts. The appellant, in giving a description of a mine in Virginia, which he desired to be exhibited to the appellee in New York, says that one hundred feet on the vein had been developed, which proved to be very rich, much richer than anything yet discovered in the United States. That the surface was rich in gold; that the formation was quite wide, and in one place twelve feet; that the veins were disseminated throughout the whole formation, in threads of from two to six inches wide; and that there was ore from the mine that would without doubt give several hundred pennyweights of gold to the hundred pounds. Now, as to one of these statements, beyond all question it is a matter of fact; we mean the one which describes the width of the formation and veins.

Having made a personal examination, he declares the formation to be wide, gives the actual width in one place, and then the width of the veins, in terms not of conjecture, but of the most positive assertion. He gives their dimensions by feet and inches. This statement, then, comes up to the standard of mathematical certainty. And even in regard to the others, he does not profess to speak of them from conjecture, but speaks of them as they are, without qualification. Take, for example, this: The surface is rich in gold. Not that he thinks it will turn out to be rich, but that it is rich. It was argued that there was no standard by which to decide what quantity of gold would justify calling it rich. There is none by which it can be decided with mathematical certainty; but the law does not require it. Suppose that a seller was to describe to a distant purchaser a tract of land as being rich, and it were proven to be poor, or very poor; can it be that a court of equity would not give relief in such a case? The certainty in the one case is as great as in the other; and the misrepresentation as to richness must be proven in each case by the evidence of those who understood the quality of the one or the other.

§ 273. — *and must be of something material.*

In the next place, the misrepresentation must be of something material, constituting an inducement or motive to the appellee to purchase, and by which he has been actually misled to his injury. Now, in our opinion, that is emphatically the case in the suit before us. The mine, we think, not only constituted a motive, but the sole motive, to the purchaser; he was induced to purchase an interest at a high price in that which has turned out to be worthless; and he has, therefore, been misled greatly to his injury.

§ 274. — *in which one party places a known confidence and trust in the other.*

It must in the next place be in something in which the one party places a known trust and confidence in the other. Nothing could be stronger than the confidence here, because the appellee had never seen the mine, and the appellant knew it; the appellee had seen the letter of description and specimens, and the appellant knew that he had; the appellee confided in the truth of the

appellant's representation and his skill in mines, and in mining operations, and the appellant knew that he did.

§ 275. *After representations, a statement that the buyer must rely on his own judgment does not alter the force of the representations or destroy the trust or change the status. Doctrine as to sale of a thing "with all faults."*

But it has been earnestly contended at the bar that whatever might be the effect of misrepresentation in cases in which there was nothing to countervail it, that in this case, at least, it cannot avail the appellee on account of the particular character of the contract. The purchase of an interest in the gold mine was made through the agency of Charles H. Richards, acting for himself and others, and amongst them for the appellee. Richards, by his letter of the 18th June, 1833, to the appellant, amongst other things said: "But after all the above-named gentlemen (amongst whom was the appellee) had seen your letter, we concluded at any rate we would look at the samples of ore, and have done so, and your letter describing the premises to N. R. (Nathaniel Richards), he read to us. The ore is rich beyond dispute; but how much there is of it remains to be seen. In regard to the extent of the mine and its richness, we must of course rely on your judgment." The appellant, in his letter of the 21st of June, 1833, in reply to the above letter of Charles H. Richards, speaking of the gold mine says: "I, however, sell it for what it is, gold or snow-balls; and I leave it to you to decide whether you will take it at my price or not." It is said that the contract having been concluded upon the basis of this correspondence, the purchase was one with all faults; that is, in effect, that the seller was absolved from all liability by reason of any representation which he had made in relation to the mine.

In support of this proposition several cases have been cited at the bar; let us examine them. The case of *Baglehole v. Walters*, 3 Camp., 154, was this: The defendant being about to sell a vessel, the subject of the suit, had printed particulars of sale, of which a copy was delivered to the plaintiff, in the following words: "For sale, the good brig *Iris*, burden per register two hundred and eight tons; will carry seventeen keels of coal and glass, or three hundred loads of timber; has lately delivered a cargo of sugar from the West Indies, in excellent condition; it is well found in all kind of stores, which are in good condition. Hull, masts, yards, standing and running rigging, with all faults as they now lie." The plaintiff purchased two-thirds of the ship, which defendant conveyed to him in the common form. The plaintiff undertook to prove that at the time of the sale the ship had several secret defects in her; that these were known to the defendant; and that he did not disclose them to the plaintiff. And he relied upon a previous case of *Mellish v. Motteaux*, Peake's Cases, 115, in which Lord Kenyon had held that the seller of a ship is bound to disclose to the buyer all latent defects known to him; observing that the terms to which the plaintiff acceded, of taking the ship with all faults and without warranty, must be understood to relate only to those faults which the plaintiff could have discovered or which the defendants were unacquainted with. But Lord Ellenborough, disapproving of the doctrine of the case above cited, held that where a ship is sold with all faults, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of the sale, unless he used some artifice to conceal them from the purchaser.

In the same volume of Campbell, 506, a case is reported of *Schneider and another v. Heath*, which was tried before Mansfield, chief justice; the opinion expressed by the chief justice is founded in so much good sense and justice

that we should have felt disposed in a conflict of authorities to have adopted it, even if it had not been, as in the sequel of this opinion we shall show it was, subsequently recognized and acted upon by the court. The opinion is in these words: "The words," that is, with all faults as they lie, "are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the case, these words will not protect him. There might be such fraud, either in a false representation, or in using means to conceal some defect. I think the particular is evidence here by way of representation; that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now is this true or false? If false, it is a fraud which vitiates the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent tells us he framed this particular without knowing anything of the matter. But it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false." As it appeared in the case that means had been taken fraudulently to conceal the defects in the ship's bottom, the case may not be an authority in favor of the opinion above quoted; yet it serves to show that the doctrine on this subject was not then settled. About the time that this last case was decided, the case of *Pickering v. Dowson*, reported in 4 Taunt., 779, was decided in the common pleas. That also was the sale of a ship with all faults. A copy of the particulars was delivered by the seller to the buyer, which, amongst other things, represented the ship as being copper-fastened, and as having recently undergone a thorough repair. It was proven that the ship was not copper-fastened, and that the defendant knew she was leaky. The court adhered to the doctrine of Lord Ellenborough, in *Baglehole v. Walters*, 3 Camp., 154, and held that the seller was not responsible. Now, it will be observed that all these cases were cases of ships, where the thing which was the subject-matter of the contract was in such situation that the buyer had a full opportunity to inspect and examine the truth of the representation; and this we take to be the ground of decision in them. The meaning, says Heath, justice, in *Pickering v. Dowson*, of selling with all faults, is, "that the purchaser shall make use of his eyes and understanding to discover what faults there are." This implies, in our opinion, that the thing must be in such situation as to enable him to make use of his eyes and understanding; and accordingly, in that case, "the full opportunity of the purchaser to inspect and examine the truth of the representation" is included in the marginal note of the case as one of the terms of the proposition which exempts the seller from liability.

Now we think that this case is strikingly contradistinguished from that in the most important particular; that in this the purchaser had not full opportunity to inspect and examine. It is true that it would have been in the purchaser's power to have traveled some hundreds of miles to Virginia to examine the mine; so it was in the case which has been quoted from Johnson's Chancery Reports; but the chancellor does not even intimate an idea that it was necessary for him to do so; so also in the case of *Sherwood v. Salmon*, 5 Day, 439, the purchaser might by extraordinary diligence have examined the land; but the court, in reference to this very subject, say that where, from the remote situation of the land or any other cause, a contract is made for the sale of land without viewing it, there is the same reason that the seller should

be responsible for a false affirmation respecting its quality as for any other fraud.

§ 276. *Where the property is remote and the buyer has never seen it, and the seller, knowing this, represents its qualities and the buyer relies on the representations, it is a warranty.*

We think we may safely lay down this principle, that wherever a sale is made of property not present, but at a remote distance, which the seller knows the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation in effect amounts to a warranty; at least that the seller is bound to make good the representation. No part of the reasoning of the cases which we have been reviewing applies to such a case; they proceed upon the idea that where the subject of the sale is open to the inspection and examination of the buyer, it is his own folly and negligence not to examine. Chancellor Kent, in the second volume of his Commentaries, 484, 485, has justly said that the law does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. We think that this imputation cannot be made with any propriety against the appellee. The subject of the purchase was several hundred miles from him; he had never seen it; the seller knew that he had never seen it. In this situation he made a representation, both by description in his letter, and by the exhibition of specimens; the appellee bought upon the faith of that representation, the appellant knowing that the appellee had read the letter and seen the samples; finally, the appellee had a double confidence in the appellant; first in his integrity, and secondly in his skill in mining; and the appellant admits his belief that the appellee had this double confidence in him.

If, under these circumstances, the seller were not bound by his representation, we know not in what cases we ought to apply the well known and excellent maxim, *fides servanda est*. We have now compared the cases, and upon principle have shown that they do not apply to this. But we will conclude our opinion by referring to a case later than all those which we have been examining, the reasoning of which is conclusive, as we think, in favor of the view which we have taken. It is the case of *Shepherd v. Kain*, 5 Barn. & Al., 240. It was a case for the breach of warranty as to the character of a ship. The advertisement for the sale of the ship described her as a copper-fastened vessel; but there were subjoined these words: "The vessel, with her stores as she now lies, to be taken with all faults, without allowance for any defects whatever." It appeared at the trial that the ship when sold was only partially copper-fastened, and that she was not what was called in the trade a copper-fastened vessel. It appeared, also, that the plaintiff, before he bought her, had a full opportunity to examine her situation.

The court said the meaning of the advertisement must be that the seller will not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold with all faults, and it turns out to be plated, can there be any doubt that the vendor would be liable? With all faults must mean which it may have consistently with its being the thing described. Here, the ship was not a copper-fastened ship at all; and therefore the verdict was right. This case decides that, even where the plaintiff had a full opportunity of examination, the term, all faults, did not exempt the seller from liability for any defect but what was consistent with its being the thing described; and, in effect, that the description amounted to a warranty. In the case be-

fore us, where the appellee had no opportunity for examination (and in that respect the case is much stronger in his favor than the one just cited), the terms of the sale, in our opinion, put upon the appellee no hazard or risk but those which were consistent with the mine being such as it was described; that those terms in no degree exempted him from liability for misrepresentation; but if the mine had been such as described, then that they would have exempted him from any liability for failure in its anticipated produce.

It may be that the appellant made the representation under the influence of delusion; but it is sufficient, to decide this case, for us to know that the representation was untrue in material parts of it. The decree of the circuit court is affirmed, with costs.

JUSTICES STORY and McLEAN dissented, holding that the appellant stood acquitted of fraud. BARBOUR, J., dissented both as to the facts and the law as stated in the opinion.

WARNER v. DANIELS.

(Circuit Court for Massachusetts: 1 Woodbury & Minot, 90-114. 1845.)

STATEMENT OF FACTS.—Bill in equity involving the validity of a contract of exchange of a farm for certain stock in a quarry company entitled the Cleft Ledge Granite Company. The bill charges fraud and misrepresentation of material facts connected with the Granite Company. The answer denies the fraud and misrepresentation charged, and the equity of the bill generally and specially. Further facts appear in the opinion of the court.

§ 277. *Question as to competency of a witness.*

Opinion by WOODBURY, J.

There was a preliminary objection in this case, as to the competency of the testimony of Scott and Gilbert, and G. C. Thompson, that must first be examined. Scott was brought in to defend, after the institution of these proceedings, on account of a mortgage of the premises to him by one of the respondents. But it is now admitted, as well as proved, that his interest ceased before the bill was filed; and he denies, as do the rest of the parties, any collusion or combination with Daniels; and there is no witness in the case testifying to the contrary. It is proper, then, to say in the outset that, not being responsible at all nor interested when he gave his testimony, it ought to be and is admitted. 1 Barb. Ch. P., 260; Murray v. Shadwell, 2 Ves. & Beam., 401; McDonald v. Neilson, 2 Cow., 139. If he was interested he could not testify for his co-defendant. 3 John. Ch., 612. The objections to Gilbert were that a copy of the interrogatories was forwarded to him beforehand. But this does not render him incompetent nor make his testimony inadmissible, as no comments accompanied them; and if they came from the respondents, the latter neither dictated nor wrote the answers, nor used any influence to shape them into any particular form. The letter to Thompson also merely requested him to tell the truth, without any suggestion as to what the writer of it considered to be the truth. The evidence of all of them is then properly in the case.

§ 278. *Under what circumstances mistake is a sufficient ground to avoid a contract.*

The grounds set up for relief on the merits are, first, on account of an important mistake as to the value of the shares received in payment for the farm

by the complainant; and secondly, on account of fraud, false representation and imposition by the respondents in making the exchange of the shares for the farm. In respect to the first ground, I do not think it tenable on the facts of the case here, though it is often a good ground for interfering when well supported. See cases in 3 Cow., 537; 14 Ves., 288; 2 Ves. Sen., 627; *Rosevelt v. Fulton*, 2 Cow., 129; *Daniel v. Mitchell*, 1 Story, 172. I doubt its validity here, because, great as was the acknowledged difference between the real value of the shares and that supposed by the complainant when he took them, being, as some of the witnesses testify, from nothing to a par value, yet he had means of avoiding much of the mistake, if there had not been falsehood and fraud. He was referred to the officers of the company, and to a personal examination of the property of the company, and allowed time for the purpose of full inquiry, and actually did consult the officers, as far as he deemed it useful to consult them. He relied then rather on the means pointed out and used by himself to get information as to most matters than on the statements alone of the parties; and in such cases, generally, if a mistake as to a material fact occurs without any fraud or falsehood on the part of the respondent, no relief can be granted on account of the mistake alone. *Daniel v. Mitchell*, 1 Story, 172; *Hough v. Richardson*, 3 Story, 659; and *Atwood v. Small*, 6 Clark & Finn., 523, note; *Moffat v. Winslow*, 7 Paige, 124. It is true that the facts connected with his examination into the matter tend strongly to sustain the idea that the difference between the real and pretended value of the shares, in the rash and speculating mania of the times in 1836, could not then be detected by anybody so easily as now. Beside the times being so "out of joint," a mistake in the value, however great, could with difficulty, even after a very full scrutiny, have become manifest to one who, like the complainant, seemed so infatuated and so bent on cheating himself. Under the general delusion which then prevailed, and the plausible mode adopted by the respondents to make the complainant seem rather to go forward than they, he acted on that occasion with what seems now an apparent determination to be duped, which would almost justify placing him under guardianship. Such circumstances rendered a mistake almost inevitable. But it is still doubtful whether it is remediable, when the means of judging were so opened to him, if no deception had been practiced upon him, no concealments, exaggerations and falsehoods, which he had not the means to detect readily, nor the keenness to suspect or expose, and hence became their victim.

§ 279. *Courts of equity can go more upon presumptive evidence than courts of law.*

This brings us to the second ground for relief—fraud or imposition. In order to sustain that, the whole circumstances of the case, as well as the positive testimony and the character and relations of the parties, are all proper subjects of consideration. Courts of equity can go more on what is called presumptive evidence than those of law. 1 Story, Eq. Jur., § 190; *Rosevelt v. Fulton*, 2 Cow., 129; *Neville v. Wilkinson*, 1 Bro. Ch. C., 543, 546.

§ 280. *Where a party has been defrauded he is entitled to relief in equity, unless there is a plain and adequate remedy at law, or there has been gross laches on his part.*

After examining all the facts in the general aspect and then in detail, if the conclusion follows clearly that the complainant has been overreached, and that in some material degree, by impositions or concealments or misrepresentations by the respondents, on which he properly relied, he ought to be

relieved. 1 Story, Eq. Jur., §§ 192, 222; 7 Paige, 124; *Colt v. Woolaston*, 2 P. Wms., 154; *Blain v. Agar*, 1 Sim., 37, 45; S. C., 2 Sim., 289; 1 Sch. & Lef., 429. Nothing should in that event prevent relief but great and unexplained delay in seeking it, or an adequate and ample remedy at law, or a condition of the property in controversy which renders it impracticable for the court on any sound principle to grant redress.

The great feature of the whole case is that the complainant, in 1836, from being a wealthy and prosperous farmer, is stripped of the whole by the respondents, through the transaction complained of. There does not seem to have been in him the imbecility of mind which, though not idiocy, makes one liable to imposition and calls aloud for the aid of a court of equity. Story, Eq. Jur., §§ 237, 238; *Willis v. Jernegan*, 2 Atk., 251; *Huguenin v. Baseley*, 14 Ves., 273, 290. Nor does he appear to have been a man rash in character, or inexperienced in business; and the difficulty in the outset, under these facts, is to find any reason for this catastrophe except in some fraud practiced upon him in making the contract. Many circumstances in the transaction, whose truth is admitted, were calculated to mislead a common observer, such as the first interview seeming to be accidental and not apparently sought by Daniels and Fales; such likewise as their referring him to the officers of the company for full information, and not hurrying him to the bargain; such as the reluctance of Daniels to exchange his stock for the farm at so high a price; and the respectability of the president and treasurer and the agent at Durham, and the geologist who certified; with the large number of persons employed, and the important contracts said to be negotiating, or made, by a company apparently authorized by law and duly organized, and with so much capital represented to have been fairly paid in.

But, amidst all this plausible exterior, it was a fact that the person introducing him to Daniels and Fales was a brother-in-law of one of them; and that the brother of that person was an owner of some of the stock, as is disclosed since his death. Yet neither of these circumstances appears to have been known to Warner. That the company was incorporated so as to appear larger and more imposing than it really was, by including in the charter several persons not original purchasers of the quarry nor owners of any of its stock; that it was organized, if at all, by those original purchasers; and its stock at first appears to have been entirely theirs, rather than belonging to others in some considerable amount at that time. That it thus converted the apparent sale of the quarry for \$53,000 to others, merely into a real sale to themselves alone,—at first in a corporate capacity, by themselves in an individual capacity, and in this way they charged other stockholders, who should afterwards buy in, the enormous difference between that sum and the seven or eight thousand dollars only, which was the original cost of the whole and the improvements. That, beside some of this being not disclosed fully to Warner, so far as any evidence is put in, the president and secretary were not proprietors of the stock originally, nor acquainted intimately with its concerns, nor was the agent, Bates; and the former had been induced to officiate in their stations under flattering assurances which all failed, and for stock chiefly given to them for services, and which peculiar situation of theirs tended directly to mislead those confiding in their general respectability and judgment, as members and purchasers of stock in the ordinary manner. That instead of a large amount of capital having ever been paid in with money, as was represented, the treasurer swears he never received in that way over one

hundred dollars; and, from the exhibits in the case, not over a thousand was probably at any time so paid; an important fact, unknown to Warner for aught which appears, and contrary to the distinct averments in Fales' answer. That the original proprietors of the quarry, as members of the company, or creditors of it, were still interested in all the stock, except two hundred and thirty shares out of two thousand of the old emission, and two hundred and forty out of eight thousand of the new emission, instead of the new owners being numerous, and to a large amount, as Warner probably supposed; that inquiries of officers who owned nothing, or only a few shares given to them for their services, and knew little about the company, were not likely to be very useful, but rather to mislead, as their information must have been chiefly obtained from parties deeply interested to make sales; that the geologist who reported on the quarry did so before it had been much opened or worked, and had been induced by Fales to leave out the important facts of there being much more granite in the immediate neighborhood of this; and that every owner of the stock, and especially the original purchasers of the quarry, among whom was Fales, had a strong motive and interest, to the extent in all of near \$50,000, in getting new owners of shares.

It is further manifest that Daniels' representation of a number of persons in Newport having bought into the company, and which he admits he made, and which was calculated to have much influence on a purchaser, was unfounded. It is not supported by any proof; and the statements by him and Fales, as to the company being duly organized, which goes to the essence of the validity of the shares, and of the purchase of the quarry, and is denied in the bill, do not appear to be sustained from the records,—the evidence proper for that purpose, in an issue like this, though they are by the oath of one of its officers who aided to organize it. All this evidence on record, if existing, is in possession of the respondents, and is the best and suitable evidence of such a fact. *Denning v. Roome*, 6 Wend., 651, 656; *Owings v. Speed*, 5 Wheat., 420. It is also the suitable evidence to prove not only the organization, but the authority to buy the quarry, and execute the notes, issue the shares, and other material proceedings of the corporation. *Rex v. Mothersell*, 1 Str., 93. This, and not the incompetency of the owners of the quarry to pass a title to a corporation, if duly organized, and composed chiefly or only of themselves as members, is the ground on which this part of the case is very defective, and leads to a strong presumption that radical objections exist to the regularity of the proceedings of the company in these important matters. It is charged in the bill that the company was fictitious, and hence this point becomes material. But I should hesitate to decide the case on this objection alone, as the error may be one that could be removed by further evidence, and may have happened from an impression that it was the duty of the complainant to put in the record, or that the oath of the clerk was sufficient evidence to show the original organization, and the charter and acts done under it, as may suffice under different issues, and when the question is an incidental one. 3 Met., 133; id., 282; 7 id., 592.

But, finally, it is manifest, further, that several misrepresentations very material, and calculated to mislead Warner, were made by both of the respondents. Thus, the statements which are admitted to have been made by both Daniels and Fales of the successful operations then going on, viz., on the 19th of November, 1836, under the agent, Bates, and of the valuable contract which had been made, and was fulfilling at Portsmouth, and which were calculated

to be very influential with Warner or any other purchaser, and to be much relied on by them, as it was testing by experiment what was before theoretical as to the goodness and value of the quarry, were utterly unfounded, and known to be so to Fales, if not to Daniels. These were assurances not only relied on probably, but were material, distinct, not vague, and such as were proper to be relied on. *Trower v. Newcome*, 3 Mer., 704; *Scott v. Hanson*, 1 Sim., 13. They were the most important representations, next to the legal existence or continuance of the company itself, which could be made; and by Fales' own letter of October 5, to the agent at Durham, as well as by the agent's testimony, they were, not only then, on the 19th of November, known to be false by Fales, but Fales, as early as the 5th of October, urged the agent to keep the truth concealed from the public lest it might injure the value of the property. On this account Warner had not the means of detecting the groundlessness of those misrepresentations. The agent left Durham entirely, about the 1st of November, and went to New York for the company; and he left their employment the last of November. Daniels joined with Fales, or was principal in all these last unfounded assertions, calculating to deceive Warner in most important particulars. He had opportunities to know, and must be presumed to know, if this be necessary to charge him, that some of them were entirely groundless, and especially that one made by him alone, concerning a large number of persons at Newport having bought into the company.

§ 281. *Representations false by mistake vitiate a contract as fully as if false by design.*

These, then, vitiate the transaction as representations untrue, on material points; and, if untrue by mistake, still vitiating as much by such a mistake in material matters as if there was a fraudulent design. *Daniel v. Mitchell*, 1 Story, 172. So it is the better opinion, that whether Daniels himself knew these accounts to be false or not, is immaterial, if they were false and influential. 1 Story's Eq. Jur., § 193; *Ainslie v. Medlycott*, 9 Ves., 13, 21; *Graves v. White*, Freem., 57; *Pearson v. Morgan*, 2 Bro. Ch. C., 388; *Shackleford v. Hadley*, 1 A. K. Marsh., 500. So if Daniels himself had not made some of these false representations, but was present when Fales made them, and was benefited by them, it vitiates the transaction. *McMeekin v. Edmonds*, 1 Hill's Ch. R., 288, 293; 1 Grant's Ch., 267. He adopts the contract, and these were a part of it—some of the *res gestæ*. He cannot take part and repudiate part, when the other contractor acts on the whole. The Portsmouth contract with the government, which Daniels admits he stated to Warner, in exhibiting the extent of their business and prospects, on November 19, had also been obliged to be abandoned or transferred, at a loss of \$500, as early as October, from the unfitness of the stone to fulfill it. But this last fact seems to have been entirely concealed or suppressed; and *suppressio veri* is as bad as *suggestio falsi*; and it here related to a particular highly important in respect to the prospective value of the shares and the quarry. It was a fact, likewise, more within his own knowledge, and which it was his duty to disclose. Story on Eq. Jur., §§ 147 and 197; 2 Kent's C., 484.

The agent employed, Colonel Bates, whose character is admitted to have been high, and to commend any business in which he was engaged, was spoken of to Warner, and his high salary as an evidence of the extent of their business; but the important facts were suppressed, not only that he had reported against the goodness of the quarry, but their inability, on that account, to ful-

fill the Portsmouth contract, and their failure to supply him his own salary or with means for working the quarry further. So Dr. Jackson's report was printed and distributed, and a copy delivered to Warner; but the fact concealed that Fales had requested him to strike out what was said of other granite quarries near. These were extensive, and that fact, if known, would of course tend to diminish the value of theirs. It is difficult, also, to see why Daniels should be so anxious to sell more of his stock to Whiting as well as pay Warner only in this stock, if, as he represented, it was at par value in Boston; if the quarry was likely to yield a dividend, in the spring, of seven per cent.; if it was the best stock in the market, or if it was worth dollar for dollar;—all of which considerations he urged on Whiting in November, 1836, when Warner was present. His declarations about a week after, in trying to sell a note to Whiting, against the company, were of a like character, and hardly to be explained on any honest hypothesis. For he averred that the company "would cash a demand against them at any time;" when, if true, why was he so anxious to sell the note? And why had Bates, the agent, been obliged to stop work in part for want of funds? And why had not the \$500 been paid for the loss on the Portsmouth contract? And why had not the numerous other debts, and especially the original mortgage, been paid? And, if true, how were the means obtained when only from \$100, or \$1,000 to the utmost, had ever been paid in by the stockholders? This last talk with Whiting is competent evidence (*Bradley v. Chase*, 22 Maine, 511), being on a subject of a kindred character near the time of the transaction in question, and illustrating his intention. *Wood v. United States*, 16 Pet., 342, 360; 14 id., 430; 1 Starkie on Ev., 64; 2 id., 220; 1 Phillips on Ev., 179, Cow. ed.; 2 id., 452, 463; 4 Bos. & Pull., 92; 7 Bingham, 543.

The entire worthlessness of the shares soon became apparent to those officers who had been duped, as well as to several others. The whole estate, including the quarry, which had been mortgaged, was foreclosed, and went merely to pay the balance of the small amount of the original purchase money. The tools, stone, etc., remaining, were attached to secure other debts; and the original purchasers of the quarry, having most of the stock of their corporation left on their own hands, became bankrupts like Fales. Instead of \$40,000 having been paid in on the shares, as Daniels alleges, the only receipts in money satisfactorily proved, were only from a hundred to a thousand dollars, but a drop in the bucket to their expenses; and the company thus, for aught which appears, ceased to have legal existence, or credit, or property, and exploded, as one of the worst among the thousand bubbles in the speculating mania of that period.

§ 282. *Failure of consideration, when sufficient to rescind a contract.*

Often an entire failure of consideration in the receipt of what is mere moonshine is sufficient to rescind a contract. *Terry v. Breck*, 1 Grant, Ch., 367; *Chesterfield v. Jansen*, 2 Ves. Sen., 155; *Dyer v. Rich*, 1 Met., 180, 192. It shocks the conscience on the face of the transaction, and is sometimes plenary evidence of fraud. But mere inadequacy of consideration may honestly occur, and often raises no certain presumption of deceit (1 Story, Eq. Jur., §§ 244, 245, 246); as the difference may be small, or, if large, occurring from other causes than fraud; and more especially is this the case in speculating times like those of 1836. *Blachford v. Christian*, 1 Knapp, P. C., 73, 77; 1 Brown, Ch. C. App., 558, 560. It is not, *per se*, fraud. *Griffith v. Spratley*, 1 Cox, 383; *Low v. Barchard*, 8 Ves., 133; 3 Ves. & B., 180. To charge such a loss

on an innocent purchaser of its shares, rather than on its projectors and early owners, would seem inequitable if the contract had not been carried into effect; but even after that, if it turns out to have been carried into effect by fraudulent representations and falsehoods, on points very material (*Smith v. Richards*, 13 Pet., 26, 37; §§ 267-76, *supra*), it would be derogatory to courts of equity and justice, if they could not and did not lend relief. *Attwood v. Small*, 6 Clark & Finn., 232; 2 Ridg. P. Ca., 397; *Jackson v. Ashton*, 11 Pet., 229; *Osgood v. Franklin*, 2 John. Ch. R., 1, 23; *White v. Damon*, 7 Ves., 30; 18 *id.*, 335.

The points here, where misrepresentation occurred, were manifestly material, as they should be, to present a ground for our interference. *Phillips v. Duke of Bucks*, 1 Vern., 227. Nor is this a case of clear and sufficient redress at law. The aid of a court of chancery was indispensable to obtain the discovery of most of the important facts in the case; and hence an application for relief here can well be sustained on and in connection with that discovery, notwithstanding the sixteenth section of the judiciary act of the United States, requiring us to refuse aid in chancery when it can be obtained as fully at law.

I do not find it necessary to consider several other matters, pressed at the hearing, or if not pressed, disclosed in the pleadings and evidence. These to which I have referred rest on facts admitted, or clearly proved for the complainant, and not disproved on the part of the respondents by proper evidence. These also give the case a direction that seems to accord with the broad face of the whole transaction. They will work no injustice to any one, as the result will be merely to place the parties *in statu quo*, as they stood before November 19, A. D. 1836.

§ 283. *Lapse of time, unexplained, short of the statute of limitations, may be a bar to the rescission of a contract; if there is fraud, or the delay is accounted for, it is no bar.*

The only remaining objection is the length of time that has since elapsed. But it appears that steps have been taken to obtain this relief, since 1840. That the complainant was induced to believe for some years that the revolutions in the times were the cause of the works not going on; that till about 1840 he was not aware he possessed a remedy in chancery; and that the shares and the farm have not been affected by the delay since, so as to render a rescinding of the contract either impracticable or inconvenient. The value of neither appears to have materially changed since, which, when happening, sometimes constitutes an objection. 5 Mason, 244; 8 Cranch, 471; 8 Clark & Finn., 650. Length of time, unexplained, may sometimes be a bar short of the statute of limitations; but if fraud exists, or the delay is accounted for, it is no bar. See 2 Scho. & Lefr., 629; 17 Ves., 99; 7 Johns. Ch. R., 90; *Angell on Limitations*; *Hough v. Richardson*, before referred to, and *Vigers v. Pike*, 8 Clark & Finn., 562; *Sanborn v. Stetson*, 2 Story, 481-488; 1 Howard, 192. So it will not be a bar by analogy to the statute, as to length of time, if such a course would work injustice. 1 Story, Eq. Jur., § 64a; 1 John. Ch. R., 316; 2 Ves. Jun., 571; 1 Atk., 493; 10 Ves., 466, 467; 12 *id.*, 266, 374; 1 *id.*, 374; 14 *id.*, 91; *Cooper, Ch. C.*, 204; 20 John. R., 58, etc.

§ 284. *Rule as to rescission where the property cannot be restored.*

If either party cannot restore the property in good condition, that may be a good ground for not rescinding; but, at the same time, damages can be and should be given instead of rescinding, if necessary to enforce what is just, and the case is properly in chancery. Thus, if the inability to restore hap-

pens by the course of the complainant, it should not prejudice him in getting some kind of relief, if he was not then aware of the fraud. 3 Littell, 365. But if damages alone are sought, and alone can be given, and the fraud related to personal property, the relief is usually at law. *Russell v. Clark*, 7 Cranch, 84. Though some cases hold otherwise, even there. *Evans v. Bicknell*, 6 Ves., 182; *Bacon v. Bronson*, 7 John. Ch. R., 194, 201; 1 Story, Eq. Jur., § 184, etc. But it could not be held otherwise in the United States courts, under the clause in the judiciary act before referred to, if the remedy at law be complete, since then, it is provided, resort shall be had to law, rather than equity.

§ 285. *Jurisdiction of a court of equity in case of fraud.*

In cases of fraud in the sale of real estate, as here, when a court of equity can set aside the sale, and a court of law cannot, the jurisdiction of the former is usually held to be clear. 1 Bibb, Pr., 244; 1 Story, Eq. Jur., § 184 *et seq.*; 2 id., §§ 798, 799 *et seq.*; *Hepburn v. Dunlop*, 1 Wheat., 197. So the jurisdiction in equity is clear, where a discovery is sought as here. *Gaines v. Chew*, 2 How., 619. In relation to the sale in this case, then, let it be rescinded, and the shares conveyed by Warner to Daniels, and the farm by Daniels to Warner, and the master be appointed to report the amount of rents and waste (after deducting permanent improvements) that, in the meantime, should be allowed to Warner by Daniels. 1 Bibb, 244; *Daniel v. Mitchell*, 1 Story, 172, 179.

It appears, I think, from the printed case, that when it was made up, Daniels still owned, and was in a situation to reconvey the farm, and that Warner, though the shares stood in his son's name as owner, still probably could control and reconvey them. Should such still be the case, it can be closed as just directed, without any complexity or resort to any estimate of damages, on the master's reporting. But if the condition of either party should be materially altered in this respect, it will be proper to provide for it, if the power and right to do so exist in this court. Some cases hold that if either party, pending the proceedings, sells the property, so that he cannot reconvey, damages alone should be given, though not in other cases. *Todd v. Gee*, 17 Ves., 273; *Denton v. Stewart*, 1 Cox, 258. But some authorities hold that, in all cases, where the jurisdiction in equity has once attached clearly to the case, damages alone may be given, whenever reasonable, and may be estimated, either by a master in chancery or on an issue *quantum damnificatus* to a jury. See cases cited in 2 Story, Eq. Jur., §§ 794–799; 9 Cranch, 493; 1 P. Wms., 570; 4 Ves., 497; 3 Atk., 512.

§ 286. *The rule in rescinding a contract is to go as far as you can in specie and give damages for the residue.*

If, contrary to expectation, then, neither the land nor the shares can be reconveyed, the master can hereafter examine and report the damages done to Warner by the misrepresentations of Daniels and Fales, and a decree be entered against them for the amount. If the farm can be reconveyed, and not the shares, the former can be done, and the net income ascertained and paid as before directed,—the value of the shares, if anything, in December, 1836, and interest since being reported by a master, and deducted therefrom. In rescinding a contract, it seems reasonable to adopt a rule like that in enforcing a specific performance, which is, to go as far as you can, *pro tanto*, and give proportionate damages for the residue. 2 Story, Eq. Jur., § 779; 1 McLean, 62; *McKay v. Carrington*, 1 Fonb. Eq., B. I, ch. 1, § 8; 1 Wheat., 197; *Porter v.*

Rogers, 1 Ves. & B., 351. Should the facts, therefore, require more than what has first been proposed by mutual reconveyances, I am prepared to go further according to what seems to me to be sound principle, sustained by several precedents, in addition to what has already been cited.

The parties in this case come here for discovery and relief, and have obtained the former, when it could not be had in a court of law; and in order to make the redress perfect, if third persons have since become interested in the property, so that the fraudulent sale cannot be set aside, and a reconveyance made of the whole, the relief for damages becomes necessary and proper, either in part or in full. A court of equity may relieve as to part of land or contract, if the fraud does not reach the whole. It will go to the extent of the injury. *Dunlap v. Stetson*, 4 Mason, 349, 364. Thus in *Pratt v. Law*, 9 Cranch, 494, in a bill in equity, where a contract has been partly performed, and the rest, that is, other lots, cannot be conveyed specifically, because sold, etc., the court can make an issue *quantum damnificatus*, and decree the amount, or, without it, make the party pay the ratio of the price given for all, which the deficiency of lots bears to all. So in *Woodcock v. Bennet*, 1 Cow., 711, in a prayer for a specific performance, it was held that the court may refer it to a master to assess the damages, and not dismiss the bill, because they cannot enforce a specific performance, the land having been conveyed away. 1 Fonb. Eq., 38, in y, and 165, in b; 3 Atk., 512-517; 1 P. Wms., 570; *Cobb v. Waterville*, 2 id., 304; *Denton v. Stewart*, 1 Cox, 258; *Greenaway v. Adams*, 12 Ves., 401.

The bill then must be dismissed as to E. Fales and Scott, and a final decree entered against Joseph Fales and Daniels, on the principles above set out, and with costs.

LINCOLN v. CLAFLIN.

(7 Wallace, 132-139. 1868.)

ERROR to U. S. Circuit Court, Northern District of Illinois.

STATEMENT OF FACTS.—In this case the plaintiffs alleged a conspiracy on the part of Mileham and Lincoln to obtain possession of plaintiffs' goods; that through the fraudulent representatives of Mileham he did obtain possession of certain goods, which Lincoln sold at auction, below cost price, and appropriated the proceeds.

§ 287. *How bills of exceptions should be made up.*

Opinion by MR. JUSTICE FIELD.

The bill of exceptions in this case is made up without any regard to the rules in accordance with which such bills should be framed. It is little else than a transcript of the evidence, oral and documentary, given at the trial, and covers ninety-six printed pages of the record, when the exceptions could have been presented with greater clearness and precision in any five of them. In its preparation counsel seem to have forgotten that this court does not pass, in actions at law, upon the credibility or sufficiency of testimony; that these are matters which are left to the jury, and for any errors in its action the remedy must be sought in the court below by a motion for a new trial. A bill of exceptions should only present the rulings of the court upon some matter of law—as upon the admission or exclusion of evidence—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are

disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed, it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some districts—quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned. It only serves to throw increased labor upon us, and unnecessary expense upon parties. If counsel will not heed the admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions.

The action in this case is brought to recover damages against the defendants for fraudulently obtaining the property of the plaintiffs. It differs materially from that of *Adler v. Fenton*, reported in 24th Howard, which is cited to show that the declaration discloses no cause of action. In that case certain creditors, whose demand was not due at the time, brought an action against their debtors and others for an alleged conspiracy to dispose of the property of the debtors, so as to hinder and defeat the creditors in the collection of their demand; and this court held that the action would not lie. The decision proceeded upon the ground that creditors at large have no such legal interest in the property of their debtors as to enable them to interfere with any disposition of it before the maturity of their demands. The creditors in that case possessed no lien upon or interest in the property of their debtors to impair or clog in any respect the right of the latter to make any use or disposition of it they saw proper. The exercise of that right, whatever the motive, violated no existing right of the creditors, and consequently furnished them no ground of action.

§ 288. *Subsequent participation in a fraud and its fruits by a co-defendant is as effectual to charge him as preconcert and combination for its execution.*

The case at bar is not brought upon the allegation that the defendants have fraudulently disposed of their own property, but that they have fraudulently obtained possession of the property of the plaintiffs. It proceeds upon the theory that the title to the goods never passed to the defendants, but remained in the plaintiffs, from whom they were obtained by false and fraudulent representations.

That such representations were made by the defendant Mileham, and that by means of them the goods were obtained, was not seriously disputed at the trial. The principal controversy turned upon the connection of the defendant Lincoln with the fraudulent acts of Mileham. The declaration alleges that the fraud was a matter of prearrangement between them, and their counsel insisted that proof of such prearrangement was essential to a recovery against Lincoln, but the court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In thus holding we perceive no error. The character of the transaction was not changed, whether Lincoln was an original party in its inception, or became a party subsequently; nor was the damage resulting to the plaintiffs affected by the precise day at which he became a co-conspirator with Mileham. If, knowing the fraud contrived, he

aided in its execution, and shared its proceeds, he was chargeable with all its consequences, and could be treated and pursued as an original party. Every act of each in furtherance of the common design was in contemplation of law the act of both.

§ 289. *When fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties at or near the same time, is admissible.*

On the trial declarations of the defendants were received, which related not merely to the transaction which is the subject of inquiry in this action, but to similar contemporaneous transactions with other parties. The evidence was not incompetent or irrelevant, as contended by counsel. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties at or near the same time, is admissible. Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary v. Hotailing*, 1 Hill, 317, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge. See, also, *Hall v. Naylor*, 18 N. Y., 588; *Castle v. Bullard*, 23 How., 172.

§ 290. *If two persons are engaged in the furtherance of a common design to defraud others, the declaration of one of them is evidence against the other though made in that other's absence.*

The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise they should not be regarded.

§ 291. *In cases of tort interest allowed only in the discretion of the jury, not as a matter of law.*

It is possible that the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury.

§ 292. *A general exception to a charge embracing several distinct propositions will not avail if any one of them is correct.*

But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill, contrary to the proper practice, as repeatedly stated in our decisions, and contrary to an express rule of this court. It embraces several distinct propositions, and a general exception in such case cannot avail the party if any one of them is correct.

Judgment affirmed.

DOGETT v. EMERSON.

(Circuit Court for Maine: 3 Story, 700-741. 1845.)

STATEMENT OF FACTS.—The defendants in this suit purchased from the state of Maine a township of land, containing, clear of reserved lands and lands

covered with water, something over nineteen thousand acres. They entered into an obligation with Williams, by which they bound themselves to procure a conveyance to be made to him, or his assigns, of said lands on being paid \$6.50 per acre, and furnished him with certificates of various persons of the quality and quantity of timber on said land. Williams sold one-eighth of the township to Doggett, the plaintiff in this suit, and made to him various representations of the quality and quantity of the timber which were untrue, and stating the quantity of the land in the township to be twenty-two thousand acres instead of nineteen thousand acres. This sale was ratified by Williams' principals, the defendants in this suit. This bill was filed to set aside the sale on the ground of fraud and misrepresentation. Further facts appear in the opinion of the court.

Opinion by STORY, J.

This is one of that unfortunate class of cases which grew out of the marvelous spirit of speculation in timber lands which a few years ago pervaded the whole state of Maine and spread such wide ruin and disaster in many directions, and produced a most sad spectacle of delusion and moral infirmity. The cause has been argued at great length and with great ability. I shall not pretend to go over the complicated facts presented in the printed record; but shall principally advert to those questions which, in my judgment, involve the substantial merits of the case, and to those conclusions of facts, which I have drawn from a full survey of the evidence, in their application to those questions. The material questions appear to me to be these: In the first place, was the plaintiff, Doggett, induced to make the purchase by any gross misrepresentations or mistakes, on the part of Williams, as to the quality of the land in the township or the amount and quality of the timber thereon? In the next place, was Williams the agent of Emerson and the other co-defendants in the negotiation and sale to the plaintiff? In the next place, do the lapse of time and the intervening circumstances interpose any bar to the present bill, supposing the other questions to be decided favorably to the plaintiff?

§ 293. *Where a purchaser buys on the faith of a false representation by the seller touching the essence of the contract, the sale will be set aside in equity whether the false representation were the result of fraud or mistake.*

Upon the first question it does not appear to me that there is any reasonable ground to doubt that the purchase of the plaintiff was made upon an entire credit given to the representations of Williams of the quantity and quality of the timber on the township. The plaintiff resided in Boston, and, confessedly, had no knowledge of timber lands, and had never seen the township. He must, therefore, have placed implicit reliance upon the statements of Williams. Now it is quite immaterial, in a case of this sort, whether Williams was himself at once the deceiver and the deceived. The question is not whether he acted basely and falsely; but whether the plaintiff purchased upon the faith of the truth of his representations. If the plaintiff did so purchase, then upon the settled principles of courts of equity, the bargain ought to be set aside as founded upon gross misrepresentation and gross mistake, going to its very essence and objects. The whole doctrine turns upon this: that he who misleads the confidence of another by false statements in the substance of a purchase shall be the sufferer, and not his victim. I had occasion to consider this subject somewhat at large in the case of *Daniel v. Mitchell*, 1 Story, 172. It came also under consideration in some of its aspects in the case of *Small v. Attwood*, 1 Younge, 407, 459, and was elaborately

discussed in the house of lords, in the same case, on an appeal from the decree of the court of exchequer.

§ 294. *A seller is bound to act with the utmost good faith; if he mislead the purchaser by false statements as to any one material fact the sale is voidable.*

Now it is manifest that the sole object of this purchase was, in the then inflated and exaggerated state of the market respecting timber lands, the timber on the township. The object was, not settlement or agricultural purposes, but speculation on the sale of the timber on the township. The quantity and the quality of the timber were, if not the sole, the main object of the bargain. It appears to me that it is high time that the principles of courts of equity upon the subjects of sales and purchases should be better understood, and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing, and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith and exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should, literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial whether the representation be wilfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain. And I cannot but believe, if this doctrine of law had been steadfastly kept in view, and fairly upheld by public opinion, the various speculations which have been so sad a reproach to our country would have been greatly averted, if not entirely suppressed, by its salutary operation.

§ 295. *Where the facts create a presumption that a person was acting as agent for another, and his sale is ratified by such person as principal, the latter is responsible for the agent's misrepresentations of facts. He must take the sale cum onere.*

In the present case, the representations made by Williams and confirmed by the certificates, which he produced with such an ambitious display, as the main inducements to the purchase, are, as is now conceded, grossly false. It is impossible, perhaps, at this moment to say exactly the amount of timber, which, at the time of the sale, was standing on the township. In all probability it does not contain more than from four to eight millions of feet of merchantable timber. In 1831, one Kelsey was employed by the land agent of the state of Maine, to survey and examine it, and he represented it to contain eighteen millions of feet; whereas, Emerson himself, in his memorial to the state commissioners in 1841, made to procure a reduction of the bonds given to the state, avers under oath that "it does not contain three millions, probably not one million of merchantable timber of the first quality;" so that he treats Kelsey's survey as a very gross exaggeration, founded in positive mistake. And the commissioners of the state, in their report after full examination of the evidence, stated that the township "did not contain pine timber of a sound and valuable quality to the amount of more than one-fourth part of what was estimated in the survey and field-notes of the surveyor Kelsey." But what shall we say to the certificates of Towle and others, shown to the plaintiff by Williams at the time of, and as inducements for, the purchase? It is

said that these certificates were not procured by Emerson and the other defendants; but they were procured by other persons contemplating a purchase from the defendants, and were known to and used by Goss, the brother-in-law of Emerson; and being in the same house with him, and interested in the sale of the township, were put into the hands of Williams, by Goss, for the purpose of being used in procuring purchasers. Again, it is said that Emerson and the other defendants had no knowledge that the certificates were used or designed to be used by Williams in accomplishing a sale of the township; and they, therefore, are not partners to or to be affected by his acts. But if Williams was, and acted as their agent in the sale, then his representations bind them, or the sale must be treated as a mere nullity. If they did not authorize the use of the certificates nor the representations of Williams, and he was their agent, then one of two things must be the result: either that the sale, having been made by the agent upon false material representations, binds them to make those representations good, they having afterwards adopted and confirmed the sale; if so, they must be bound by it *cum onere*, with all the incidents; or, the sale having been without authority from the defendants, and procured by false material representations of Williams, is not binding either upon the defendants or upon the plaintiffs. In short, the sale is utterly void; the plaintiff, as purchaser, cannot be bound by a sale made by an agent, who falsely represents the quantity and quality of the thing sold, for if he is to be bound by the sale, it is because the agent has authority to make the representations as well as the contract. And the defendants cannot avail themselves of the contract, as a sale by their agent, and repudiate the accompanying representations. The defendants are bound by the contract of sale in its totality, or not at all; so that the actual posture of the case, if it be one of agency by Williams, is either a nullity throughout, or binding throughout. The principals have no right to bind the other party by a ratification of part of his acts and transactions, and by a rejection of the rest. They must take the whole or none. The representations are a part of the *res gestæ*, and not separable from the sale. The question as to the agency of Williams will arise hereafter.

Now, the certificates above alluded to, which constituted the basis, as it were, of the purchase, represent the township to contain from one hundred and fifty to two hundred millions of timber. So gross an exaggeration, so extravagant an estimate, never could have been made in good faith by the certificate makers—notwithstanding their affected sincerity—nor could the certificates have been intended otherwise than to mislead and cheat purchasers, credulous, if you please, but on that very account more easily seduced and deceived. This record, as well as some others of a kindred character, which have already been before this court, exhibit a very low standard of morals and duty—if one might not more strongly characterize it as a most unscrupulous profligacy—much in vogue among this class of certificate makers. Admitting that Williams himself was a dupe of the deception (which is not very easily to be admitted), the aggravation of the case is not lessened as to the plaintiff and other purchasers. They believed in him and in the certificates, and the plaintiff made the purchase upon the faith of both. It was, therefore, either a case of mutual mistake or of gross misrepresentation in a matter vital to and constituting the very basis of the bargain. If the law would tolerate such a bargain, which I am very slow to believe, it would find no countenance in a court of equity. There is not any ground to suppose that Emerson was not acquainted with the contents of these certificates. On the contrary, if Williams

is to be believed, his testimony fully establishes that Emerson not only knew the contents, but corroborated them; and there is some other independent testimony in the record to the same effect.

There is, besides, a not unimportant ingredient in this case, which ought not to be passed over in silence. The paper given by Emerson to Williams (of which we have several versions in the case not differing substantially from each other in their import on this point) affirms that Williams is to have the refusal of three-fourths of the township at \$6.50 per acre;—the terms one-third cash, one-third in one and one-third in two years, with interest annually. Now from this paper it would seem that Emerson was to retain one quarter part on his own account, and that the real price was truly stated. In point of fact, the price is untruly stated, and, as it would seem, purposely. At all events, it could not but mislead, as it was considerably higher than the actual bargain, and would have a tendency to show that Emerson placed a higher value on the land than was the truth. The other defendants deny, in their answers, that they ever authorized Emerson to sell any portion less than the whole township, or that they ever authorized him to make such a contract of refusal as he gave to Williams. Be it so. They subsequently ratified the sale as made to the plaintiff, and are bound by it, as much as if they had given a precedent authority. There is some attempt made to explain the ground of this false statement of the price in the paper given by Emerson to Williams; but I must say that it is wholly unsatisfactory, and looks very much like an afterthought. Besides, the paper would naturally lead every purchaser to suppose that the price was \$6.50 for every acre in the whole township; and not upon a deduction on account of an excess of land covered with water in the township beyond the usual quantity. Nay, such is the obvious purport of the language used in it. Emerson could not but know that the paper would be shown to purchasers; nay, that its known object must have been to procure purchasers. Why then should he have suffered them to be misled by a statement now admitted to be untrue on the face of the paper?

§ 296. *An agent is a competent witness to prove his own agency.*

Passing from this, let us proceed to the next question, and that is, whether the sale was made by Williams as the agent of Emerson and the other defendants, or on his own sole account as principal. I am aware of the positive denial of Emerson of any such agency; but, looking at all the facts, is not the agency substantially an inference of law? If Williams is to be believed, he acted as the agent of Emerson and the other defendants, and not upon his own sole account as a purchaser. It is said that Williams is an interested witness; but it seems to me that his interest is no more than that of any other person called as a witness to establish his agency in a particular transaction; and the competency of such a witness is a known exception, in the law of evidence, to what may be deemed the general rule. Then, again, his credibility is assailed, upon the ground of his mistakes and the frail state of his memory. But the *ex parte* deposition, taken in May, 1842, before his apoplectic attack, if it be not primary evidence, is, at least, corroborative evidence of his deposition in November, 1842, to the general truth of his statements, as to all the material facts on which I rely upon the present occasion; and his testimony derives no small support incidentally from other witnesses. The main fact, whether he was a purchaser or an agent, is scarcely a matter in which he could be under any error or mistake. The paper given to Williams by Emerson is by no means inconsistent with the suggestion that he was an agent.

It is precisely what would take place, if the design was to conceal the agency, and yet at the same time to give the agent an interest and premium upon all he could sell the township for beyond a fixed price. Such a course of proceeding is not unknown in general commercial business; and this court has had occasion to know that, in the recent timber land speculations, it was not an uncommon expedient. It was not unimportant to give to a real agent the appearance and character of a purchaser on his own account. His representations would be likely to be listened to with more respect and confidence as a purchaser, than as an agent clothed with the instructions and interests of others. The subsequent facts corroborate this view of the matter. All the defendants except Emerson deny that they ever authorized him to give any such paper of refusal or to sell *sub modo*. Emerson was to sell for all of them and to sell the entirety of the township; and certainly he might consistently employ a sub-agent to effect the sale upon such terms as he, Emerson, might dictate and subsequently sanction. Williams never made any deed; but Emerson acted as the substantial party in interest, and the title from the state to the purchasers was procured by and through Emerson. So that whatever was the form of the transaction, Emerson acted as principal for the defendants in procuring the deeds from the state, and he received the purchase money and took the notes in his own name. Williams incurred no responsibility either to Emerson or to the purchasers in the final arrangements, whatever he might have done in the antecedent steps of the negotiations. Indeed, it is very difficult to see how, upon the admitted facts, he can be treated as a purchaser from Emerson — or as principal selling to the plaintiff and the other persons interested in the sale. He never acquired any title to the property himself. How could he then be treated otherwise than as an agent, not in form but in substance, negotiating for Emerson and the other defendants? It is true that he was permitted to appear as a principal; but it is equally true that he was a mere conductor *rei*, subject to the control and confirmation of the sale by Emerson as the owner of the property.

In considering the testimony of Williams, I have not adverted to the depositions of Moses Paul and Joseph Hanson, introduced into the supplemental record; not that, if regularly introduced into the case, they would in any manner change my opinion as to the value of his testimony; but simply because, being irregularly and improperly taken and being irrelevant to the matters of the supplemental bill, they must be suppressed.

§ 297. *As to lapse of time in case of fraud.*

In the next place, as to the lapse of time. This in many cases is a most important consideration, and weighs much, and sometimes *est maximi et momenti ponderis*, especially when there has been a great change of circumstances as to the character and value of the property in the intermediate period, and *a fortiori* where the party complaining has been fairly put upon his diligence, and has had ample means of inquiring as to all the material facts, and has chosen to lie by in gross indifference and indolence. This question does not indeed seem fairly open upon the present pleadings. The bill charges that the plaintiff first discovered the gross fraud and imposition practiced upon him in July, 1841, and, as it should seem, by means of the memorial of Emerson to the commissioners, in March, 1841, and their report thereon made in July, 1841. The answer sets up no denial to this statement of the bill, and does by implication admit its correctness. But whether this be a just inference or not, it seems to me that the lapse of time cannot interpose any bar to the relief

asked by the bill, if otherwise well founded; for the memorial of Emerson is of itself clear proof that he was before that time fully aware of all the material facts, and there is no pretense to say that he communicated them to the plaintiff. Neither is it shown that the plaintiff had by any other means obtained suitable information to put him upon inquiry. In short, for aught that appears in the case, the plaintiff never discovered the gross falsity of the representations made to him until the memorial and report brought it home to his knowledge. Besides, as was remarked by the lord chancellor in *Partridge v. Usborne*, 5 Russ. R., 195, 232, when one party to a contract makes a positive representation, it is not lawless in the other not to proceed immediately to verify that representation. At all events, the defense is not put upon any such ground as the lapse of time and knowledge by the plaintiff of the material facts, so as to have called upon him for precise proofs of his real situation and of the time when he first discovered the full nature and extent of the deception practiced upon him. So that it seems to me that the court is not called upon in this case, by the state of the pleadings and evidence, to act upon any such defense as the lapse of time, whatever, under other circumstances, might have been the just value of any such defense.

Upon the whole, without going more at large into the merits of the case, my opinion is that the contract of sale with the plaintiff ought to be set aside, as founded in gross mistake and gross misrepresentation, and that the plaintiff ought to be restored to his original rights, and receive back the purchase money, upon executing a due reconveyance to the defendants, and making such other allowances as upon a hearing before a master shall, under all the circumstances, be equitable and just.

STEBBINS v. EDDY.

(Circuit Court for Rhode Island: 4 Mason, 414-426. 1827.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This cause was argued at the close of the last November term of this court, and derives some of its interest and importance from the character of the parties, who are both clergymen, and the nature of the bill, which contains charges of fraud and misrepresentation. On the 21st of June, 1801, the parties entered into a written contract, whereby the defendant sold to the plaintiff a farm situate in Swansey, and agreed to execute a deed for the same in six weeks from that date. The plaintiff agreed to pay for the same at the rate of \$50 per acre. And the parties, "in consideration of the failure of the condition aforesaid," further bound themselves each to the other, "whichever may fail in the condition aforesaid," to pay the sum of \$50. Both parties acted upon the supposition (in which they were doubtless mistaken in point of law) that the agreement was not binding upon them as an absolute sale, but that, at the option of either party, it might be rescinded upon the payment of the stipulated sum of \$50. In consequence of this supposition, some correspondence took place between the parties towards the close of the stipulated period, as to the intention of the defendant to complete the conveyance, and on that occasion the defendant expressed his determination to fulfill his bargain. The ill health, however, of the defendant, of which due notice was given to the plaintiff, postponed the actual execution of any deed to the plaintiff until the 17th day of August of the same year, when one tract, constituting part of the farm, was conveyed, at the request of the plaintiff, to one Winslow,

a sub-purchaser under him, and the residue was conveyed to the plaintiff. The deed to Winslow described the tract by metes and bounds, and as "containing seven and a half acres, be the same more or less;" and the deed to the plaintiff also described the residue of the farm by metes and bounds, and as "containing forty acres, be the same more or less." No measurement of the farm, though intended by the parties at the time of the original contract, took place; but upon the final negotiation, at the time of giving the deed, the land was affirmed by the defendant to contain, according to his belief, fifty acres and upwards; and the plaintiff, giving entire credit to the suggestion, paid or secured the consideration of \$2,500 for the same, and has since discharged the whole amount. In point of fact the land, as the bill asserts, upon a recent survey, contains forty acres and one half acre, and no more; and this assertion is not contradicted by the answer. The bill seeks compensation for the asserted deficiency at the rate of \$50 per acre, upon the ground that the representation that the same contained fifty acres was fraudulently and deceitfully made by the defendant, at the time of the execution of the conveyance, and was implicitly confided in by the plaintiff. The bill also prays general relief.

The answer, in the most explicit manner, negatives any fraud and misrepresentation; but it admits that the defendant did, at the time of the original contract, as well as of the conveyance, represent to the plaintiff that the farm contained, in his belief, fifty acres and upwards; and it asserts that such was in fact the defendant's belief from all the information he had from old measurements and other sources. It further alleges that at the time of the final negotiation the original contract of sale, at a specific sum per acre, was rescinded, and that the bargain was completed for a gross sum of \$2,500; and that the plaintiff distinctly understood that the defendant would not then complete the sale unless for the sum of \$2,500, whether there were fifty acres or not, and the deed was drawn accordingly.

§ 298. *Where a contract for the sale of a farm is made at the rate of so much per acre, and there is a mistake as to the quantity, equity will relieve the party injured; and the purchaser has a right to take the property, such as it is, with an abatement of price for the deficiency.*

The first question arising in the case is, whether the original contract has been rescinded, so that it is no longer to be considered as a purchase at a stipulated price per acre, but a purchase for a gross sum, whatever might be the measurement of the farm. Upon the terms of the original contract it is quite clear that the price was to be regulated by the acre, and if that contract formed the sole basis of the conveyance, it might be difficult to resist the plaintiff's title to a decree. The general rule in equity is, that under such circumstances, if there is any mistake in the quantity, the party is entitled to take the land and have compensation for the deficiency. The reason is, that each party is supposed to be regulated in his bargain by the real quantity, and if there be any mistake as to the real quantity, the one has more, and the other less, than what both intended, either in land or price. In such cases the quantity conveyed constitutes an essential ingredient in the bargain, and is not mere matter of description. Equity, therefore, will correct the mistake, and put the parties in the situation in which they would have been if the real facts had been known to them. This is the clear result of the authorities. Thus, in *Shovel v. Bogan*, 2 Eq. Ca. Abr., 688, pl. 4, where A. agreed with B. for the purchase of lands at so much per acre, and an old survey was produced, and the purchase money paid according to it, and there was a deficiency in the number

of acres, the lord chancellor decreed compensation for the deficiency. Whether, in that case, there was fraud or mere mistake, is, perhaps, not quite certain from the language attributed to the lord chancellor; but he deemed the production of the old survey a direct affirmation of the quantity, and, therefore, gave relief. The doctrine was fully recognized in *Hill v. Buckley*, 17 Ves., 394, where the master of the rolls said, "where a misrepresentation is made as to quantity, though innocently, I apprehend the right of the purchaser to be, to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally, as, though the land is neither bought nor sold *professedly by the acre*, the presumption is, that, in fixing the price, regard was had, on both sides, to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced, in an equal degree, by the quantity which both believe to be the subject of their bargain. Therefore a ratable abatement of price will probably leave both parties in nearly the same relative situation in which they would have stood if the true quantity had been originally known." Here, the principle was not only admitted, as to purchases by the acre, but it was applied to cases of purchases for a gross sum, where there is a positive representation of quantity. I say positive, for a different rule is, or may be, applied, where there are qualifying words annexed, as we shall presently see. And even where there is a positive statement of the quantity of acres, much may depend upon the manner and connection of the statement, and the nature of the contract or conveyance, whether it is to be deemed mere description or of the essence of the purchase. For support of this observation it is only necessary to refer to *Mason v. Pearson*, 2 Johns., 37; *Powell v. Clark*, 5 Mass., 355; *Dagne v. King*, 1 Yeates, 322; *Smith v. Evans*, 6 Binn., 102, and *Boar v. McCormick*, 1 Serg. & R., 164.

§ 299. — *rule where the contract contains the words "more or less."*

But where there are qualifying words in the contract, as to the number of acres, such as the words "more or less," or "said to contain," or "containing by estimation," in these and the like cases there has not as yet been adopted any general rule allowing the parties a compensation, either for deficiency or overplus, if the mistake has been innocent on both sides. In an anonymous case in *Freeman's Reports* (2 Freem., 107), it is reported that a case was cited where a man conveyed his land by the quantity of one hundred acres, *be it more or less*, and it was not above sixty acres, but had no relief, because it was his own laches. Mr. Sugden (*Vendors and Purch.*, 3d ed., ch. 6) thinks this case open to much observation, and supportable only upon the ground of an actual conveyance before relief sought. But it may be explained upon another ground, and that is, that the boundaries were actually described, or the tract well known to both parties, though its reported contents were different from the real quantity. In *Twiford v. Wareup*, Finch, 310, where the conveyance stated that there were so many acres *by estimation*, and the preliminary articles declared that the lands completely contained so many acres as were mentioned in a particular, which stated them as so many acres *by estimation*, the court denied relief for the deficiency. So in *Winch v. Winchester*, 1 Ves. & Beam., 375, where the particular of an estate, sold by auction, described it as "containing, by *estimation*, forty-one acres, *be the same more or less*," but it in fact contained five acres less, the master of the rolls thought that merely upon this particular the party could not be entitled to any abatement of the

purchase money. On that occasion he said, "the effect of the words 'more or less,' added to the statement of the quantity, has never yet been absolutely fixed by decisions, being considered sometimes as extending only to cover a small difference the one way or the other; sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it." It was in the former light that the words were considered by my learned brother, Mr. Justice Washington, in *Thomas v. Perry*, 1 Pet. C. C., 49, and probably also in *Nelson v. Matthews*, 2 H. & Munf., 164, as it certainly was in *Quesnel v. Woodlief*, 2 H. & Munf., 173, note, by the court of appeals of Virginia. See, also, *Jolliffe v. Hite*, 1 Call, 301. In the latter case there was the ingredient of the sale being at a specific sum per acre, and in the former case, though the sale was for a gross sum, yet the title deeds of the vendor himself showed that there was an overestimate in his own deed by twenty acres. These facts may have had a material influence in producing the decree for compensation. On the other hand, in *Hull v. Cunningham's Ex'rs*, 1 Munf., 330, where the sale was for a gross sum, of a tract "said to contain three hundred and seventy acres, *be it more or less*," the court held that the purchaser took upon himself the risk of the quantity, and was not entitled to any abatement of the purchase money for any deficiency. *Twiford v. Wareup*, Finch, 311, proceeded on the same ground; so did *Winch v. Winchester*, 1 Ves. & Beame, 355; *Smith v. Evans*, 6 Binn., 109; *Boar v. McCormick*, 1 Serg. & R., 166, and *Glen v. Glen*, 4 Serg. & R., 488. In short, the latest cases generally concur with the doctrine laid down in the anonymous case in 2 Freem., 107. It seems to me that there is much good sense in holding that the words "more or less," or other equivalent words, used in contracts or conveyances of this sort, should be construed to qualify the representation of quantity in such a manner, that, if made in good faith, neither party should be entitled to any relief on account of a deficiency or surplus. Nor am I prepared to admit that the fact that the sale is not in gross, but for a specific sum, by the acre, ought necessarily to create a difference in the application of the principle. I do not say that cases may not occur of such an extreme deficiency as to call for relief; but they must be such as would naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract. Where the sale is fair, and the parties are equally innocent, and the quantity is sold by estimation, and not by measurement, there is little, if any, hardship, and much convenience in holding to the rule *caveat emptor*.

But to recur to the question whether the original contract has been varied or rescinded. The defendant positively asserts the fact in his answer (and it opposes on this point the allegations of the bill), that at the time of the conveyance the sale was for the gross sum of \$2,500, whether the quantity was more or less than fifty acres. This state of things is perfectly compatible with the terms of the original contract. It was necessary, by these terms, that the number of acres should be ascertained by a measurement and survey before the conveyance could be completed. There was nothing unnatural in an agreement of the parties to waive the measurement, and to finish the contract upon an estimate of the quantity. Each of them well knew the land and its boundaries, and each had, or at least might have, equal means of ascertaining the probable quantity. It is true that the plaintiff placed great reliance on the statements of the defendant, and had confidence in his sincerity and good

faith. If the defendant's statements contained his real opinion in sincerity and good faith, the confidence of the other party, though now shown to be erroneously given, ought not to prejudice him. If the mistake was mutual and innocent, it ought not to be visited with the same consequences as if it were fraudulent. Now, the terms of the conveyance are very strong to prove that the defense, so far as the point of waiver of the terms of sale by the acre is concerned, is well founded. In the first place, the land specified in the deed to Winslow is described as "containing *seven and a half acres*, be the same *more or less*," and in the deed to the plaintiff as "containing *forty acres*, be the same *more or less*," making in the whole forty-seven acres and one half, and no more. So that upon the face of the deed the estimation is less than fifty acres. This certainly cannot be accounted for except upon the supposition that neither party deemed the estimate of fifty acres previously made as binding, controlling, or absolute, but merely as a fair representation of belief or probability. In the next place, the words "more or less" restrain even this representation of the number of acres in the deed. They show that neither party contemplated the number of acres as of the essence of the contract, but as matter of description, as what both believed and neither warranted, to be the absolute contents of the farm. The whole weight of the evidence is to the same effect. It shows that the defendant did not undertake to affirm positively, in the course or conclusion of the negotiation, that there were fifty acres, or any other certain number, but that he would not sell short of estimating the farm at fifty acres, that is, for \$2,500. How can the sale of forty-seven and a half acres, "more or less," on the face of the deeds, be reconciled with an absolute sale at \$50 by the acre for fifty acres? We must, therefore, take the case to have been that the parties concluded their bargain and made the conveyance for the gross sum of \$2,500, though the farm might exceed or fall short of that quantity. Suppose the farm had measured forty-seven and a half acres, could there have been any pretense for compensation to the plaintiff in the face of his deeds? Suppose it had exceeded fifty acres, could he have been compelled to pay more purchase money? The answer to each question must be in the negative. Upon this point the case of *Twiford v. Wareup, Finch*, 310, is very significant. The court there said, "that the articles were only a security and preparatory to the conveyance, and the defendant, having afterwards taken a conveyance, shall not resort to the articles or to any particular, or to any averment, or communication afterwards; for such things shall never be admitted against the deed." So in *Smith v. Evans*, 6 Binn., 102, Chief Justice Tilghman considered that the original contract, which was for three tracts of land containing nine hundred and ninety-one and a quarter acres, at a specified price by the acre, was done away, or rather conclusively closed as to quantity, by taking a deed by metes and boundaries of the tracts as "containing nine hundred and ninety-one and a quarter acres, etc., be the same *more or less*." "By accepting this deed," said he, "it appears to me that the agreement, so far as concerned the quantity, was closed, both parties consenting to estimate it at nine hundred and ninety-one and a quarter acres." And though the deficiency in that case was eighty-eight acres, as there was no pretense of fraud, the court enforced payment of the securities for the whole purchase money. This case is far stronger than the present; but it has much in its principle which commends it for adoption in practice. My judgment accordingly is, that the original contract of sale at \$50 by the acre was so far waived

or modified by the parties that the number of acres did not form the basis of the ultimate conveyance, but the farm was purchased upon an estimate assumed by the parties, and at a gross sum.

§ 300. *When the affirmation of a belief may amount to fraud.*

This leads me to the next, and indeed, upon the structure of the bill itself, to the only important point of the controversy; and that is, whether there has been a fraudulent misrepresentation of the quantity by the defendant. The case has been argued also upon the ground of mere mistake; but the bill does not put the charge under this aspect, nor assume it as a ground of relief. The court, therefore, must deal with the case as it is, *secundum allegata et probata*. The whole stress both of the allegations and proofs is, that the defendant represented his opinion and belief of the quantity in such a manner as to gain the entire confidence of the plaintiff. There is no pretense that the plaintiff made any positive assertion of fact, in the nature of a declaration of his knowledge, or of his warranty of quantity. The whole was confined to an expression of opinion and belief, and was so understood and acted upon by both parties. The contradiction, therefore, of the defendant's good faith is to be established, not by showing that the quantity is different from the representation, but that the opinion and belief of the plaintiff were fraudulently misrepresented to the injury of the plaintiff. It has been suggested at the bar that fraud cannot be predicated of belief, but only of facts. But this distinction is quite too subtle and refined. The affirmation of belief is an affirmation of a fact, that is, of the fact of belief; and if it is fraudulently made to mislead or cheat another, to abuse his confidence, or to blind his judgment, it is in law and morals just as reprehensible as if any other fact were affirmed for the like purpose. The law looks, not to the nature of the fact averred, but to the object and design of the affirmation.

§ 301. *Rule as to force and effect of an answer in equity.*

It is very material in this part of the cause that the defendant's answer is so full, direct and circumstantial in the denial of the fraud and misrepresentation. In a court of equity nothing short of clear and decisive testimony by two witnesses, or by other circumstances quite equivalent, ought to outweigh such an answer. In the complaint brought by the plaintiff before the church, of which the defendant is the pastor, there is an allegation of fraud; but if the testimony of the witnesses, as to the occurrences which took place before the proper authorities on that occasion, is to be credited, the plaintiff abandoned that charge and denied his intention to make or persist in it. Such an admission would go very far to weaken the force of the charge.

§ 302. *Circumstances relied on to show fraud.*

The circumstances principally relied on to sustain the charge are, in the first place, the conduct of the defendant about the time of executing the conveyance. He made inquiries as to the state of the plaintiff's mind in relation to the purchase, and whether he was eager and earnest for the bargain. Having received information that the plaintiff was, in the language of a witness, "pretty fierce" to buy, the argument attributes to him the determination to make the most of his advantages. This may be a circumstance not wholly without weight; but it is surely too slight to rouse a suspicion of grave and intentional fraud. It may show wariness, and watchfulness, and worldly prudence in ascertaining how to negotiate with a willing purchaser; but it can scarcely pass for more than the indication of a wish to drive a close and thrifty bargain.

Another circumstance of more significance is the fact of the representation of the property in the probate inventory of the father's estate, presented and sworn to by the defendant, as executor under his will. The defendant took by a deed from his father one of the three tracts of land composing the farm, estimated at about twenty acres. The father, by his will, gave a parcel, estimated to contain about twenty-two acres, to one person, and another parcel, estimated to contain about one acre, to another person; and the residue of his real estate was devised to the defendant. In the inventory, the real estate of the father is represented to be "*forty* acres of land with one dwelling-house thereon." The argument drawn from these facts is, that, deducting the twenty-three acres given to other devisees, there could remain not exceeding seventeen acres devised to the defendant; and therefore, uniting the tract, thus devised, with that which the defendant took by deed, there was within his own knowledge an estimated quantity, not exceeding thirty-seven acres. This argument is met on the other side by the allegation that the inventory was by mere estimation and not by measurement; and that in cases of this sort it is not usual, especially where the estate is solvent, to be exact in the statement of the number of acres. The executor affirmed the inventory simply because it was so returned by the appraisers. There is weight in this suggestion; and it derives some aid from the devise of the tract of twenty-two acres, which is described in the will, not by absolute quantity, but by metes and bounds, as containing "about twenty-two acres, be the same more or less." The circumstance, however, is not without importance; and it certainly called upon the defendant for much caution in his affirmations as to the quantity.

Another circumstance is, that upon a prior negotiation with certain persons of the name of Sherman for the purchase of the estate, the defendant represented the farm to contain *forty-five* acres. This fact comes out from both of the persons who negotiated for the purchase. But both agree that it was a mere estimation and not a positive representation. A certificate of this fact was laid before the church meeting; and another witness asked the defendant at another time, why this representation was made. His answer was (as the witness states), "that it was in time of war, when it was not prudent for a man always to tell exactly what he was worth." I own that this excuse is very unsatisfactory. In the case of an intended sale it could form no ground for an undervaluation of the property, whatever might be the case for other purposes. The excuse, under any circumstances, if it involved a known misrepresentation, would not be very creditable; and it is less easily reconcilable with the high standard of moral purity, so appropriate in clergymen, than with that which is found in the common business of human life. The view, however, in which it bears on the present controversy is not one of ethics, but of fact. Does it show that the defendant himself misrepresented his own opinion and belief to the plaintiff, or only that he sometimes, when his own interest was concerned, used language without much care, and in a loose and inaccurate sense?

The other circumstances of the case have not presented any serious difficulty to my mind. This circumstance, I am compelled to admit, is calculated to make an unfavorable impression. It has a tendency to diminish, in some degree, that undoubting confidence with which one would listen to the direct denials of the answer. But after pausing with much deliberation upon all the facts, I cannot say that this circumstance ought to overcome them. The representation in the conveyances is of forty-seven acres and one-half only; and here, giving this testimony its whole force, the prior representation re-

duces the quantity to forty-five. This difference is not such as would or ought, ordinarily, to introduce a presumption of ill faith. The estimates of men of quantities in themselves uncertain and unmeasured may differ at different times from various circumstances, without any suspicion of wilful misrepresentation. What is matter of opinion in such cases carries with it the elements of doubt. Better information, more reflection, and more guarded attention may honestly change the belief of the party; and if his interest lies that way, it more readily draws his judgment to the most favorable conclusion. It would sound harsh, under such circumstances, to found a decree as upon fraud, where there might be innocent mistake, loose and inconsiderate assertion, or negligent inquiry. Especially would it be harsh to press such considerations against a solemn denial under oath, unless the judgment of the court could not justly avoid the conclusion.

The case of fraudulent misrepresentation does not appear to me to be made out, so that a court of equity ought to interfere. My opinion is, that the bill ought to be dismissed; but it is not a case for costs for the defendant.

The district judge concurs in this opinion, and therefore let there be a decree of dismissal without costs.

Decree accordingly.

BOYCE v. GRUNDY.

(3 Peters, 210-221. 1830.)

Opinion by MR. JUSTICE JOHNSON.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court of West Tennessee, rendered in a case in which the appellee was complainant. The bill was filed to obtain the rescission of an agreement entered into on the 3d of July, 1818, between James Boyce, the appellants' testator and deviser, and the complainant, for the sale of a tract of land lying on the Homochito river, in the state of Mississippi.

The grounds set forth in the bill are fraudulent misrepresentations: 1. As to the testator's title to the land. 2. As to the locality of the land. 3. As to the liability of the land to inundation. 4. As to the general description of the character and quality of part of the land not examined by complainant.

We have weighed the allegations of fraud contained in the bill, and are well satisfied that they are material, and such as entitle the complainant to relief, if substantiated. We have also considered the evidence introduced by the complainant, and compared it with the rebutting testimony introduced by the appellants, and are of opinion that the testimony in support of complainant's allegations is full to the purpose of sustaining his bill, and the credibility of his witnesses fully established, wherever it has been necessary; so that in those points in which it has been contradicted by the appellants' witnesses, we cannot avoid giving credit to that of the complainant.

The decree below must, therefore, be sustained, unless the appellants can prevail upon some legal ground which will except this case from the general rules on this subject. The first and principal ground taken is, that the court of law was competent to give relief, and that this court should refuse relief, as well on the general principle as affirmed in the judiciary act, as because: 1. That the complainant was not prompt in insisting upon the fraud as soon as discovered; and 2. Because he did not avail himself of it in a plea to the action at law.

§ 303. *Rule as to remedy in equity.*

This court has been often called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. In the case before us, although the defense of fraud might have been resorted to, and ought to have been sustained in that particular suit, and, I will add, would have greatly aided the complainant in a bill to rescind, yet it was obviously not an adequate remedy, because it was a partial one. The complainant would still have been left to renew the contest upon a series of suits; and that probably after the death of witnesses.

§ 304. *Duty of the party who relies on the defense of fraud.*

That he was bound to be prompt in communicating the fraud when discovered, and consistent in his notice to the opposite party of the use he proposed to make of the discovery, cannot be questioned. But we cannot concede to the appellants' counsel that the complainant was chargeable with delay or inconsistency in the particulars. In his bill he alleges that the fraud did not come to his knowledge until 1821, and that he forthwith gave notice to James Boyce that he might resume possession of the premises, and receive the rents and profits, for that he would not comply with the contract; which notice he repeated to the appellants after Boyce's death.

It has been argued that the testimony establishes an earlier notice, and even a contemporaneous notice of the facts which the complainant alleges were concealed or misrepresented. The misrepresentations relied upon are of two classes; those which relate to the land, and those which relate to the title.

As to the title, the case furnishes no ground for imputing to the complainant contemporaneous notice of the involved state it was in. The evidence of the fact of representation on this subject rests chiefly on the deed and the letters from Port Gibson. From these it clearly appears that, so far as relates to the two hundred acres purchased from Ellis, the complainant could not, even at the time of sale, have been put on inquiries respecting the title. For the deed expressly imports that the whole land sold was comprised within the grant to Davis. With regard to the land actually comprised within the grant to Davis, if the agreement to make a present sale of land, for which there was to be made present and successive payments to a large amount within four years, does not imply a present title or a present power to sell, it certainly amounts to a representation that, at the end of four years, the seller would be able to make a clear title.

But since, upon the discovery made at Port Gibson, the notice given by the complainant was not of an intention to rescind, but of a claim for a deduction *pro rata*, and since time is expressly given to the extent of four years to make title to the whole tract, we will not affirm that, in the absence of any proof of positive loss from want of title in the interval, if the party had been able to make title when the bill was filed, and had so answered, and duly set out the title to be tendered, that it would have been a case for relief. But the defendants in their answer go into an exposition of the only title they can offer, and that is so involved and imperfect that a court of equity would not even refer it. If, then, the appellants were now before this court, under

a bill for a specific performance, it is clear that they must be turned out of court, being incompetent on their part to fulfill the contract. The rules of law relating to specific performance and those applied to the rescission of contracts, although not identically the same, have a near affinity to each other.

Again, if the object of the complainant's bill had been confined to obtaining an injunction until he could receive from defendant a good title to the land, can it be doubted that where the cause of action at law is a covenant in the same deed which stipulates for such a title, that he would be enjoined until he made a title? And if so, how long is this state of suspense to be tolerated? The title was to be made in four years; this certainly amounts to a representation that he would be able to make title at that time; but twelve years have now elapsed and still it is not pretended that a clear legal estate has been acquired.

In excuse for this it is urged that the complainant committed the first fault; that had he been punctual in his payments Boyce would have been able to procure, to be executed to himself, a title that would have enabled him to comply with his agreement. But the state of his title is before us, and a mere tender of money was not sufficient to give him a legal estate. He must still have passed through the delays and casualties incident to a suit in equity, before he could have acquired such an estate as would have satisfied the just claims of the complainant. The case, however, furnishes a more conclusive answer to this argument. The two hundred acres not included in Davis' grant, valued at the average which complainant would have paid for all the good land actually contained within his purchase, would have satisfied every payment that fell due within the four years. This deduction he informed Boyce he would insist upon, and there is no evidence in the cause to make it clear that Boyce did not acquiesce in this agreement.

It is argued, that of the defects in Boyce's title the court could not be informed; that the complainant did not ask for a specific performance, and the defendants were not, therefore, called upon to set out their title. But by referring to the bill it will be seen that they are expressly called upon to set out their title, and in their answer undertake to do so, and in the effort exhibit a title which he cannot deny is defective, but, instead of setting out a title free from defects, content themselves with showing that the defects are not incurable.

§ 305. *Where a grantor represents the quality of land falsely and the grantee has a right to rely upon the representations, other information will not hold him to inquiry.*

With regard to the misrepresentations relating to the land, the only evidence by which it is attempted to fasten on the complainant a want of promptness and consistency in availing himself of the discovery when made, is that by which a knowledge at the time of the contract is supposed to be established. Of the witnesses from whom this evidence has been obtained, it is enough to say, that, with the exception of Mr. Poindexter, it is impossible to avoid putting their testimony out of the case. And Mr. Poindexter's testimony, even without his subsequent examination, may, without any forced construction, be reconciled with that of the witnesses who testify to the representations made by Boyce at the time of the sale. It relates exclusively to the subject of inundation, and when the complainant spoke to this witness of the island's overflowing, he accompanied it with the assertion that the overflowing could be prevented by a levee at a small expense. This may well be confined to the

representations received from Boyce, and does not necessarily imply a knowledge of its being subject to general inundation. Nor was the information received from Mr. Poindexter on this subject of such a full and decided character as to amount to a communication of knowledge. It is said that it ought to have put him on inquiry; but he was in possession of Mr. Boyce's positive assurances to the contrary, and a right to rely upon that assurance without inquiry. The bill alleges the time of coming to his knowledge to have been that of the communication authorizing the party to take possession, and the evidence is not sufficient to prove notice at any previous time.

§ 306. *Whether an injunction to restrain proceeding on a judgment will lie where the party neglected to plead a defense.*

The second ground on this head of the appellant's argument has been partly answered by the doctrine laid down upon the construction of the judiciary act, on the subject of the remedy at law. And so far as it relies on the adjudication quoted from 3 Mer., 12, 225, 226, we think it unsustained. The position is, that an injunction to restrain proceeding on a judgment at law will be refused by the court of equity to a party who had a defense at law and neglected to plead it. The doctrine of the case quoted, we conceive, has no bearing upon the present. The question there was upon a point of practice, whether a special injunction should issue instead of the common injunction; there was no question about the right to the latter, but the circumstances of the case were such that the common injunction did not afford full relief to the party. The rule of practice, as laid down by the court, is, that the special injunction goes only in those cases in which, from their nature, the defendant can make no defense; such as judgments on warrants of attorney. This was not such a case, but the party went for an exception in his favor, grounded upon a state of facts which brought him within the reason of the rule. And it was in fact granted.

§ 307. *Reducing an agreement to writing is an argument against fraud but not conclusive.*

It has been further argued for the appellants, that reducing the agreement to writing precludes a recurrence to all representations; and to establish this doctrine, a passage from Sugden has been quoted. It cannot be doubted that, in the language of the author, reducing an agreement to writing is, in most cases, an argument against fraud. But it is very far from a conclusive argument, as is previously shown by the same author on the same page. The doctrine will not be contended for, that a written agreement cannot be relieved against on the ground of false suggestions; and yet if the doctrine of this quotation were the rule, instead of an incident to it, such would be the consequence.

There is no attempt made here to vary the written agreement; the relief is sought upon the ground that, by false suggestions and immoral concealment, the party seeking relief was entrapped into an agreement in which he would not otherwise have involved himself. This is not denying that the agreement in the record was the agreement entered into, but insisting that it was vitiated by fraud, which vitiates everything.

§ 308. *That damages may be recovered at law is no defense to a suit in equity to rescind a contract on the ground of fraud.*

It has been further argued that the misrepresentation, if at all established, was but of a personal character, and susceptible of compensation or indemnity, to be assessed by a jury. On this there may be made several remarks; and

first, that if the facts made out such a case, yet the law, which abhors fraud, does not incline to permit it to purchase indulgence, dispensation or absolution. Secondly, that although, locally, a misrepresentation may be partial, yet it may be vital in its effects upon the views and interests of the party affected by it. Such was the case of *Fulton v. Roosevelt*.

But lastly, the evidence makes out a case very far removed from one of merely a partial character. North, south, east, and west, we find the misrepresentations influencing the estimate of the value of these premises. Indeed, if we are to believe the testimony of Randel M'Garvick—and its clearness, fullness and fairness speaks its own eulogium—a case of more general or more vital misrepresentation can seldom occur, or a case of more absolute devotion to misplaced confidence. Not only for the qualities and incidents, but also for the lines, the representations of the seller were implicitly relied on, and certainly to the most important results as to the value of the property. M'Garvick proves that they were carried to a certain fence, which fence excluded a large knob, as it is called in that country, containing a considerable body of untillable and worthless land, and expressly told by Boyce that the fence was his line. Thus explicitly declaring that that body of bad land was not included in the land sold him, whereas in fact it was included; and in another direction where the land was fine, as if to make up the deficit in quantity to an experienced eye, he represents the land in view as being included within his survey, when in fact it was not all included. And suppose the utmost effect be given to the testimony of the appellants, relative to the actual extent to which the island was subject to inundation, still, it leaves wide ground for the charge of misrepresentation. The testimony is full to establish that, in several years, the whole has been overflowed. And the most favorable state of facts will leave from one hundred to one hundred and fifty acres, instead of fifteen or twenty, subject to this casualty in ordinary years. This, although partial in one sense, is total as to the diminution of the value of the whole. Compared with the representation proved, it certainly annihilates the very material consideration that it admitted of being prevented at a small expense, more especially as the chief injury was to be expected from the waters of the Mississippi.

In a purchase of nine hundred and fifty acres at \$20 an acre, such a discrepancy between facts and representations as would add thirty-three and a third or perhaps fifty per cent. per acre to the cost, is not a case for mere compensation. And if not a case for mere compensation, there was no controlling necessity to send the cause to a jury. The decree must be affirmed, with costs.

SMITH v. BABCOCK.

(Circuit Court for Massachusetts: 2 Woodbury & Minot, 246-298. 1846.)

STATEMENT OF FACTS.—Proceeding in equity to recover back the consideration for a tract of land situate in Maine, and paid by the complainant to the defendants, partly in cash and the rest in notes; the same having been received by defendant, John Cross, and the money divided between himself and the other defendants, except Noble, the notes having been given to the latter.

The bill charges principally that there were fraudulent misrepresentations on the part of said Cross, which influenced complainant to make the purchase in November, 1835, which is now sought to be set aside. That Cross and

the other defendants were the owners of said land; that he was chiefly instrumental in making said misrepresentations, as agent and part owner with the other respondents, except Noble; and that Noble, as holder of complainant's notes given for the land, with full notice of their consideration and only as collateral security, could not recover their amount and ought to return them. The material facts as set forth in the bill are as follows: Cross became possessed of the land in 1835, his grantor being one William Reed; a company was then formed for the sale of the land at higher and better prices, called the First Boston Company, the stock of which was owned in ten equal shares, and the land was conveyed by Cross to the trustees of said company, Babcock and Glover, also defendants herein; said shares are all owned by the defendants to this action. Thereafter, by means of false valuation and a series of deceptions as to the sales of the land, the quantity of timber thereon, etc., its value was steadily and fictitiously increased until in November, 1835, when complainant bought from said company a fifteenth of said land at \$6 an acre; its true value not being one-sixth of that sum. Complainant states that among the false representations made by Cross to himself and the other purchasers of said land were these: that he was the owner thereof; that he was a man of large means and able to respond to all his guaranties, bonds, etc., and that there were one hundred and thirty million feet of pine timber upon each acre of said land, and a stream suitable to transport it yearly to market.

In their answer respondents deny all fraud; they deny the agency of Cross to sell the land on their behalf, and they assert that the certificates for the land were honestly obtained and were believed to be true.

Cross also denies all fraud, and further avers that he was a man of large means as late as 1837 and 1839. The answer of Noble denies or expresses ignorance of all other matters, except the transfer of complainant's notes by Cross to himself, which were so transferred to indemnify him and one Wyer for liabilities of Cross assumed or thereafter to be assumed by them. The other facts and evidence in support of the same are set forth in the opinion.

Opinion by WOODBURY, J.

The lapse of time since the proceedings in this case commenced has been such that the members of the court are neither of them the same. Most of the counsel are also new, and the condition of all the respondents, with a single exception, has changed, it is said, and several from what was supposed to be splendid affluence to bankruptcy, and one of them passed "that bourne whence no traveler returns." Where the fault has been for such unusual delay, or whether there has been none but mere casualties and postponements growing out of the great number of parties and counsel, and the complexity as well as magnitude of the case, I shall not attempt to settle. But my best efforts have been made to prevent any further postponement not indispensable to a due hearing and examination of the cause; and I shall now proceed to deliver a final opinion on the questions necessary to be decided, with a desire to put both sides in possession of the reasons on which it is founded, rather than with the vain expectation of rendering it satisfactory to both.

Various questions have been raised as to the competency of some portions of the testimony and the sufficiency of other parts, which may be first disposed of by a single general remark. Without giving in detail my decision in each case, it may be taken for granted, where I rely on a piece of evidence and refer to it in support of a conclusion of fact, it is deemed competent; and where a fact has been denied by the answers in particulars responsive to the

bill, it is not considered as sustained by sufficient proof unless it be by more than the testimony of one witness.

§ 309. *It is no bar to the recovery that the suit for the rescission of the sale of land was instituted two years after the purchase and little more than one year after the discovery of the fraud.*

It may be added further, in the outset, that I discover no delay in the institution of the proceedings by the complainant which should be regarded as a bar to his recovery on the merits, if merits exist, and which can, therefore, be interposed to excuse this court from the labor and responsibility of examining the rights of the different parties on those merits. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-86, *supra*), and *Mason et al. v. Crosby*, id., 363 (§§ 22-27, *supra*).

The proceedings were begun in less than two years after the purchase of the land by the plaintiff, and in little more than one year after the deficiency in the timber was ascertained to be great, and after the conduct of the respondents was believed to have been unfair and illegal. Nor is there understood to have been any alteration in the property or title, since the sale, which is sufficient to disable the plaintiff from making a valid reconveyance of his share, if it should otherwise appear just to rescind the sale, though it is stated in evidence that some auctions of the land for taxes have since taken place. But redemptions are understood to have been made before the title was foreclosed; and though some timber was got off by the plaintiff and others the first winter, it is supposed to be not so much as sensibly to change the value and condition of the premises. Proceeding then to the great points in the controversy, as the interests and liabilities of the respondents are in some respects different, I shall first consider those of Cross, the most active and conspicuous participator in the transaction; next, those of the rest of the First Boston Company; and, lastly, those of Noble.

§ 310. *In a suit to set aside a sale of land on account of fraud, the party most interested in the sale is in a situation to be suspected of fraud.*

It is clear that the respondent, Cross, was the sole owner of the whole township in dispute, about the 1st of June, 1835. It is equally clear that in all the subsequent transfers of it, as well as in all the contracts and arrangements for sales, whether defeated or perfected, and in all the representations connected with them, whether true or false, and in all the certificates obtained as to the timber, and which are conceded now to be so erroneous, he was the chief actor, and probably more deeply interested than any other individual.

For if the whole land cost him only about \$30,000, which is the price that was to be paid to Reed, according to his testimony, though Cross testifies to near \$20,000 more in various ways; and if Cross obtained for it about \$70,000 beyond this \$30,000 from the First Boston Company, and next received in New York near \$30,000 more than he was to pay to the First Boston Company, and something like \$5,000 more net profits on his one-tenth reserved in his original deed, and invested in that company, he would, supposing all the payments to be honestly made, have realized, in only this one township, in about six months, the enormous profits of near \$105,000; while all the other persons united, so far as is known here, could not have profited in this same operation half that amount, and no one person over one-twentieth as much.

It will be seen, then, at a glance, how great was his interest or inducement to effect these various sales, and how strong were his motives to press on purchasers such considerations as should be likely to throw within his grasp in so

short a time, and in an operation as to a single tract of land, such a brilliant fortune. Cross being thus situated, as the great gainer by these sales, was therefore in a condition to be tempted into misrepresentations in order to effect them. But having stronger motives than any others to do wrong is only one step in the inquiry as to his real conduct; and the next is, what representations, if any, did he actually make concerning the township, which were in fact erroneous, and likely to deceive the plaintiff?

The first specific examination concerning Cross' course, in respect to these sales, may as well be in relation to the representations about the quantity of pine timber on the township. What kind of statements on that subject did he actually make to the plaintiff and others, about the same period, and connected with the sale of this land, so as to render them competent evidence? See cases in *Warner v. Daniels*, 1 Woodb. & Minot, 90, showing when they are competent. Next, were they relied on by the plaintiff? and were they false?

The case is full of proof that he made statements as to the quantity of good pine being one hundred and thirty million feet per acre, not only at Boston and Hopkinton, in writing and orally, by guaranty separately and in bonds, but at Long Island and to this plaintiff, with the other purchasers.

That they were relied on, also, is proved by the fact that the land was purchased with the view of paying the interest and part of the principal speedily by sales of the timber; that Cross gave a guaranty of twenty-five per cent. profits from it by such sales; that even before leaving New York he was constituted their agent, to go at once on the land and begin the removal of the timber, to realize these great profits from it; that he gave written guaranties of the quantity, and computations showing how some \$43,200 per share could be made by the purchasers of this timber.

§ 311. — *the fact that a written guaranty supporting false statements was also given providing the purchaser with another remedy does not prevent the suit to rescind such sale.*

It is an objection not well sustained, which his counsel have urged against setting up such representations as fraudulent, that another remedy existed on those guaranties. It is a novel doctrine that a written warranty is a bar to a suit or defense founded on fraud in the same transaction; and the cases are not only numerous, that fraud vitiates all contracts tainted by it, but that it may be set up in contests as to the condition of the sales, whether a warranty existed or not. *Semb.*, 1 Wash., 170; 1 Day, 156-158; 4 Mass., 491, 492; 4 D. & E., 67, 337; 6 John., 110, 181; 1 id., 414, 503; 2 Woodeson, 416; 7 Mass., 68. If such an objection was urged in another view, as furnishing an ample remedy at law (and hence that none in equity exists here, under the judiciary act of 1789), the conclusive answer to it is this: The other remedy is only against one of the respondents instead of all, and that one entirely insolvent.

All that remains on this point is, to decide whether these representations were in reality true or false. Perhaps there is no better general test of this than the failure of Cross to fulfill his various guaranties concerning them, during the four or five years after, when the plaintiff and others contended that they had turned out to be false, and while Cross was not only under guaranties to make them good, but swears that he had ample means for any such purposes, though since become insolvent.

If they were true it would have been no loss, but a gain for him to take back the land; or if doubtful, it was honest and honorable to exhibit new evidence of their truth, or, with his professed ample means, to make good the

indemnity he had given. On the contrary, if they were neither true nor colorably so, but undeniably groundless, and made, not in ignorance, but with intent to mislead, the course of conduct was likely to have been pursued which has been charged in the bill as exhibited on the present occasion. Firstly, buying Reed's bond, who estimated the good pine at only twenty-five millions, then getting a set of certificates which were made in March for seventy or eighty millions, and then in three months, when new sales at a higher price were contemplated, obtaining a new set of certificates for one hundred and thirty millions, increasing like the rolling snow-ball; and whether obtained in some degree by presents or "gratification money," or by inexperience and looseness of morals in certifying, it is not necessary to settle on the evidence as to those points; but only that they were obtained and used, and were in truth great exaggerations. Again, when the correctness of the statements as to this large quantity of timber was questioned by Cordis, certainly as early as October, if not September, and the grounds of it stated to Cross; and when in consequence of it, in part at least, the Second Boston Company was broken up, it is in symmetry with this previous suspicious behavior of his, not to have the land more carefully re-examined, and not to be more cautious and measured in his future statements as to the quantity, but still continue to represent it as high or higher than the last inflated certificates. And so, when letters were written to New York from Maine, repeating this charge of deception against him, he refrained from taking any new steps to disprove it, as incorrect.

So, when at Long Island, new and more careful explorations instead of these were proposed to him, not being willing to make them, but objecting to the loss of time from them, and offering his guaranty as to the quantity, with assurances of his great wealth and responsibility to meet it. Lastly, when those who had been thus misled complained in 1836, it is in perfect keeping with the same hypothesis, that the certificates were false, if not so known to be, that he should not attempt to fulfill his guaranty, though professing in his answer to have been amply able, but recommended "Christian resignation," and proceeded at once to foreclose his mortgages.

If satisfied that a great error had occurred inadvertently, why did he not procure and return the notes, and honorably rescind the sale, when his ability at that time, though pledging the notes to Noble for certain specified liabilities, is sworn by both him and Noble to have been great, and to have rested on much other property not pledged, as well as that pledged. But the closing survey of the timber, made under an arrangement between the purchasers and some of the holders, to give up their notes to the amount or extent the quantity of pine timber should prove to be less than eighty millions of feet, shows beyond question how the actual truth was in respect to the representations of there being one hundred and thirty millions.

The whole quantity was in fact found not to have exceeded eight millions, not one-sixteenth of the quantity represented and guarantied; and two of the very certifiers in March, 1835, Russell and Paine, when under oath, testify to this reduced quantity of eight or ten millions as the truth in March, 1835, instead of the eighty millions to which they then certified, and instead of the one hundred and thirty millions which Russell was the pilot to point out to the certifiers in June, 1835. How fully does this indicate what was to be inferred from Reed's own knowledge and belief, for some time an owner and explorer of this township, that the quantity of good pine timber was then known not to exceed twenty-five millions?

And how fully could any one possessed of that knowledge, like Cross in all probability, have been satisfied that certificates swelling the quantity several hundred fold must be deceptive, and founded in ignorance or fraud? And that the land, if possessing such an increased quantity, would never have been sold to him by Reed at a dollar per acre, or even two dollars, and that he himself, or the Boston Company, with such an increased quantity really on it, ought not to sell it at even six dollars per acre?

Whether the exaggeration and falsity of these representations and certificates were known at the time or not by Cross is not material in a civil suit, however otherwise it may be in a criminal one. See *Doggett v. Emerson*, 1 Woodb. & M., 205. But, to show the probability of his knowledge, connected with his representations, and the fact of their falsity, it is apparent that still more evidence could have been furnished if deemed necessary.

The bond of Reed distinctly appears to have been in the market for this land before January, 1835, and in the hands of some person in Bangor. It would have had a very material and additional influence on this point, if this township, as seems probable, had in fact been fully explored before he bought it, and the quantity of timber ascertained to be less, or at all events no larger than Reed had supposed. As the proof is, it certainly was surveyed from Bangor before January, 1835; and the result as to the timber seems to have been such as to defeat any permanent purchase of the township there. And this was probably done by Haynes, judging from Cross' own answer to Tuthill's bill.

That Cross knew this result before his purchase is not improbable, though the evidence of it is inferential. Certainly he knew it through Cordis in September, who had obtained it at Bangor from Moulton, and made it the ground with Cross against completing a purchase of a share in the town from him, and was thus fully in possession of the facts when he made the exaggerated statements to the plaintiff in October and November after. Before that, also, from Reed's evidence as to Cross' frequent inquiries of him about the quantity of timber on the land, Cross probably must have known that Reed did not, though once the owner, compute the quantity higher than twenty-five millions. Probably, then, through the whole sales, Cross knew that the survey by Morse and Stone was not only a great exaggeration of the true quantity of pine timber on the land, when calling it seventy or eighty millions feet per acre, but the survey in June, calling it one hundred and thirty millions, was a still greater departure from the facts. He had assuredly enjoyed ample means to know the incorrectness of both of them.

But if this survey under Morse and Stone was believed by Cross to be only as high as the truth, and nothing then existing is known which should suggest any motive for its being too low; but, on the contrary, Moulton's communications, founded probably on some other prior examination, or facts connected with this, indicate a knowledge at Bangor that these were too high, the inquiry arises, how could Cross honestly suppose that the statements made to the First Boston Company by himself and the second lot of surveyors, in June, 1835, nearly doubling this quantity of good pine, were unexaggerated and true? But much more, how could he in November, after told by Cordis in September of Moulton's representations, if not known before, honestly repeat his exaggerations and guaranties?

Either the first surveyors were incompetent and unfaithful, or the last ones were so; and the certificates of both could not properly be used longer as

trustworthy. Or if it be said that he confided in the first ones, and not in the last, then the last should not have been exhibited, and the inflated quantity set out in them should not have been reiterated by him as less even than the truth about the quantity, and the correctness of it guaranteed by him over and over again in writing, as well as verbally.

But enough as to the timber. The next important representation connected with the sale, and especially with the confidence placed in the statements and guaranties of Cross, as to the quantity of pine timber, related to his wealth. As that was asserted and believed by others to be great, or otherwise, his guaranty as to the quantity of timber, and also as to the profits to be made from it, would be more or less confided in, and more or less induce a stranger to buy. Had Cross represented himself to be poor, who believes that his guaranty would have had the influence on the purchase by the plaintiff, which it probably had, when coming from a man stated to be so very wealthy?

So the prior purchase of the land back by Cross from the first company, at an enhanced price over what they gave for it, if made by a man of property, able and likely to pay, and not by a needy speculator, careless whether he ever paid or not, if he could only obtain the title to sell to others, was an important element to influence the plaintiff and other buyers. What others, possessing fortune and responsibility, had done at \$5 per acre, there could be less risk in doing at \$6, than if it had been done by those who were irresponsible and never likely to pay, unless able to sell again at as high a price. The importance and influence of his wealth on purchasers in trusting to his guaranties, and to the risk he had run in buying at such high prices as a man of fortune, are thus very manifest.

That he made representations of his great wealth to the plaintiff and others, and in almost all forms, is not only proved again and again, but attempted to be shown by himself and some witnesses to have been well founded. Without going into all the details of evidence, as to the truth or falsehood of his assertions to the plaintiff and others, concerning his great wealth at that time, it is certain that he has since taken the benefit of the bankrupt law, and disclosed, in his petition and schedule, rather a meagre account of property compared with the debts he owed. It is equally certain that no particular losses are shown to have been sustained by him since 1835, unless it be by the Long Island notes; and most of that must, as yet, have fallen on others. Much less are many specific losses shown, since 1837 and 1839, when his last answers were filed, and when he still seemed unwilling to be regarded as insolvent.

It is evident, too, that the depreciation in his property since 1838 and 1839 is not likely to be much, though it may have been more since 1835. But, even in 1835, the idea of his great wealth seems to have rested much more on a mere reputation to that effect, than on any substantial and particular data, sworn to by witnesses. If his own testimony, however, were competent, the case, on its face, in its general aspect, might appear to be one showing his fortune then to exceed \$290,000. Indeed, even after his conveyances to Noble, he represents himself as retaining "much property," being, as estimated by him in another place, over \$130,000; and that he has since paid "many thousand dollars." But the proof as to this, when coming to particulars, is very meagre, except his own testimony. That he had, even in October, 1835, much estate of solid and real value, except what was then conveyed to Noble, and

especially much after paying his debts, is very questionable from various circumstances, some of which it may be here proper to advert to.

They are, that the conveyance then was made on the eve of a threatened suit by the First Boston Company; that it contained a long list of both real and personal estate; that it extended down to his carriage and horses, if not to everything which was exposed to attachment; that it seemed on its face, so far as any writing is put in the case, to contain another proof of its being a general conveyance by an insolvent, as it extended so as to cover subsequent liabilities for four years; that one of his creditors soon after sued him, and recovered a judgment which he was unable to satisfy; that others had contests concerning the title of a part of the property he conveyed to Noble; that the only notes he is shown to have procured since the conveyance have been likewise transferred to Noble under like pledges; and that from his own answer, and more especially his deposition, giving an estimate of the value of his property and the amount of his debts, so as to render him then worth a balance of nearly \$150,000 by one, and \$290,241 by the other, it is quite evident that the property, not assigned to Noble, was chiefly of a "fancy character." It consisted, among other things, of shares in the Maine "Mining Company," "United States' Quarrying Association," and "Hollis Granite Company;" beside, some lands in various places, and among the rest in "Shelburne, N. H.," "inclusive of minerals," and for which little probably was given, or could soon, if ever, be expected. These are valued by him at sixty or seventy thousand dollars, and including what was assigned to Noble, there are, beside, in all his estate, as Cross estimated it, some \$200,000 of other lands, and \$99,504 in notes and other obligations; making the great aggregate of \$390,241. The debts owing are put at only \$100,000.

But what has been done with these effects, except those assigned to Noble, or what was their real value, does not appear, as he gives no exact list of sales or collections, and they are not contained in the schedule of his effects as a bankrupt. His deposition, furnishing the chief specific data concerning them, is confined, in that respect, to 1835. Some of these will soon be referred to for another purpose, and others are particularized in the eighth page of the testimony taken as to document (C), and exhibit, among other alleged and extraordinary reservations, when conveying to Noble, about \$5,000 in money, and this at the very time Winslow was attempting, without success, to collect from him less than \$1,000.

Again, taking the property which is in his conveyance to Noble, and putting the value on it which Noble would seem to, and making the deductions made by him for incumbrances, and then making a like *pro rata* reduction on Cross' estimates of other property, where he is as likely to run into excesses as in that with Noble, and it is manifest, even on his deposition if admitted, that he was a bankrupt in 1835, not having means enough, if thus estimated, to pay all he concedes that he then owed. He seems to forget that the debts he owed were sure to be exacted without reduction, while the claims due to himself were subject to great losses and risks, and the property he owned was of such a character that no reliance could be placed on anything beyond its cost, and not always that, until it was actually sold and the consideration realized in money.

Thus, as one illustration. Of the lands assigned to Noble, the latter seems to value one portion of them at about \$24,000, after deducting the mortgages

on them; while Cross, after a like deduction, values them at \$150,000. This is an overestimate by Cross in these lands alone of \$126,000. Supposing a like overestimate in all his property, and the true value of the whole was but \$56,000, while his admitted debts were \$100,000. Again, Cross computes all he assigned to Noble, both real estate and notes, at about \$203,000; but all which Noble has realized from it is stated to be only \$13,500, or not one-sixteenth. His whole property on that scale of depreciation would be worth only \$22,000, or not enough to discharge his debts into \$78,000.

Again, Noble swears that all the signers of the notes assigned to him in the first instance, except two firms, have failed; that set-offs existed against many of them; that none were secured by mortgages; and that half of the debt of these two firms was doubtful. From this it can readily be computed how little his notes, as well as other property, were likely to accomplish in paying \$100,000 of debts, most of which in the end, as was to be expected, seem to have been spunged out by the bankrupt law.

Another striking evidence of Cross' own opinion being entirely unsettled as to the value of his property to the extent of over \$100,000, is, that in his deposition he computes his wealth to be from \$100,000 to \$150,000 (varying as doubtful quite \$50,000), while in his bill of particulars annexed he computes himself worth \$290,241, after paying all debts, or nearly \$200,000 more than the first sum of \$100,000. There is another similar illustration of his habit in overestimating his property, tested by himself, and near the time of this transaction, before any depreciation could have occurred. Thus he computes the Dorchester property at \$7,000, when he sold it to Noble for only \$1,200, a depreciation of near five-sixths. Such a fortune, like the Indian philosophy of the earth resting on an elephant and the elephant on a tortoise, but nothing for the tortoise to stand on, falls with the first adverse gale.

So it happened, and was verified by Cross himself in relation to the sales and the net profits anticipated, of more than \$100,000 from this very tract of land now in controversy. Instead of realizing that princely fortune, the very first purchase money to Reed of the small sum of \$30,000, according to the proof, has never yet been paid, except a few thousand dollars otherwise raised. The paying of that depended mainly on the paying by the First Boston Company to Cross; and their paying depended on Cross' purchase back and paying them; and his paying them depended on the paying of the First Boston Company or somebody else to them; and the paying by the Second Boston Company or others depended on the sale and paying to them by purchasers in Long Island or elsewhere; and theirs, on the paying to them by the purchasers of "the good pumpkin white pine timber" at one hundred and thirty millions feet, yielding over \$1,000,000 in profit, when in fact only seven or eight millions grew on the whole township, and with a bad stream to get it to market. This foundation of the whole failing, the entire cob-house tumbled down, with fragments rolling and scattered in all directions, but not a single payment perfected from first to last.

I refrain from spending time on the evidence as to Cross' efforts to create, through the newspapers and otherwise, in advance of the attempts in August to make these sales, exaggerated notions as to his great wealth and philanthropy. It is certain that when in that month he gave his bond to the first company, though it was intended, as he says, for a purchase, they were not willing to trust him as a man of property, nor did they even confide in his notes secured by a mortgage. So, again, whether he was intending to dupe

others or really duped himself on this topic till the 22d of October, 1835, it is impossible, after the failure which happened then to meet his engagements with the First Boston Company, and after the Second Boston Company had refused to buy of him the same land, assigning to him a deceit as to the quantity of timber as a cause, and after he had become conscious, as stated in his answers, that eastern lands were growing duller of sale and falling in the market, and after he had felt obliged to make so large and sweeping a conveyance of his property to Noble, it is almost impossible to suppose that the delusion could continue of his being likely to turn out very rich. Certainly not, unless in the madness of the times, not entirely over in some places, he could be able to dispose of this township in some way so as to realize more for it than he had engaged to give the First Boston Company.

It is very significant that Noble, who knew Cross' means best and his character fully, and was less likely, therefore, than others to confide in mere reputation, or in newspaper puffs, treated him throughout very much as mankind in general do debtors whom they consider insolvent.

His earnest inquiries of Cordis as to any payments he intended to make to Noble, his procurement of security on the 22d of October of almost the whole of Cross' property shown to be attachable and to possess much real value, even down to his horses and carriage; his obtaining also all the new notes belonging to Cross connected with the Long Island purchase, almost immediately after his return, and extending to near \$30,000 in amount,—all indicate that his practical course, whatever may have been his theoretical conjectures, was precisely that of a shrewd man towards one believed by him to be of questionable responsibility.

And when it soon became apparent that all Cross' assignments to him were likely to yield much less than his just claims, and that these notes were to be contested, it seems inconceivable, if he too then deemed Cross really retaining much valuable property and able to secure any of his creditors (as his answer and Cross' both hold out), that he should not have asked for more of it to be placed in his hands, considering the confidential and friendly relations that existed between them, and considering the very large liabilities he and his partner Wyer were under on account of Cross, amounting, as he says, to near \$80,000.

Indeed, in his answer in Tuthill's case, he says he could not, in October, 1835, have realized by a sale over half the nominal amount of all his securities by notes, and that since, as before remarked, every signer of them has failed, except two persons, and half the small claim against them is doubtful; that set-offs existed against many of the rest, and none were secured by mortgages or sureties. Could something more and trustworthy as security have been got, and his demands against Cross were genuine, is it probable he would not have obtained it, when his existing securities were proving to be so worthless and he had been so anxious even in October to be made safe?

§ 312. *A grantee of land under a contract of sale is not, so far as third persons are concerned, the actual owner or purchaser thereof until the consideration is paid.*

The next misrepresentation set up as made by Cross in August, October, and before the sale in November, is that he owned the whole township A. No. 2, having repurchased it of the First Boston Company at an advanced price, and from a conviction of its superior qualities. Clearly, from the evidence, such a statement seems to have been made in August, during the negotiations,

as well as at the time of the negotiation in October, and the sale in November.

Indeed, it is *quasi* admitted, being justified as true on the ground that having obtained a bond for a deed in August, and given a bond to take and pay for one on the 19th of October, he was virtually the owner till that date; and that though he then failed to obtain a deed, from his inability to make the promised payments, yet he obtained a parol extension of the time for having the deed and for making payment, thirty days longer. However such a contract for a purchase may, in law or equity, confer certain rights to the land, which may be sustained on making, subsequently, the payments stipulated (1 Sug. Vend., 171; 1 Atk., 572; 7 Ves. Jr., 265, 274), yet it is difficult to see how they amount to an actual sale till the condition precedent is fulfilled, and which usually is the payment or tender of the consideration.

As between the parties where there is a contract to sell and buy, chancery, by considering that done which ought to be done, may regard the buyer as owner, and if he is to mortgage back, as mortgagor. *Longworth v. Taylor*, 1 McLean, 395. This must be, however, only between them and not third persons, and even a court of equity could not consider a deed as executed unless the consideration was paid or secured. So what is to be conveyed is regarded as personalty, if the vendor die before conveying. 7 Ves. Jr., 436; *McKay v. Carrington*, 1 McLean, 54 (*EQUITY*, §§ 801-11).

Here, too, not a dollar of the money was tendered or paid at the time agreed, nor till after Cross had himself conveyed to the plaintiff and others, and obtained notes and money to pay over to Montague, who then, and not till then, delivered to Cross the several conveyances of one-tenth each, which had been signed by the trustees, and which conveyances they did not mean should have any effect till payment and delivery. This was as fully known to Cross as to themselves. It is equally difficult to see how such an inchoate and imperfect claim to have the land in a certain event, which had not then happened, and did not happen at the time agreed, nor till after he had made the very sale, now in controversy, could, in common parlance, be regarded as making him the owner or purchaser till that event.

Much less can it be regarded so in the sense and for the purpose and effect manifestly intended in making those representations here, and as they were probably understood by others, who relied upon them. The impression undoubtedly made was, that the land was of such clear and high worth, from its great amount of timber and other circumstances, as to be sold over again, by those purchasing from himself, and even to one so well acquainted with it as a former owner was presumed to be, and at an advanced price on the advanced price which he had before obtained for it, and that owner also a man of great responsibility and wealth willing to be risked in this way.

But if the naked truth had been developed at the sale, that the money had not been paid to Cross by the First Boston Company, for the enhanced price then given by them, if it has been to this day, except in part; that Cross himself was one of the purchasers in interest from himself at that enhanced price, to the extent of one-tenth of the township; that the next purchase back by him, at a still further enhanced price, had never been completed, nor a dollar of money paid for it, nor any likely to be, until he could accomplish another sale of the land, and thus raise the means; that this had been attempted with a Second Boston Company, a part of whom were also members

of the first one, buying from themselves at an advance, but never paying anything, from a conviction among some, at least, that the pine timber on the land had been greatly overrated,—looking at all this, can any person suppose that the purchase back, represented by Cross to have taken place to himself, accorded, as understood by the grantees in Long Island, or was meant to accord, with the whole truth? or that it was supposed by him to be understood by the plaintiff, and other grantees, in conformity with what he knew to be the truth in relation to what had happened as to that repurchase?

And can any one for a moment believe that the real facts as to it, if all disclosed, would have made the same impression on them, or held out the same inducements to buy, as the representations did which Cross then actually made? I think not. But when you add to this the further representation by Cross that he had purchased this land back from a conviction of its superior qualities, there can be little doubt of the influence he meant to produce by the whole statement, and that it was at variance with the real gist of the whole transaction.

There was still another matter, connected with the land and the sale, which appears to have been stated by Cross in a manner not according with the facts as proved by various witnesses. The value of all the timber on the land depended much on the facilities, and speed, and certainty of getting it to a market. Cross represented that it could be sent to market, yearly, by a stream running through a portion of the township, while in truth it cannot be so sent, usually, short of two or more years; and he thus impressed on the plaintiff and others a belief of a fact which would naturally lead to a great overestimate of the value of what timber did exist on the land, independent of the other impression he attempted to make, of a quantity of pine timber being there so greatly beyond the truth as since developed, and as before referred to.

But, besides these departures from what was open, upright and truthful in the transaction, certain other measures were resorted to with a view to produce the sale, which were reprehensible, and tended to suppress the real character of the transaction. In such cases there is little if any difference between *suppressio veri* and *suggestio falsi*.

Thus the whole matter as to the Second Boston Company, whose agent it is now said by some of the defendants he was, and whose bond of August, 1835, he carried to New York in his pocket, and who in that bond state they had purchased this township of him, when they had not, but whose failure to purchase and pay took place in October, and were well known to him in November, as well as the cause of it, in the deficiency of timber on the land, which had been assigned to him by some of them,—I say, the whole of this seems from the evidence to have been carefully concealed or suppressed, and did not become known to some of the grantees, if to any of them, before the ensuing spring.

Had it all been made known before the sale, it cannot be doubted that its influence would have been decisive to prevent the sale, and could hardly have been overcome except through another concealment which existed in the case, and which is among the most censurable of the whole, and was at the start resorted to by Cross, and must throughout the whole of it have naturally exercised a controlling influence over the minds of the plaintiff and others. This was the employment of Chalmers, residing in New York, and a former partner of Cross, and an acquaintance of the grantees, as a secret agent of Cross, to

promote the sale, on high commissions for the service, while Chalmers was to hold himself out to the grantees as a friend of theirs in the trade, a counselor, and a purchaser of several shares in common with them.

The proof of all this, though denied by Cross in part, is satisfactorily made out by Chalmers' own testimony and various corroborating facts. If Chalmers, thus conducting, stood alone to disprove the answer of Cross, thus conducting, the rules of evidence might require us to hesitate as to the proof of this charge being sufficient, unless believing Cross to be otherwise much more discredited by the contradictions to many of the allegations in his answer than Chalmers is.

But, beside such a consideration, Cross admits some circumstances which go to support Chalmers. Cross admits he had been his former partner, and Cross was thus likely to use his services, and was not so likely to mislead him, as a stranger, in making a sale to him. Cross needed the services of some one to make him acquainted with the New York grantees, and he admits that certain notes were executed between them, which Chalmers avers to have been part of this corrupt transaction. Cross admits that he abated \$1,000 on one note as a compromise of "Chalmers' claim," and "to pacify him."

Nor does he deny the averment in the bill, that Chalmers signed an obligation to take two-thirtieths of the township at \$9 per acre, to be afterwards shown to the Long Island purchasers. He also made Chalmers the correspondent in relation to this sale during his absence; and letters of Chalmers put into the case, written to some of the purchasers, as well as to Cross, pending the negotiation, are of a character to indicate the double capacity in which he was acting, or rather show much more of the agent for Cross, than the ordinary purchaser. One of them written a few days after the sale, and addressed to E. Wyer, another former partner of Cross, recommends the responsibility of the signers of the notes, and shows Chalmers still continuing to act in aid of Cross and his interests.

The evidence of Miller and others proves, likewise, Chalmers' efforts to smooth over any difficulties in the way of the sale, which were much more in conformity with his agency for Cross than with his action merely as a common buyer with the rest from Cross. The influence which Chalmers, thus situated, could and did exercise, would be sinister, and almost impossible to thwart or resist. While confiding in him as their friend and copartner in interest, even affixing his name to and heading the written subscription to take shares, and expressing solicitude as to the purchase, and actually receiving conveyances as if a *bona fide* purchaser from Cross, they in reality were cherishing in him, the hired agent of Cross, with a deep interest, to tempt them to purchase, though ruinously, and himself taking really no share in the purchase, except as in payment for his fraudulent services.

The notes given to Cross were, as Chalmers states, but a cover to blind the eyes of all concerned in Boston and New York, with counter notes given by Cross to him, to be subsequently exchanged or arranged so as to exonerate Chalmers from any other payment than his commissions as agent. Had the grantees known Chalmers' position, it cannot be supposed, for a moment, that the trade would probably have been consummated.

Connected with this, and the diminished confidence to be placed in Cross' statements when to the contrary, and connected with his general behavior as to fairness throughout the whole business, is the change in his answers and oaths respecting the form of the written contract with Noble. The lame ac-

count also given of his exaggerations concerning the amount of his property; his apparent tampering with some of the certifiers and persons living near the land; his concealments as to the Second Boston Company, and of the disclosures made to him by Cordis; his ante-dating all the writings in November; his ante-dating the paper signed by Gregg; his having certificates addressed double, as if made either at his request or Babcock's; his failure to produce the Reed bond; his claim at one time to have Noble retain property to pay it, and then avoiding it when sued; his pretensions to be immensely rich in 1835, and yet, in that very year, allowing himself to be prosecuted, defaulted, and no payment made, and assigning most of his estate to other creditors; his assumed ability to fulfill all his extravagant guaranties, and yet going into hopeless bankruptcy; his avowed loss of the written contract made with Noble, but preserving one not made; the looseness evinced in his deposition respecting his various debts, and the securities for them, lodged with Noble, and not accounted for in his bankrupt schedule; and, finally, his eagerness to sell what he stipulates and guaranties shall yield a profit of \$1,296,000, thus throwing away at once that immense profit! — from all these, and from the considerations before explained, I regret that it is impossible to divest my mind of the conviction that the conduct of Cross, in this transaction, has been such as to render his answer entitled to diminished confidence, and the sale to the plaintiff void on account of material misrepresentations, which could not but have influenced the plaintiff to make the trade, and which have turned out to be unsupported by facts.

§ 313. *Quære: Whether, where a bill only alleges fraud, relief can be had on the ground of mistake.*

Nor do I entertain much doubt that the bill in this case alleges enough to justify setting aside the sale on account of a gross and great mistake in the quantity of pine timber on the land; there being clear evidence not only of that mistake, but that the quantity of such timber formed a principal inducement to the purchase by the plaintiff and others.

But there is no substantive, distinct claim in this bill to set the sale aside for a mistake alone; and though all the averments necessary to recover for a mistake may be included in the higher charges of fraud, and there are some analogies to justify the waiver of what is surplusage in cases at common law, such as finding a prisoner guilty of manslaughter under an indictment for murder, and of larceny under one for burglary, yet it is not certain that the respondents, under this bill, would come fully prepared to make such answers and proof as they would make, in case of a bill asking specifically to have the sale set aside for a mistake. The case of *Daniel v. Mitchell*, 1 Story, 172, seems to sustain such a course; but the printed report of it does not set out the bill so fully as to enable one to judge, with certainty, whether it is a precedent in point or not on this question.

The manuscript bill, however, on being examined by me, is found to declare the representations there made not to be true. It uses the words, “‘knowingly’ and ‘wilfully’ misled the explorers, with intent to deceive them;” that, relying on them, they purchased as if true; that, in fact, the land did not contain so much timber, nor of such quality, nor were the certifiers honest or acquainted with business; that the respondents knew so; and that the plaintiff had not seen the true tract of land, and the defendants combined to deceive him, etc., etc. The words “fraud” or “mistake,” *ipsissima verba*, are not used, though the bill seems to rely chiefly on the former. But if the

doubts first expressed on this subject are somewhat shaken by this state of the record, in *Daniel v. Mitchell*, it is manifest that Tuthill, one of the purchasers, had some means of knowledge to correct mistakes; and that, through him, some opportunities for information were enjoyed by all the parties, which possibly might prevent them from setting the contract aside for a mistake alone, if no falsehood or fraud were employed to prevent the full and fair use of those means, and to make the parties enter into the trade, partly on account of other circumstances, tainted by such falsehoods.

I have therefore turned my attention to the matter of falsehood and fraud, as perhaps necessary, and have inquired what misrepresentations were made, which were material in the trade, rather than looking to mere mistakes; and am convinced that falsehood and fraud were practiced in all the means used by Tuthill, so far as those means are proved to have come to the knowledge of Smith, the plaintiff; and in that mode, as well as directly, they extended to other essential elements in the trade, so as entirely to destroy its validity in respect to the respondent, Cross. More especially is this the case as to many details, where the purchaser, confiding in the representations and guaranties of Cross, who claimed to be a man of great wealth, would be less particular, and surely would be far less so as to matters laying more within Cross's private knowledge. *Mason v. Crosby*, 1 Woodb. & M., 342 (§§ 22-27, *supra*). As to these, still trusting to him, they would look only to general appearances and general considerations.

There is, to be sure, much in extenuation as to Cross, that shows him to have been, in such an insane era as 1835, in many respects duped as well as duping; and after conforming heedlessly to a false standard of the times, acting, without doubt, from recklessness and want of sober reflection, in respect to his statements, more than with a view wilfully to misrepresent and defraud. One striking illustration of this existed in his presumption to guaranty that the land, even at the high price it was sold for, should yield over a million of dollars in profits. Nor is there any solution of this, independent of extreme credulity and inconsiderate folly, except what is worse, a conviction that he was worth nothing, and hence was risking nothing, though professing to be so wealthy.

His temperament seems to have been sanguine, and his operations hasty; and hence he perhaps often believed what others, even in that credulous epoch, distrusted. But it is to be remembered, that in all these cases the court is bound to look only to civil obligations and duties. It is not necessary, except in criminal prosecutions, to find that the mind was evilly disposed, or knowingly deceiving under an entire loss of its moral tone. But it is enough if statements were made, whether with or without knowledge, which were material to the trade and were relied on, and which turn out to have been clearly unfounded. He who hazards such statements should be made to suffer from them *civiliter*, rather than those whom he misleads by them; the author of them should suffer rather than their victims.

According, then, to this respondent, all which charity and the facts may justify, he must still be answerable to the plaintiff for all the money and notes he obtained from him. What aid he ought to receive from the other parties to the bill in meeting this liability, and on what terms or conveyances back by the plaintiff, will be seen after examining the rest of the case.

The next inquiry is, how does the case stand in respect to the other defend-

ants, who were members of the First Boston Company? They were owners, as *cestui que trusts*, of certain shares in common and undivided with Cross.

Besides this, they had recently bought the land of him, and united with him in making a new survey of the timber on it; and some of them had visited the premises in company with him. He held a large amount still due from them in notes; and in a few weeks, if not days, after taking them, during the very next month, entered into a negotiation with Babcock and Glover, the trustees authorized to sell and manage the land, to repurchase it from them at the advanced price of \$5 per acre, when they had given only \$3.50. This was done, either because he believed, after so short a time, that he had parted with it much below its real value, though at nearly treble the price he had agreed to pay Reed for it, which belief would be not a little extraordinary; or from a conviction, which he had impressed on the minds of the trustees of the company, that although not able to pay them so large a sum as the advanced price would amount to, even after deducting their own notes to him, he could in a short time accomplish it, if they would give him a bond for a deed by the 19th of October ensuing; and, in the meantime, would co-operate with him in effecting a sale to a second company in Boston at a still further advance, and then enable him to make still another sale at a still further advance for the second company in New York or elsewhere.

The whole seems to have been parts of one plan; that plan or arrangement was to effect a sale by and payment to the owners at an advanced price, and for profit to them as well as Cross. It was a leading object to secure payment no less than a sale, in order to discharge their notes to Cross as well as realize large gains soon, and, taking this idea with us, many of the apparent discrepancies will be reconciled. They doubted Cross' responsibility, as has been already shown, and were under heavy liabilities for the considerations, which they must have been anxious to provide for and seasonably meet. To accomplish this arrangement or object through Cross, it was indispensable that he should have the aid of his associates in the First Boston Company, in order to obtain and to give titles, and to make them in a satisfactory degree sure, as to being paid such a large consideration as they were to receive, or even the smaller, but still large one, they were already liable to pay to him.

That this was not intended as an actual sale to him, it appears that they did not, with all Cross' exaggerated wealth, seem willing to trust him with a deed, and take his note for the balance beyond what they owed him. It is a very decisive fact, to show it was not meant as a sale to Cross, that they did not execute to him a deed at once, and, after taking up their own notes, receive for the balance a mortgage from him on the whole premises, in order to secure it, and which they could not doubt, after just giving \$3.50 per acre for the land, would make them entirely safe.

Nor could Cross object to this, if the sale was *bona fide*, though at a price so much beyond what he had just sold it for; because in this way he would secure the first notes that run to himself, and all the consideration for his original sale to them, and only be liable to pay, beside, what he had become convinced was the increased value of the township. Nor would its being incumbered by a mortgage be any bar to his subsequent sale on his own account at an expected price still higher, as the mortgagees would discharge it on receiving a due portion of the consideration, and a good title could then be made by him, and the balance would be his own regular gains.

But not doing this, and resorting to the form of a bond on the 15th of August, to convey to him on his making payment by the 19th of October, and receiving back a bond from him to make the payment, is much more reconcilable with the idea that the sale was either conditional and to depend on his success in other sales by their aid; or was rather, and as is most likely in the usages of that day, regarded merely as one mode of enabling Cross, as their agent or attorney, to get more confidence as an apparent buyer. He might thus be able to make an absolute sale, if he could, for them, before the 19th of October, and then, on letting them have the money and securities to the amount of \$5 per acre, convey a title, and retain the residue of the consideration for his services and gains.

In the usages as to land sales in Maine, in 1835 and 1836, the agent was frequently clothed with powers as an actual or expected purchaser, though in truth a mere agent. Because his statements as one who had himself ventured to buy and was more responsible as an owner would be more confided in than those of only an agent. *Doggett v. Emerson*, 3 Story, 700 (§§ 293-97, *supra*). At first the "bonds," so called, were not sealed, but were mere written slips agreeing to give a refusal a certain length of time at a certain price. *Doggett v. Emerson*, 3 Story, 700. But others were soon drawn by lawyers in common form. They appeared in that form more like real sales, and hence misled more in getting credit as owners, and at last that form was generally adopted. Cross also would be perfectly willing to enter into such an arrangement if confident he could sell the land with the company's co-operation at a higher price, as he would thus obtain not only the excess but the payment of his notes held against the company for his sale to them, and great profits on his one-tenth still owned in the township.

This direct interest of his seems, before the proceedings were closed in November, to have increased to two-tenths, if not more, thus making him a larger owner in the first company and hence more likely to be employed as its agent; and though an agent, this large private interest accounts also for the circumstance of his being willing to indorse the notes he procured to the company, having it also in his own power to take only good ones and to secure them, as he did in this instance, by mortgages which he seems afterwards to have proceeded to foreclose with dexterous speed. What appears to have next been done in order to render this arrangement successful?

The first company engaged to unite with other signers to form a Second Boston Company to purchase the township of Cross forthwith, at even a dollar in advance on an acre, or over \$28,000 advance in the aggregate on the price they had just agreed to sell it for to Cross. It is proved that they agreed as a company to take something like one-third of the new shares, divided into thirty instead of ten, as in the first company, and three of the old members actually headed a subscription for seven shares in the new company. How can this be accounted for, if the sale to Cross had been absolute or *bona fide* and not a mere mode of enabling the first company to effect in that way to others, if possible, an absolute sale in order that they might realize \$5 an acre from Cross for what they had just before engaged to pay to him only \$3.50?

If they really wished to remain interested in the land, why sell to Cross any but the portions which they did not wish to retain? And why, if so wishing, agree to pay \$1 per acre more than they were getting from him for the very same premises? If the old company did not still remain owners, and Cross their agent, why not pay Cross the one-third they agreed to take in the second

company, and convey to him to that amount in the township under their contracted sale to him? And why, in the end in November, did they not take the balance of the township back from Cross, or retain it and pay the enhanced price as agreed? But considering him in both these arrangements as their agent and a large part owner, and thus acting for them rather than for himself alone, and these last acts become consistent and are left unfinished as would be natural, while on any other hypothesis they are inexplicable.

So, if this subscription was not intended to be a real *bona fide* transaction, a sale and repurchase on the part of the first company to this extent and in this way, but only a cover to induce others to buy into the township at an enhanced price through Cross, their agent, though apparently to be a grantee, calling himself the actual purchaser from them, and being called by the new company their vendor, it is then reconcilable throughout. But without this hypothesis it cannot be. Thus reconciled, it is manifest the whole transaction operated deceptively, and was calculated to inflame the minds of new subscribers or purchasers with high hopes of still greater gains, seeing this township pass so rapidly through the hands of so many buyers, and each sale at a price constantly increasing.

In order to heighten the delusion still more, in this writing of the Second Boston Company, which is produced and signed by the members, it is not only stated that they had bought the land of Cross at \$6 per acre, and the statement is headed by three of the old members, but that Cross was to be their agent to effect another sale at \$7.50; taking to himself for his services the excess he might get beyond that, and paying himself out of it also the \$6 per acre they had engaged to give him. There is some evidence of other papers having been signed in connection with this, and certain guaranties having been made by Cross on them as to the quantity of timber on the land, in order to induce some of the subscribers to enter into this arrangement.

But there being no deed produced from the first company at that time to Cross, and none from Cross to the second company, and no proof of any notes being executed to him by any of its members for the consideration, or any bonds given to take any portion of the land, except in two or three instances, the whole real interest and title still continued in the first company, and Cross seems in reality, and throughout, to have been merely their agent, in order, if possible, to accomplish a sale, which would enable them to realize their expected \$5 per acre, and thus be able to pay Cross for the original purchase of him, as well as realize large profits, before they would convey a title to any one.

The representation of an actual sale to Cross by the first company, made by him and some of the other members, when they never had executed a conveyance to him, and never agreed to, except on a condition, which he had not performed, and did not perform seasonably; and when they were very careful never to make such a conveyance, till he had sold and obtained the means, and delivered them over to their agent, to pay them for the land, was pretty obviously a representation made, not because such a sale had been perfected, or was meant to be till they were paid, but because, in that way, he might obtain more confidence for his statements in selling, and might sell or profess to sell to another company, which they could aid in getting up, in order to have the means raised to pay themselves by that other company, or by some subsequent persons, thus induced the more readily to buy of the second company under Cross' agency. Without such a professed sale by them to Cross, it

would have been too barefaced to join in a company to buy again of themselves rather than of him.

But amidst the whole of this complicated machinery, and unusual as complicated, except in times like those of 1835, no actual conveyance was ever made by the trustees of the first company until the sale was completed to the plaintiff and his associates; and not a dollar of money appears to have been paid to them for any proposed or actual sale, till that now in question. The second company do not, in fact, appear ever to have received any deed either from Cross or the first company; and after the failure of the second company (October 17) to go on, Cross could act for nobody except himself or the first company; and as he had no deed from them, then or previously, he must, of course, in law, have been acting for them or nobody.

Indeed so much were they from the start using Cross as a mere instrument to accomplish a sale in their behalf, that some of their members aided him in the surveys of the timber; some united in the Second Boston Company to buy or profess to buy from him; some joined in puffing the lands to the New Hampshire purchasers, as if still deeply interested; some accompanied him to Long Island, where the sale was to be completed; and some received there the consideration, as well as delivered there the deeds.

It is difficult, then, to resist the conclusion, that, however in form they may have given Cross a bond to convey to him on condition, and however they did in form convey to him in the end, after he had made the bargain with and given a deed to the plaintiff, the whole was but a mode of making a sale by them, through him, as a part owner and agent. He was to fix the terms within certain limits, negotiate the times of payment and amounts, and they then, and not till then, were to receive the consideration and deliver a deed, to and through him, for the purchasers.

That this was the real nature of the transaction, several circumstances, beside those already specified, tend to confirm. They are such as the decline in value, which, for some months, had been going on in that kind of property; such as the refusal of most of the Second Boston Company to buy, and some of them on account of the quantity of timber having been overstated by Cross; such as Cross' inability to pay them, and take a deed on the 19th of October; such as the acquaintance of Cross with this kind of business, and his supposed usefulness as an agent to aid them; and such as his being almost in form, as well as substance, the agent of the second company also.

If all this shows that the first company had never sold, and never meant to let Cross or others have the land till they were well secured for the consideration, these various negotiations were virtually made to enable them to get their price paid or well secured, and then, and not till then, to part with the title. In accomplishing this, whether Cross acted as part owner, and thus largely interested to succeed, or as agent, or as both, is not very material, as, in point of law, the acts were, in a great measure, for all the owners, for *their* benefit, to complete *their* sale, and secure to them *their* price.

They could not, as Mr. Justice Story said in substance in *Doggett v. Emerson*, take the benefit of these negotiations, and some of them join in them, without taking the burthen. If they adopt one part of the *res gestæ*, they must take the whole. They cannot repudiate a part, and yet derive all the advantages from it. If one claims under an agent, he must take the case *cum onere*, with his knowledge and acts. *Hovey v. Blanchard*, 13 N. H., 149.

If Cross proved an unfaithful agent or associate, it should be their misfor-

tune and loss, rather than those of strangers. A principal is answerable for the deceit of his factor *civiliter*, though not *criminaliter*, because, as somebody must lose, it is better to be him who employs one dishonest than him who is defrauded. Bull. N. P., 31, b; 1 Salk., 289. And it is of no consequence whether they specially and beforehand empowered Glover and Babcock, the trustees, to appoint Cross as the agent of the owners, or not, if they ratified his doings, and thus adopted them, and strove to profit by them. See *Doggett v. Emerson*, 3 Story, 700 (§§ 293-97, *supra*). The whole sale is to be set aside, then, as void for fraud.

The measure of the liability of each of the respondents in this class will be the amount each was entitled to receive, and did receive, from Cross and the trustees, which was paid by the plaintiff, and any notes of the plaintiff either may have received from Cross towards his share. When a master has reported on this, the final decree can be made up to correspond with the report of the master. If any of the respondents be dead since the pleadings closed, a *scire facias* can issue against his executor, to show cause why judgment should not be entered, to that extent, against his goods and effects. To this extent they will come in aid of Cross' general liability.

§ 314. *Rule as to innocent holders of notes where a sale is rescinded on the ground of fraud.*

The last inquiry is in respect to the liability of Noble. He is the holder of some of the notes taken for this sale to Smith, and if he took them before due and in the usual course of business, as an absolute purchase of them for a present or past consideration, and without notice of any fraud by Cross in the procurement of them, or any want of an adequate consideration to the makers, he is a *bona fide* purchaser and cannot be required to surrender them till paid.

But on the contrary, if it is satisfactorily shown that he knew what was the consideration for them, and that it was either fraudulent or of little value, or if he took them without such knowledge and notice, yet not as a purchase in the usual course of business, whether for a new or past consideration, but rather as a pledge to secure existing liabilities, and much more if he took them to secure future liabilities, the notes are open to any defense they would be if still continuing in Cross' hands.

Among those defenses is fraud, or want of adequate consideration, or a set-off against the promisee. Without regard to notice of fraud, or of enough to cast a shade on their consideration, the first and best test on this subject strikes me as being whether there was an absolute sale of the notes. Was there any residuary interest left in the vendor, the indorser? Any equity of redemption? Any right to have a return of them on the payment of money or performance of some act? If so, it was not within the principle of protection to negotiable paper in the market, as that principle is to protect a purchaser, and not a mortgagee, who takes the notes as security only for other matters, instead of buying them in market overt as negotiable paper. He thus holds them merely as he would unnegotiable paper or personal property pledged for a like purpose; as some personal property and even land were pledged in this case to Noble. In such an event, he does not hold them for an agreed price paid outright for the notes, or credited for them on a former debt at the time of receiving them instead of when collected; nor as other property bought and not lodged merely as security. The destruction or loss, or failure in any way of this last property, would fall on the assignor, while of the former it would fall on the assignee or buyer. These seem the natural and truest tests of such

transactions, rather than the fact of the consideration being new or pre-existing. 10 N. H., 266; Williams v. Little, 11 id., 66; 20 John., 637; 6 Hill, 93; 16 Pet., 1; 2 Wheat., 66; 2 Pet., 170; 4 Hill, 93; McNeil v. Holbrook, 12 Pet., 84.

§ 315. *Pre-existing debt a good consideration for the sale of a note.*

A pre-existing debt is a good consideration for the sale of a note when it is sold actually, or taken in actual payment. But whether the consideration be one or the other of these, new or pre-existing, seems of little consequence, except as one species of evidence in relation to the fact of the transfer being absolute or merely conditional. It is more likely to be conditional when the debt is pre-existing, being more often then taken only to secure the debt; whereas when a new consideration is given it is generally to make a purchase, and the transfer is more likely to be absolute. Yet, in either event, there may be other and much more decisive evidence than the oldness or newness of the consideration as to the transfer being absolute or otherwise, such as a written acknowledgment that it was a pledge or a promise to account for the balance after collected, or no receipt being given of payment of the old or new consideration. While these would satisfy most persons of the fact that the property or notes were pledged merely, the reverse of them would prove that there was an absolute sale.

And the character of the sale or the transfer, whether absolute or conditional, and not the consideration only, must show, in my apprehension, whether the interest has been all parted with or not, and whether it is all to be shielded or not in the hands of a purchaser of commercial paper, in the usual manner and in the usual course of business, in disposing of such paper. If the general as well as residuary interest in the notes has never been parted with, but any loss of them, or any loss in their collection, is to fall on the assignor, and not the assignee, then the transfer is not absolute, and is not entitled to protection as negotiated paper, sold outright in the usual course of business.

Now there can be no doubt that Noble took the notes and other property of Cross in October, 1835, as collateral security for certain debts belonging to him and his partner, Wyer, and liabilities for which Cross was responsible, and that he was to apply their proceeds in discharge of those debts and liabilities and return any balance to Cross. A similar account is given of the transaction by Noble, in his answer in Tuthill's case, even after the alleged discovery of the mistake in the authenticity of document C, as to his agreement with Cross. But whether the property so assigned was to be held as security for any new and future liabilities by them on account of Cross during the ensuing four years, is a matter about which there is much controversy, and is in the former view, as to the character of the transfer, not very material.

So it is equally certain that when the present notes were handed to Noble by Cross in November following, it was done under a like arrangement as to their being security for the former debts and liabilities, and any balance was to be accounted for as with the others. But the same doubt exists, whether they were intended to cover any future liabilities or debts between the parties, and an additional doubt whether any new responsibilities, before not included and not assumed, were to be covered by the pledge of these last notes.

It is also quite clear that some of the former notes, to the amount of about \$4,800, were given up, when these last, amounting to about \$29,000, were lodged with Noble in November. I speak of what is clear as contradistin-

guished from what is controverted, because the writing itself given by Noble to Cross, October 22, 1835, whether in the form as now contended by them, or as they originally, in the pleadings in this case, set it up to be in respect to future debts and liabilities, is conceded on all hands to have been an obligation to account for the proceeds with Cross, and pay over to him any balance.

Such is its language as to this, under either view; such the averments in the answers as well as the bill; and such the nature of the transaction. Neither the real nor personal estate, nor notes, were appraised at certain sums and sold, or pretended to be sold, and Cross discharged or released from debts to that amount. The same remarks are applicable to the pledge of the last notes, except that some of the former ones were given up then; and there is some contest whether some new debts or liabilities were not also to be covered by these. Giving those up is likewise another evidence that they had not been purchased outright.

It will be seen that, under these circumstances and views, it becomes unnecessary to settle the much controverted question whether the writing given back by Noble to Cross covered any liabilities not existing at the time; and whether its operation would then be different in respect to this case, however it might be as to subsequent attaching creditors of the property. For, in either event, it is in other respects on its face, and as proved by the nature of the whole transaction, and as admitted in Noble's and Cross' answer, decisive that the notes were not sold absolutely, but only lodged as collateral security; the proceeds to be accounted for afterwards, and any balance to be paid over to Cross, and no past nor present consideration having been discharged or released at the time between the parties, and no fixed sum having been agreed on, for which the notes were sold or bought.

Indeed, Noble admits that no specific value was fixed or computed by him as to the property or notes originally assigned, so little did he think of making a purchase of them. Again, it is unnecessary to settle another moot point, whether when the new notes, including that in this case, were pledged, Noble assumed any new liabilities or not. For if he did, they were only for the amount of a part of the notes; and of those formerly pledged, a part were given up, and the whole left were held as the others had been, only for security for what was due at the time they were pledged, whether consisting of old or new matter. It was no more an absolute sale for one set than the other; and they both were understood to be held in pledge the same way and to the like extent, and on like terms, though they might be in pledge for some new as well as old responsibilities.

§ 316. *Effect of state laws on the rights and liabilities of the holder of a note in suits in the federal courts.*

This renders it not necessary to decide still another point much discussed, which is, whether these notes, being made in New York, and to be paid there, must not be governed by the New York laws, as expounded by the decisions in the New York tribunals. It is conceded that they must be in such a case, if local statutes existed there, changing the law merchant. *Towne v. Smith*, 1 Woodb. & M., 115 (DR. AND CR., §§ 434-38); 2 Kent, Com., 459; *Story on Conf. of Laws*, 261, 262; 1 Pet., 25; 9 Barn. & Cres., 209; 1 Ad. & El., 43; 12 N. H., 520; 3 Mass., 77.

This is a different question, where there is no such statute, from what it would be to decide in a suit in this court on a contract, made elsewhere than in New York, or to be performed elsewhere, whether, one of the parties belong-

ing there, or even the suit being brought there, the judges of the United States would feel obliged, as a matter of course, to conform to the New York decisions on a general commercial question. I think it is clear they would not. *Swift v. Tyson*, 16 Pet., 2 (BILLS AND NOTES, §§ 382–86), holds that state decisions on commercial paper do not bind us, except when on state statutes and peculiar local laws (11 Pet., 175), and these last bind, though on commercial paper. But the question here is, whether, in considering a contract, the *lex loci contractus* is not to govern the construction of that particular contract, when the law on it is the law expounded and settled in their courts, as much as that is the law which is there expounded on their statutes. I give no opinion on this.

There is so much in this long and complicated case which it is necessary to decide, in order to dispose of it properly among so many parties, and such conflicting interests, that I am inclined not to agitate and decide either facts or points of law which arise, unless their decision seems to be, in some degree, either necessary or expedient to a correct judgment of all the merits. But when it so seems, it is the duty of the court, however unpleasant to itself or the parties, to probe the truth to the bottom, and announce it fearlessly without regard to consequences. I am more inclined, also, to forbearance, whenever justifiable, if the questions involve imputations on character and moral turpitude, such as fraud and palpable misrepresentations, made with a view to deceive.

§ 317. *Principal liable for false statements of agent.*

For these reasons I have offered an opinion on the character of Cross' conduct in this case, because obliged to do it in order to dispose of the merits justly; but I have not expressed any opinion on the evidence, implicating several of the First Boston Company in respect to representations, covering the quantity of timber on the township in dispute, and concerning Cross' title, and which have not been shown to be true.

It is not necessary to a just disposal of the case, to pass on the character of their own acts, or those of some of them, whether fraudulent in design or not. Because, without that, I hold the members of that company, in law, responsible for the statements and conduct of Cross, as their agent, and a part-owner in selling the land. The sale was for their benefit, and the proceeds of it were received by them to the extent of their claim on Cross, and for whose statements and conduct, while so acting, they must, in a civil point of view, be liable, if they choose to take the benefit or fruits of his doings, whether intending themselves to have defrauded the purchasers or not.

In like manner and for like reasons, I do not intend to express any opinion on the conduct of Noble in respect to his books, some of it very remarkable, or on his various answers as to the paper (C) containing what purports to be the contract between him and Cross, neither of them professing to preserve the true contract, but both preserving what was wrong, and losing what was right; or on the looseness and imperfections of his exhibits and accounts connected with this large transaction; or the variances of dates, sums, and positions taken at different times; or on his knowledge of anything false or fraudulent in the proceedings of Cross in selling this land to the plaintiff and others, so as to obtain the notes now in dispute for his own security; or on his collusion in any way or to any extent with Cross, either to defraud his creditors by the conveyances to Noble; or to defraud the plaintiff and others by having their notes forthwith negotiated to himself, so as to prevent defenses to them, or

the satisfaction of any judgments which might afterwards be recovered against Cross on guaranties or warranties or bonds.

But in respect to the fact of notice to Noble, or knowledge by him that these notes were part of a large consideration paid by the plaintiff and others, for township A., No. 2; and that the land was of little value in comparison with the price obtained, if it were necessary to decide, no great doubt can exist, looking to all the circumstances and proofs. It probably is not necessary to show that Noble had such knowledge, if he held the notes merely as collateral security. 10 N. H., 226; 11 id., 66. But if this knowledge was necessary, it is well made out, and the facts involved were enough not only to excite inquiry but to "cast a shade" over the notes themselves, and bring them so as to be open to this defense on other well settled principles. Chitty on Bills, 281; Story on Bills and Prom. Notes, §§ 194, 197.

The fact of his knowledge does not, as is argued, depend merely on the testimony of George Miller. If it did, the position of Miller, as one of the associate purchasers, and the attorney and adviser of the rest, would require a close scrutiny; and after all, it would be but the evidence of one person to overcome the denial of Noble in his answer. But it besides rests on the evidence of Lord about Noble's conversation with him, disparaging the value of this township, on the evidence of Reed as to Noble's repeated inquiries of him concerning the timber, and Reed's opinions that the quantity was small; on the fact that Noble himself was a dealer in such lands and likely to know the value of lots owned by those so intimate with him as Cross, a former clerk, a present limited partner, a large debtor to him; on the fact that Cross' bond to Reed for the price of this very tract was signed by Wyer, another partner of Noble, and that property was assigned to Noble to secure Wyer for this liability, as well as others on account of Cross; on the further fact that Noble was a witness to one of Cross' deeds of these premises, was a traveler or visitor near to them with Cross when about to explore them, was with him when Tuthill was negotiating at Portland for his purchase of a share in them, was in New York pending the negotiations there for them, was suspected of interfering there, and did there speak disparagingly of them, and actually is shown to have made inquiries about them, not only of former owners who considered its timber as small in quantity compared with the surveys, but an inquirer of others, such as Cordis, who had proposed to buy but refused, because the quantity of timber was believed to have been much exaggerated.

Now, after all those intimacies and confidences and connections, that he should become the assignee of Cross to the large amount of \$80,000 or \$100,000 worth of property, and then take in addition to it near \$30,000 more in notes, and not ask Cross the consideration of them; and that Cross, when so asked by such a friend and creditor and trustee, should have concealed from him that the notes were given for this land and the price per acre; and that Noble did not know the purchasers must have given such a price, under the supposition that the quantity of timber was much larger than Noble knew to be probable, it is exceedingly difficult to believe.

This conclusion is strengthened, moreover, by the testimony of Gregg, that Noble told him that Cross had frequently said to him he was agent of the Boston Company; showing that they were in the habit of conversing about the land and its sale. For reasons like these, and those first detailed, without going into the specific question of any fraud being known or intended by Noble, it seems to me equitable as well as legal that he should be considered

as holding the notes subject to any equities or defenses existing against Cross at the time of their indorsement by him.

In holding this, if a loss must happen somewhere, it is more proper in justice, as well as law, that it fall on Cross, and those representing him, and holding the notes for him and for his benefit as well as their own, rather than on those whom Cross had deceived and misled in order to obtain them. But, at the same time, though in this view it seems right to require the notes of the plaintiff held by Noble to be surrendered, and it must be done, yet it is proper that Noble should have the same lien on what is to be reconveyed to Cross or the First Boston Company, and what constituted the consideration for the notes, as on the notes themselves. Hence Cross' two or three-tenths, as owned at the time he got these notes, should go in pledge to Noble till his claims are satisfied, rather than go to the general assets of Cross as a bankrupt for the benefit of all his creditors, *pro rata*.

The reconveyance by the plaintiff might be made so as to do justice in two or three ways. But the most natural one is for it to run to Cross, on the plaintiff's receiving his money and notes, in trust for Noble to the extent of the shares owned by Cross at the time of the sale, and to be conveyed by Cross to Noble as collateral security after the notes of Smith are surrendered to him, and the residue held in trust for each of the First Boston Company, and to be conveyed to each, according to his shares in the land, after his making the payments of money directed by the decree in this case.

Let a master be appointed to ascertain and fix the sums of money to be paid by Cross, and refunded to, or in aid of, him, by each owner, and also to prepare the form of the conveyance to be executed by the plaintiff, and by Cross to the other parties; interest to be computed on all that has been paid by the plaintiff, from the times it was paid, and the usual deductions made for timber cut, or rents received by him.

BANK OF MONTREAL v. THAYER.

(Circuit Court for Iowa: 2 McCrary, 1-11. 1881.)

STATEMENT OF FACTS.—Action for damages on account of alleged fraudulent misrepresentations. Thayer was the receiver of a railroad, and as such issued to the Joliet Iron and Steel Company five debentures for \$5,000 each, for iron rails furnished to the railroad under Thayer's charge.

Upon the faith of the statements made in the debentures by Thayer, *i. e.*, that they were issued by order of the district court of Clinton county, Iowa, and issued for iron rails furnished for the railroad, plaintiff bought the debentures or certificates of credit in due course of trade. It further appeared that upon application for payment it was refused, and that the courts of Iowa would not enforce the obligation. This suit was brought charging defendant as personally responsible for false and fraudulent representations. There was a demurrer to the petition.

Opinion by McCrary, J.

We will consider the grounds of demurrer to the first count in the order in which they are presented by counsel.

§ 318. *A charge that a person fraudulently certified that certain statements were true, whereas none of them were true, is a sufficient allegation of fraud.*

First. It is insisted that the facts alleged do not constitute fraud. The allegation is that defendant wrongfully, fraudulently and falsely certified and

represented that the certificates were issued in pursuance of the order of the district court of Clinton county, Iowa; that they constituted a first lien, and that they were given for iron rails furnished for constructing said road; whereas none of these things were true.

It is said that a fraudulent intent is not alleged, but it is difficult to see how representations as to a matter of fact can be wrongful, fraudulent and false without they are made with a fraudulent intent. It is certainly necessary to prove the intent, and of course it must be alleged, but no form of words is necessary. If the terms employed by the pleader, taken in their ordinary signification, necessarily include the idea of a fraudulent intent, that is enough. We must give to the term "fraudulently," as found in the petition, the meaning which the law gives it, and which attaches to it in common usage, to wit, a deliberately planned purpose and intent to deceive and thereby gain an unlawful advantage. After stating what representations were made with sufficient particularity, it is enough to aver that they were wrongful, false and fraudulent. It is not necessary in such a pleading to define the meaning of these terms; and to say that the representations were made with intent to deceive, would add nothing to the allegation that they were falsely and fraudulently made. *Langsdale v. Girten*, 51 Ind., 99; *Thomas v. Beebe*, 25 N. Y., 244; *Bayard v. Malcom*, 2 Johns., 550; *Norris v. Mil. Dock Co.*, 21 Wis., 131; *Watson v. Chesire*, 18 Ia., 202.

§ 319. *Rule as to fraudulent statements in a negotiable instrument.*

Second. The next proposition of defendant's counsel is that the first count of the petition is bad, because there is no allegation of fraud practiced by defendant upon the Joliet Iron and Steel Company, the payee of the certificates, or upon any one else. The petition does not state that the false and fraudulent representations were made with the intent to defraud any particular individual, but it does state in substance that they were contained in certain written instruments, payable to the Joliet Iron and Steel Company or bearer, and that, relying upon the statements and representations contained in said instruments, the plaintiff purchased them from the payee in good faith in the usual course of business, before they were due, and without knowledge or notice that said representations were false, and paid their full face value.

Is this sufficient? To state the question as concisely as possible, it is this: Assuming that the representations contained in the certificates were false and fraudulent, that is, made with intent to deceive, are we to assume that they were made with intent to deceive whoever should purchase the paper? In the very nature of the case the defendant must have intended that his representations would or might be acted upon by any person or persons purchasing the certificates in the open market. He was placing paper upon the market, where it was likely to be bought and sold. The certificates were so drawn as to facilitate their negotiation; they were to pass from hand to hand without indorsement; they were to be payable to bearer. Why is not it a sound rule of law and of morals that makes the signer of such paper liable in damages to any one who may be deceived and injured by having relied upon statements of fact fraudulently inserted therein? To say that it is necessary for plaintiff to show that defendant had a particular individual in view as the person to be defrauded would be in effect to release him from liability for his representations; for a person who places such paper upon the market cannot know into whose hands it will pass, and therefore cannot have in view the person or persons who may be injured.

The matters of fact stated in the certificates gave them currency; if true, they made them amply secure, and very desirable as investments. The controlling question is, who had the right to act upon the representations, since the law will presume that they were addressed to all persons having such right? Is there anything on the face of the paper to indicate that the representations were addressed to and intended for a particular individual, and to no others? I think, on the contrary, the representations were manifestly intended to be considered and acted upon by purchasers of the paper in the market.

In *Bruff v. Mali*, 36 N. Y., 200, 205, it was held that officers of a railroad corporation were liable to any person injured by their misconduct in issuing false certificates of stock, and inducing a party to purchase the same by false and fraudulent representations as to the affairs of the company. And see to same effect the following authorities: *Bigelow on Fraud*, 89, 90; *Cazeau v. Mali*, 25 Barb., 598; *Bartholemew v. Beatty*, 15 Ohio, 660; *Railroad Co. v. Schuyler*, 34 N. Y., 30.

There is nothing in the authorities cited by defendant's counsel which, rightly understood, is in conflict with this rule. It is very true that an innocent misrepresentation—an honest mistake—cannot be made the ground of an action for fraud. There must be an intent to defraud by false representations. This must be alleged and proved. We hold that it is sufficiently alleged by the plaintiff. If it is not true, let the defendant join issue.

We cannot give judgment in his favor while he stands here admitting the allegations of the petition. We construe the allegations of the petition to mean that defendant executed and placed upon the market certain instruments payable to bearer, and containing upon their face false representations intended to deceive the purchasers thereof, whoever they might be. This being so, if the plaintiff purchased them in good faith, before maturity, without notice, relying upon the representations, he may recover, although the defendant had no purpose to defraud and deceive the plaintiff in particular, when he executed the instruments.

§ 320. *Rule as to liability in case of intermediate parties in a suit for false representations.*

There is sufficient privity between the defendant and any purchaser of the certificates to support the action. Nor is it any answer to say that the Joliet Iron and Steel Company, the payee of the certificates, must have participated in the fraud. The action is based upon the defendant's written representations contained in the body of the certificates, and upon these alone.

If we were at liberty to assume that similar false representations must have been made by the Iron and Steel Company to the plaintiff, this would not release the defendant from liability, nor would it be necessary to join the Iron and Steel Company as a party defendant. The liability of the defendant depends upon the question whether he committed any fraud by his own conduct and representations, and it is not to be defeated by showing that others have, or have not, committed like frauds. If, for example, the paper in question had passed through the hands of a number of persons after it left those of defendant, each in turn making the same false and fraudulent representations as to its validity, would it be insisted that the last purchaser would be obliged to join all the previous holders in one suit? How could he know who had held and transferred by delivery the paper, except in the case of the person from whom he obtained it? He might sue that person, but in order to re-

cover, it would be necessary for him to allege and prove that he relied upon *his* representations and not those embodied in the instrument. If he relied upon the latter, and acted in good faith upon them, his right of action would be against the maker of the paper—the party who, by signing it and placing it upon the market, certified to the truth of the statements it contained, and gave it currency.

§ 321. *To recover in a suit for false representations the plaintiff must show that he acted on such representations. He need not show that they were made to him.*

In all such cases it is of course necessary for the plaintiff to show that he acted upon the false representations, and that he had a right to act upon them. If the party suing is not the party to whom the false representations were made, it must appear that they were made with the intent that they should be acted upon by third parties, and that they were acted upon by him. The English cases cited by counsel for defendant illustrate and enforce this doctrine, and show that all that is required of the plaintiff, here, is to show some direct connection between the defendant and himself in the communication of the certificates, and its influence upon plaintiff's conduct in becoming a purchaser thereof. *Barry v. Croskry*, 2 J. & H., 117; *Deck v. Gurney*, Law Rep., 6 House of Lords, 377; and *Thompson on Liability of Officers*, etc., 309.

We have seen no case which holds that it must be made to appear that the fraudulent representations were made directly and individually to the plaintiff. It is enough if he was authorized to act upon them, and did so. If it be true that the defendant issued the certificates honestly and in good faith, believing he had the right to do so, this is a perfect defense, but must be pleaded by way of answer. The petition being taken as true does not show such a state of facts.

§ 322. *If the party to whom a warranty is made has no right of action upon it, his assignee can have none.*

Third. The second count omits the charge of fraud contained in the first, and is founded upon the theory that the representations contained in the certificate were warranties upon which the plaintiff has the right to sue and recover. In order to sustain the sufficiency of this count it would be necessary to hold: 1. That the representations contained in the certificates were warranties upon which the payee, the Joliet Iron and Steel Company, could have maintained an action. And 2. That the plaintiff, as a subsequent purchaser of the paper, without an assignment, became entitled to maintain an action upon the warranty.

As to the first proposition, it is not averred that the Joliet Iron and Steel Company relied upon the representations or were in any wise deceived or defrauded thereby. On the contrary, it would seem that that company must have known all the facts known to the defendant, as it is fairly to be inferred from the face of the certificates that they were given to said company in payment for iron rails furnished by it. Such being the fact, it is manifest that the company could not have maintained an action upon the warranty.

A right of action upon a warranty, if it be assignable, is certainly not negotiable in the sense that the assignee may take a better right than the assignor possessed; and it follows from this, that the plaintiff, even if regarded as the assignee of the right of action upon the warranty, can have no better right than its assignor. And since the petition does not show that the assignor had any right of action upon the warranty, it does not show any right of ac-

tion in the plaintiff. As to the second proposition, we know of no authority in its support. A warranty is addressed to some particular person, and ordinarily that person alone can sue upon it. Under the very broad statute of Iowa on the subject of the assignment of causes of action, it might be assignable, but that it goes without assignment in a case like the present, we think cannot be maintained.

§ 323. *A warranty differs from a fraudulent misrepresentation.*

There is a clear distinction between a warranty and a fraudulent misrepresentation. The former is a contract, and the action upon it is an action on contract. It is an action which can be maintained only by a party to the contract. The latter is a fraud, a wrong for which an action *ex delicto* lies in favor of the person injured.

We conclude that the plaintiff can recover upon the facts stated in the first count, upon proving the intent to defraud by executing the certificates and placing them upon the market, but he cannot recover alone upon the facts stated in the second count. The demurrer is overruled as to the first count and sustained as to the second.

LOVE, J., concurs.

§ 324. *Statements not known to be true.*—It is equally a fraud for a vendor to allege a fact to exist, the reality of which he is ignorant of, as if it is known by him to be false. *Mason v. Crosby*, Dav., 303.

§ 325. It is immaterial whether a vendor knows his statements to be false, provided he states what is not true, respecting a material point, and the statements are relied on by the purchaser. The same rule applies where the sale and representations are made by an agent. *Mason v. Crosby*, 1 Woodb. & M., 342 (§§ 22-27).

§ 326. *Representations by a vendor, made to a third person, and communicated by the latter to the vendee, and acted on by him, are not res inter alios acta, but are treated as if directly made to the vendee by the vendor.* *Crocker v. Lewis*, 3 Sumn., 1.

§ 327. *An action of assumpsit in the nature of an action for deceit will lie for false and fraudulent representations as to the soundness of a slave sold by the defendant to the plaintiff, although the contract was in writing, under seal, and contained a warranty of title but not of soundness.* *Grant v. Bontz*,* 2 Cr. C. C., 184.

§ 328. *By agent.*—Where an agent makes a sale, his principal is bound by his representations, whether the representations were authorized or not. *Hough v. Richardson*,* 3 Story, 689.

§ 329. *The knowledge of an agent, in making a purchase, is the knowledge of the principal.* *Ibid.*

§ 330. Where there is an agency coupled with an interest in the land, or an interest in the consideration of the sale of it and not in the land itself, and the agent actually receives in the first instance the whole consideration, and the sale is avoided for fraudulent misrepresentations made by him and others under him, he is, in the first instance, liable to refund the whole consideration. But where he has paid a part of it to each of the other owners, they are in aid of him to refund respectively the proportion which each has received, and he is held answerable only for the balance not paid by them. The reconveyance is to be made to him in trust for the others, they being entitled to receive a deed from him of such portions as each refunds of the whole consideration directed to be returned. *Doggett v. Emerson*,* 1 Woodb. & M., 195.

§ 331. *A contract to purchase shares in a corporation, induced by fraudulent representations or concealment, is not void but voidable; that is, it is valid until disaffirmed.* *Upton v. Englehart*, 3 Dill., 496.

§ 332. It seems that if a company has fraudulently misrepresented or concealed material facts and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution or judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon without delay notifies the company that he repudiates the contract and offers to rescind the purchase, the assignee in bankruptcy of the company cannot insist that the purchase is binding. *Ibid.*

§ 333. *If a fraudulent misrepresentation or concealment on the part of an agent of a corporation has induced a person using reasonable caution and judgment to enter into a contract to*

purchase shares, it is no answer ordinarily to his claim to be relieved from his contract that by more vigilance he might have discovered the deception. Thus, if an agent of an Illinois corporation, in selling shares in Iowa, makes fraudulent representations concerning the laws of Illinois and the charter of the company on file in Illinois, that by those laws and the charter eighty per cent. of the stock is non-assessable, the purchaser is, in the absence of laches and acquiescence, entitled as against the company to resist payment of the eighty per cent. *Ibid.*

§ 834. Sale of mine—Concealment.—On an issue whether the directors of the plaintiff corporation were induced to purchase a mine by the fraudulent representations or concealments of the defendants (the vendors) regarding material facts, the jury were instructed that, inasmuch as the defendants were also directors of the plaintiff at the time of the sale of the mine, and, for that reason, bound to exercise the utmost good faith in their dealings with their co-directors, a more rigorous rule should be applied than that which obtains between vendor and vendee ordinarily; and that if the defendants withheld from their co-directors any information as to material facts affecting the property, intending thereby that the latter should be misled, their conduct was actionable concealment, within the meaning of the law, if it operated to induce the purchase. *Held*, that this instruction was correct. *The Emma Silver Mining Co. v. Park*, 14 Blatch., 411. See §§ 416-25.

§ 835. Waiver of fraud.—If a purchaser, after acquiring knowledge that representations made by the seller were false and fraudulent, promises to pay, he cannot rely upon the fraud as a defense. *Fitzpatrick v. Flanagan*, 16 Otto, 648.

§ 836. Conspiracy to obtain goods.—On the question whether A. and B. were engaged in a fraudulent conspiracy to procure goods in the name of A., but for the secret benefit of B., by means of representations as to the responsibility of A., it was held that an inquiry into the means of A. and the correctness of the representations was pertinent and proper. *Rea v. Missouri*, 17 Wall., 532.

§ 837. Sale of land, etc.—If one who sells land describes it as situated in a certain place, whereas it is situated in another place, he must make good the representation either specifically or by way of damages, though it was by mistake and not fraudulent. *McFerran v. Taylor*, 3 Cr., 270.

§ 838. False representations will vitiate a sale. *Hough v. Richardson*, * 3 Story, 689.

§ 839. If the purchaser relied upon such representations in part, and would not have purchased otherwise. *Ibid.*

§ 840. Where representations made upon a sale are vague and indefinite, they should put the purchaser upon inquiry. *Ibid.*

§ 841. If, upon a treaty for the sale of property, the vendor makes representations (touching the nature and character and value of that property) which he knows to be false, the falsehood of which the purchaser has no means of knowing, but relies on them, a court of equity will rescind a contract so entered into, although it may not contain the misrepresentations. But it will not rescind without the clearest proof of fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them. But if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or his agents, he cannot be heard to say that he was deceived. And it is not material whether the misrepresentations were founded on mistake or fraud, but in cases of mistake, the bargain must have been made in strict faith and reliance upon the representations. *Ibid.*

§ 842. It is no objection to the rescission of a sale of lands alleged to have been induced by the fraudulent misrepresentations of the seller, that the purchaser made an examination of the land, but did not go into the details, spending but two days upon a very large tract, and being conducted over the premises by a concealed employee of the seller, who pretended to be an associate with the purchaser in the purchase; and where most of the fraudulent misrepresentations and material concealments were in other matters than the land and timber, could not easily be detected by him, and on which he could not but strongly rely. *Tuthill v. Babcock*, * 2 Woodb. & M., 298.

§ 843. Plaintiff brought an action for deceit against P. and S., alleging that he had been induced to sell a large amount of goods to P. and give him credit for the same, upon false and fraudulent misrepresentations as to the value of a certain farm, represented to belong to S., and upon which a mortgage was given as security; that S. had, unknown to plaintiff, made a fictitious sale of the farm to P., who had given his notes therefor, and confessed judgment thereon; and that S. had levied executions on the stock of P., which consisted chiefly of the goods sold to him by the plaintiff. The plaintiff also procured attachments to issue upon the goods and also upon property of S. A bill in equity was also filed by the plaintiff seeking to enjoin S. from making any sale of the goods under his executions, and for the appointment of a receiver to sell the property and bring the proceeds into court to abide the judgment in the cause. Upon the petition of the plaintiff, both of these causes were removed into the United

States court. It was held to be a case for equitable interference, and that there was no adequate remedy at law. *Perry v. Sharpe*, 8 Fed. R., 15.

§ 344. In pursuance of authority from a partnership composed of A., B. and C., C. made a contract of purchase with D., representing that the firm was solvent, and doing a good business, and that one of the members was wealthy. C. having withdrawn from the firm without the knowledge of D., an arrangement was made by which the proceeds of the goods sold by the agent of the firm were applied in payment of the debt to D., and the unsold goods returned. D. believed A. and B. to be insolvent, and they were shortly afterwards declared bankrupt. It was held that, as the representations were false, D. might rescind the sale and follow the goods or their proceeds; and that the creditors of A. and B. could not complain of the arrangement made for the payment of D., the same not having been fraudulent. *Montgomery v. Bucyrus Machine Works*,* 2 Otto, 257.

§ 345. This was an action on the case brought in 1841 for fraudulent misrepresentations in the sale of certain lands, made by the defendant to the plaintiffs in 1835. Between the time of sale and the time of suit, the plaintiffs had paid the purchase money without objection, and had sold large quantities of the land and the timber thereon to different purchasers. And between these two dates the value of the land had greatly diminished. The defendant did not pretend to be well acquainted with the land or to have explored it, and expressly told the plaintiffs' agent to explore for himself. The agent, intending to become a co-purchaser, did examine and explore the land for himself, communicated his estimate to the plaintiffs at fifty-one millions of feet of timber, was perfectly satisfied with the exploration and purchase, and continued to express a favorable opinion of the bargain for years afterwards. In 1836 the plaintiffs employed others to explore the land, who estimated it at eighteen millions of feet of pine and twenty-seven millions of hemlock, and the plaintiffs did not thereupon take any steps to rescind the sale. One of the plaintiffs' counts complained that the land was represented to contain fifty millions of pine, whereas it contained only twenty millions. None of the counts in the declaration were sustained by the evidence, and it was held that the plaintiff could not recover. *Sanborn v. Stetson*,* 2 Story, 481.

§ 346. If a vendee, in order to induce a sale, fraudulently misrepresents his pecuniary ability, and these representations are relied on by the seller, who but for them would not make the sale, the sale is voidable as between the parties. *Johnson v. Peck*,* 1 Woodb. & M., 334.

§ 347. Where a vendor is charged with false and fraudulent representations in making a sale, all the negotiations of the parties may be taken into consideration. *Crocker v. Lewis*, 8 Sumn., 1.

§ 348. In order to sustain an action on the case for fraudulent misrepresentations in the sale of lands by the defendant to the plaintiffs, it must be shown that fraud was intended by the defendant, that it was consummated, and that the purchase was made upon the faith of the representations of the defendant and not solely upon statements of the plaintiffs' own agent or of other persons. *Sanborn v. Stetson*,* 2 Story, 481.

§ 349. A. contracted to sell to B. a piece of land, the execution of the conveyance to be made only upon the payment of the sums stipulated as they became due, and the cutting and removal of timber being in the meantime prohibited without the written permission of the vendor. B. assigned the contract to C. To this A. assented, and gave to C. the permission to cut and remove timber upon consideration of C.'s guarantying the payment of the sums stipulated. Held, that false and fraudulent representations by B. to C. as to the quantity of timber were no defense to an action by A. upon the guaranty. *Lumber Co. v. Buchtel*, 11 Otto, 633.

III. INADEQUACY OR FAILURE OF CONSIDERATION.

SUMMARY — *When sufficient to avoid a bargain in equity*, § 350.

§ 350. Mere inadequacy of price or other inequality in a bargain does not *per se* constitute a ground for avoiding a bargain in equity. Still there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or undue influence; and, in such cases, courts of equity ought to interfere upon the ground of fraud. But such inadequacy or unconscionableness must be such as to shock the conscience and amount in itself to conclusive evidence of fraud. *Eyre v. Potter*, §§ 351-56.

[NOTE.— See §§ 357-370.]

EYRE v. POTTER.

(15 Howard, 42-63. 1833.)

Opinion by MR. JUSTICE DANIEL.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the United States for the district of North Carolina, by which decree the bill of the appellant (the complainant in the circuit court) was dismissed with costs.

The allegations in the bill, on which the interposition of the court was invoked, are substantially as follows: That Samuel Potter, deceased, the late husband of the complainant, died on the 29th of May, 1847, possessed of a large real and personal estate, consisting of houses in the towns of Wilmington and Smithville, in North Carolina, of a productive rice plantation, of an interest in one or more valuable saw-mills, of a large number of slaves, of a considerable amount of bank and railroad stocks, and of other personal property; that the complainant, who, at the time of her husband's death, was ignorant of the value of his property, had, from recent information, ascertained that the annual value of the real estate was more than \$6,000, perhaps equal to twice that sum, and that her share in her husband's personal property was worth not less than \$15,000; that by the laws of North Carolina the complainant, in addition to one year's maintenance for herself and family (in this instance amounting to not less than \$1,000), was entitled, in right of her dower, to one-third of her husband's real estate during her life, and to an absolute property in a child's part, or one-sixth of the personalty, her husband having left surviving him four children and one grandchild; that by the laws of the same state, she had the prior right of administration upon the estate of her husband, and thereby the control of his assets, and a right to all the regular emoluments resulting from that administration; that the complainant is an aged and infirm woman, predisposed to nervous affections, and wholly inexperienced in the transaction of business; that during the last illness of her husband, being overwhelmed by daily and nightly watchings and anxiety, she became ill; that whilst she was thus sick and oppressed with affliction and infirmity, Samuel R. Potter, the son of her late husband, professing great sympathy and affection for the complainant, availing himself of her distressed and lonely condition, and of her ignorance of the value of the estate, with which he was familiar, having been several years the manager of it, combined with a lawyer by the name of Mauger London, to defraud the complainant, and to deprive her of her rights and interest in the estate, and succeeded in accomplishing this scheme in the following manner: In the prosecution of their plan, they in the first place induced the complainant, under an assurance that the measure would be in accordance with the wishes of her late husband, and would prove the best means of protecting and securing her interests, to relinquish to the said Samuel R. Potter her right to administer upon her husband's estate. In the next place, by false representations as to the value of the estate, and the expense and trouble of managing it, they prevailed upon her to sell and convey to the said Samuel R. Potter, by a deed bearing date on the 31st of May, 1847, her entire interest in this wealthy and productive estate for the paltry consideration of \$1,000, and a covenant for an annuity of \$600 during the complainant's life; and that even this small allowance was not otherwise secured to the complainant than by the single bond of said Samuel R. Potter, for the sum of \$2,000. That in their eagerness to effect their

iniquitous purposes, the said Potter and London, in total disregard of her feelings, and even of decency, did, on the day of her husband's death, and before his interment, urge her acquiescence in their scheme, and on that day, or the day succeeding, accomplished it by extracting from the complainant a deed bearing date on the 31st of May, 1847, conveying to Samuel R. Potter the complainant's entire interest in her late husband's estate, and the instrument of the same date, whereby she relinquished to the same individual her right to administer upon that estate. The bill makes defendants the said Samuel R. Potter and Mauger London; charges upon them a direct fraud by deliberate combination, by misrepresentation, both in the suppression of the truth and the suggestion of falsehood, and in the effort to profit by the ignorance, the sickness, the distress and destitution of the complainant. The bill calls for a full disclosure of all the facts and circumstances attending the transactions therein alleged to have occurred; prays that the deed of May 31, 1847, from the complainant to said Samuel R. Potter may be canceled; that the property thereby conveyed may be released and reconveyed to the complainant, and concludes with a prayer for general relief.

§ 351. *What necessary to a recovery on a bill alleging fraud.*

It is now the office of this court to determine how far the foregoing allegations are sustained upon a proper construction of the pleadings, or upon the evidence adduced by either of the parties. And here it may be proper to premise, that in the examination of the case made by the bill, it cannot be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and, therefore, to be dealt with by the law under the necessity for protecting such relation; but it is one of actual, positive fraud, charged and to be judged of, according to its features and character, as delineated by the complainant, and according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable by a court of equity with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree by establishing some of the facts quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of *Price v. Berrington*, decided by Lord Chancellor Truro, in 1851. *Vide English Law and Equity Reports*, vol. 7, p. 254.

The defendants, in this case, were clothed with no special function, no trust which they were bound to guard or to fulfill for the benefit of the complainant; they were not even the depositaries of any peculiar facts or information as to the subject-matter of their transactions, or which were not accessible to all the world, and by an omission or failure in the disclosure of which they could be regarded as perpetrating a fraud.

Recurring to the pleadings in this case, there is not alleged in the bill one fact deemed material to the decision of this controversy which is not directly met and emphatically denied by both the defendants. Although the age assumed for the complainant seems to be controverted by none of the parties, yet the assertions that, at the period of her husband's death, she labored under any unusual infirmity; that she was exhausted by fatigue and by anxious

watchings at the bed of sickness, or was overwhelmed with grief, or even discomposed by the event which severed forever her connection with her husband, are assertions directly met and positively contradicted; and in further contravention of these statements by the complainant, are the averments that the intercourse of the complainant with her late husband was of a very unhappy character, evincing not indifference merely, but signs of strong antipathy. Equally direct and positive are the denials, in the answers of both the defendants, of the charges of persuasion or inducement of any kind, or of any concealment or misrepresentation moving from the defendants, by which the complainant was or could have been influenced, and it is expressly denied by each of the defendants, that any proposition was by them, or either of them, submitted to the complainant for the sale of her interest in the estate, or for the relinquishment of her right to the administration. These positive denials in the answers, being directly responsive to the charging part of the bill, the latter, by every rule of equity pleading, must be displaced by them, unless those denials can be overcome by evidence *aliunde*.

§ 352. *Answers to interrogatories propounded in a bill are conclusive against the plaintiff unless overcome by proofs.*

But by the peculiar frame and structure of the bill in this case, the complainant has imparted to the answers a function beyond a mere response to the recitals or charges contained in the bill. The complainant has thought proper specifically to interrogate the defendants as to the origin, progress and conditions of the transactions impugned by her, and as to the part borne in them, both by the defendants and the complainant herself. By the answers to these interrogatories, the complainant must, therefore, be concluded, unless they can be overthrown by proofs. How stands the case, in this aspect of it, upon the interrogatories and the evidence? The defendants being called on to disclose minutely and particularly their knowledge of, and their own participation and that of the complainant in the transactions complained of, declare that when those transactions took place the complainant was in her usual health; was in possession of all her faculties; was exempt from any of those influences, such as grief and depression, which might have rendered her liable to imposition; was in possession, likewise, of all the knowledge as to the subject-matter of the transactions requisite to judge of her own interests; that with such capabilities, and such knowledge, the complainant herself proposed the arrangement which was adopted, and although informed by both the defendants that the consideration she proffered to receive was less than the value of her interests in the estate, she urged and insisted upon that arrangement, assigning for it reasons which are deemed neither unnatural nor improbable, and which, although they might, to some persons, appear not to be judicious, she had the right, nevertheless, legally and morally, to yield to.

How does the history, thus given by the defendants, accord with the proofs in this cause? And, first, as to the state of complainant's health, and the condition of her mind and spirits as affected by the illness and death of her husband. Benjamin Ruggles, who says that he is acquainted with the parties, states that he was with the husband of the complainant every day during his illness (which lasted eight or ten days), and sat up with him two nights; that he saw the complainant every day; that she did not sit up either night that the witness was there; that she exhibited no sign of distress at the sickness of her husband, nor devoted much of her time to him, nor showed any sign of grief at his death; that on the night of her husband's death, the complainant

attended to getting his burial-clothes, which she handed to the witness, seeming calm and composed. The complainant was not sick during the witness' stay.

Josephine Bishop, also acquainted with the parties, was at the house of the deceased on the day of his death, returned there on the second day after that event, and remained three or four weeks. On the morning of the witness' return, the complainant, in a conversation, informed her that complainant intended to propose to the defendant, Samuel E. Potter, to make over to his wife all the complainant's interest in her husband's estate. Some two or three weeks after, the complainant said to the witness that she had sent for Mr. London to arrange her business for her, and felt greatly relieved and satisfied at the manner in which he had arranged it; that she had conveyed her interest in her husband's estate to Samuel R. Potter, who was to give her \$2,000 in cash, \$600 a year during her life, to furnish her board and a servant, and would have given her more if she had asked it, but she was satisfied with the amount, which was as much as she would have use for. The complainant spoke of the defendant London in the strongest terms of approbation. She further remarked to the witness that she knew her interest in the estate of her late husband was worth much more than she had asked for it. Yet, at the time of her marriage with him, she had made over her own property to her children by a former marriage, and thought it nothing but right that his children should have the benefit of his property; besides that, the greater part of the property consisted of slaves, and she would not own one for any consideration. Witness saw the complainant every day during the time she was at the house; she did not complain of ill health, nor appear to be at all distressed, and witness had never seen her in better spirits. The conversations in which these declarations of complainant were made were introduced by the complainant herself.

Margaret H. Wade, who is acquainted with the parties, states that she was three or four times at the house of defendant during his illness, and remained three or four hours during each time. Witness saw the complainant once only in the room of her husband; she stayed in an adjoining room. Witness did not perceive that the complainant was indisposed in any way, nor did the complainant appear to be grieved during the illness of her husband, nor after his death. In a conversation with witness some three or four days before decedent's death, the complainant asked the witness if she thought the decedent could live, and upon the reply of the witness that she did not think he could, the complainant observed that she was provoked at Samuel (the defendant) for forcing him to take first one thing and then another, "and make him live any how." Afterwards, on board of the steamboat, returning from Smithville, from the funeral of the decedent, the complainant told the witness that she had made over her property to Samuel R. Potter, or intended so doing, on account of his wife, Marian; that she was very fond of her and wished to stay with her the residue of her life, though she did not know that her friends at the north would be willing that she should do so.

Without a further and more protracted detail of the testimony adduced on the part of the defendants, it may be sufficient merely to advert to the depositions of Julia and Caroline Everett, of Edwin A. Keith and of Sterling B. Everett (the last for many years the physician in the family of the decedent), and of the complainant herself, as fully sustaining the averments in the an-

swers of the defendants, and the statements of the witnesses previously named, in relation to the capacity of the complainant, to her disposition and deportment towards her late husband, the effect of his illness and death upon her health and spirits, her knowledge of her rights and interest in the subject of her transactions with the defendants, the origin and fairness of those transactions, the objects for which, and the means and instrumentality by which, they were consummated. Nor can it escape observation, as a circumstance of great if not of decisive weight, that all this testimony is derived from persons familiar with the parties, living upon the immediate theater of the transactions in controversy, many of them more or less acquainted with the subjects embraced by them, witnesses, all of them, free from imputation on the score of interest, and against whose veracity or intelligence no exception is even hinted.

§ 353. *Mere inadequacy of price, or any other inequality in a bargain, is not per se a ground to avoid a bargain in equity.*

Against an array of evidence like this the question of equivalents or of exact adequacy of consideration cannot well be raised. The parties, if competent to contract and willing to contract, were the only proper judges of the motive or consideration operating upon them; and it would be productive of the worst consequences if, under pretexts however specious, interests or dispositions subsequently arising could be made to bear upon acts deliberately performed, and which had become the foundation of important rights in others. Mere inadequacy of price, or any other inequality in a bargain, we are told, is not to be understood as constituting *per se* a ground to avoid a bargain in equity; for courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet or otherwise, or profitable or unprofitable, are considerations not for courts of justice, but for the party himself to deliberate upon. *Vide* Story's Equity, § 244, citing the cases of Griffiths v. Spratley, 1 Cox, 383; Copis v. Middleton, 2 Mad., 409, and various other cases.

§ 354. — *but such inadequacy as would shock the conscience may demonstrate gross imposition or undue influence.*

Again, it is ruled that inadequacy of consideration is not of itself a distinct principle of equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. One man, in the disposal of his property, may sell it for less than another would. If courts of equity were to unravel all these transactions they would throw everything into confusion and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the injustice and impracticability of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief. Still, there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence; and in such cases courts of equity ought to interfere, upon satisfactory ground of fraud; but then, such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. *Vide* Story's Equity, §§ 245, 246, and 9 Ves., 246; 10 id., 219, and other cases there cited.

§ 355. — *circumstances of the bargain, and considerations of affection, justice to others, ease, etc., taken into consideration.*

But the contract between the parties in this case should not be controlled by a comparison between the subject obtained and the consideration given in a mere pecuniary point of view; added to this were the motives of affection for the wife of the grantee, the granddaughter of the grantor, a conviction in the latter of what justice dictated towards the children of the decedent in relation to his property; the prospect of ease and independence on the part of this elderly female; her exemption from the expense, the perplexities and hazards of managing a species of property to the management of which expense and energy and skill were indispensable; property to the tenure of which she entertained and expressed insuperable objections. Here, then, in addition to the sums of money paid, or secured to be paid, we see considerations of great influence, which, naturally, justly and lawfully, might have entered into this contract, and which we think cannot be disregarded in its interpretation, upon any sound construction of the testimony in the cause. Upon the first view of this case, it may, in the spectacle of the widow and the son bargaining over the unburied corpse of the husband and the father for a partition of his property, be thought to exhibit a proceeding revolting to decorum, and one, therefore, which a court of equity, equally with a court of morals, would be cautious in sustaining, or be inclined to condemn; yet, upon testing this proceeding by any principle of decency, as well as of law or equity, it is manifest that it could not be disturbed without benefit to the chief offender against such a test; for the evidence incontestably shows that whatever in the conduct of the parties was inconsistent with the highest and most sacred relations in life—whatever may be thought to have offended against the solemnity and decorum of the occasion—was commenced and pressed to its consummation by the plaintiff in this case. Tried, then, by this standard, she should be left precisely where she has placed herself.

§ 356. *The evidence of witnesses who reside at remote distances and who are not familiar with the party is not entitled to much weight on a question of the incapacity of such person to contract.*

To avoid the consequences flowing from the acts of the complainant touching the matters of this controversy, the testimony of several witnesses, taken in the city of Philadelphia, has been introduced to prove the mental as well as physical incompetence of the complainant. With respect to the character and purposes of this testimony, it may be remarked, that a position in a court of justice founded upon what is in effect the stultification of the person who assumes that position is one to be considered with much diffidence, as it admits in general the *factum* which it seeks to invalidate; and if the averments on which such position rests be true, the person occupying that position should be in court by guardian or committee. But in truth this testimony establishes no such position, either directly or inferentially, in reference to the complainant. In the first place, all these witnesses resided in a different state, and at the distance of many hundreds of miles from the complainant; and not one of them appears to have had any intercourse with her or to have seen her even for a series of years preceding the contract which it is essayed to vacate; nor to have had any knowledge of the existence of that contract until after its completion; nor of the state of mind or of the health of the complainant at the period at which that contract was found. In addition to this ignorance of these witnesses, of the transaction under review, and of all the circumstances

surrounding it, there is no fact stated by one of them which amounts to proof of incapacity on the part of the complainant to comprehend the character of her acts, and of the legal consequences incident to them; and much less do they establish, as to her, such an aberration or imbecility of mind as would justify a presumption, and much less a legal conclusion, against the validity of any and every act she might perform. To such a conclusion only could the general expressions of opinion and belief of these witnesses apply, and such a conclusion they come very far short of establishing.

We are therefore of opinion that the decree of the circuit court should be affirmed, and the same is hereby affirmed, with costs.

§ 357. When proof of fraud.—Inadequacy of consideration in a sale, of a nature so gross as to shock the conscience, is proof of fraud. And this rule applies to sales under judicial process, although the fact that the sale is made by an officer under authority of law may weaken the presumption of fraud. *Byers v. Surget*, 19 How., 303; *Surget v. Byers*,* *Hemp.*, 715.

§ 358. Inadequacy of consideration does not invalidate a contract unless it is so gross as to strike every one with a presumption of fraud. *Follett v. Rose*, 3 McL., 332; *Godfrey v. Beardsley*, 2 McL., 412.

§ 359. Mere inadequacy of price, or other inequality in the bargain, is not of itself a ground of avoiding the bargain in equity. But if there is such an unconscionableness or inadequacy as to demonstrate some gross imposition or undue influence, equity will interfere on the ground of fraud. But the inadequacy must be so gross as to shock the conscience, and amount in itself to decisive evidence of fraud. *Vint v. King*,* 2 Am. L. Reg., 712.

§ 360. A grossly inadequate price is, under some circumstances, evidence of fraud, and a fit subject of inquiry by a jury in determining the validity of a sale made under judicial process. *Blanchard v. Brown*, 3 Wall., 245.

§ 361. Where a person gives \$25,000 worth of property for \$1,000, the inadequacy is so very gross that the court ought to lay hold on the slightest circumstance of advantage or oppression to set aside the sale. The fact itself furnishes good ground to conclude that the party was laboring under some controlling necessity, or was oppressed, or was ignorant of the true value of the property. *Holmes v. Holmes*, 1 Saw., 99.

§ 362. Where a deed made by an agent is sought to be set aside for inadequacy of price, the price must be so small as to strike the mind, at first impression, as grossly inadequate, and to raise the conviction that the property was sacrificed in the market for a price less than its value. *Walker v. Derby*, 5 Biss., 134.

§ 363. Not evidence of fraud.—Inadequacy of consideration, unless extremely gross, does not, *per se*, prove fraud. *Kempner v. Churchill*,* 8 Wall., 362.

§ 364. Entire failure of consideration in the receipt of what is mere moonshine is often plenary evidence of fraud and sufficient to rescind a contract. But mere inadequacy of consideration may honestly occur, and often raises no certain presumption of deceit. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-86).

§ 365. Inadequacy of consideration, in the absence of other evidence of fraud, to charge a purchaser from a trustee having power to sell, with liability to account for the property, must of itself be an indication of fraud, and must be affirmatively established beyond question. *Carpenter v. Robinson*, 1 Holmes, 67.

§ 366. Inadequacy of price, independent of other circumstances, is not sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. To amount to fraud it must be so strong and manifest as to shock the conscience and confound the judgment. *Holmes v. Holmes*, 1 Abb., 525; 1 Saw., 99.

§ 367. Miscellaneous.—Where a want of sufficient consideration was charged as a ground of fraud in a family settlement of litigated rights, it was held proper to look to equitable circumstances, and not to expect all such technical formalities as prevail among strangers. The settlement in this case sustained, though subject to some doubts as to its fairness. *Gratz v. Cohen*,* 11 How., 1.

§ 368. A compromise in which notes secured by a marriage settlement are transferred in payment cannot be set aside for failure of consideration in that the marriage settlement is invalid, until the litigation concerning its validity is ended and it is decreed to be invalid. *Chapman v. Wilson*, 5 Fed. R., 805 (§§ 207-10).

§ 369. Under the statute of Ohio of February 24, 1834, providing that a failure or want of consideration of a sealed instrument may be pleaded, a fraudulent consideration may be shown. *Greathouse v. Dunlap*, 3 McL., 303.

§ 370. On a bill to set aside a deed for fraud and inadequacy of consideration, the inadequacy must be tested by the value of the property at the time of the sale. *Barribeau v. Brant*, 17 How., 43.

IV. RELATION OF THE PARTIES. UNDUE INFLUENCE.

SUMMARY — *Deed from child to parent*, § 371. — *Suit in equity; lapse of time considered*, § 372.

§ 371. A deed from a child to a parent, conveying real estate of the child, is not *prima facie* void, on account of the relation of the parties. *Jenkins v. Pye*, §§ 373-75.

§ 372. Lapse of time, and the death of the parties to a deed, are considered in a court of equity as entitled to great weight, where it is sought to be set aside on the ground that it was obtained by undue influence. *Ibid.*

[NOTES. — See §§ 376-382.]

JENKINS v. PYE.

(12 Peters, 241-262. 1833.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS. — This case comes up on appeal from the circuit court of the District of Columbia, for the county of Alexandria. The appellees were the complainants in the court below, and as heirs-at-law of their mother, Eleanor Jenkins, filed their bill, by their father, James B. Pye, as next friend, to set aside a deed given by their mother to George Jenkins, her father, bearing date the 15th of March, 1813. The bill charges that the deed was made wholly without consideration, and operated only to create a resulting trust in favor of the grantor and her heirs; and if their claim cannot be sustained on that ground, they charge that the deed was obtained by the undue influence of parental authority, and therefore void in equity against the said Eleanor Jenkins and her heirs.

The consideration expressed in the deed is \$1; and, as to the allegation of undue influence, the bill charges that the said Eleanor inherited, as heir of her mother, the land conveyed to her father, and in which her father was entitled to a life estate. That at the time of her mother's death she was an infant of very tender years, residing with her father, and continued to reside with him until her marriage. That she never was informed of the extent of her property, to which she became entitled on the death of her mother; and having led a life of great seclusion in the country, at a distance from Alexandria, where the lands are situated, she had no means of acquiring information on the subject. That very soon after the said Eleanor had attained the age of twenty-one years, and whilst she still resided with her father, and remained in ignorance of the extent and value of her rights, the said George Jenkins, availing himself of his parental authority and of the habit of implicit obedience and submission on the part of his child, procured from her the deed in question.

The answers of the appellants deny every material charge and specification in the bill tending to show that any undue influence was exercised by the father to obtain the deed from his daughter, but that the act was voluntary and free on her part. That she was well acquainted with her rights, and the value of the property. That at the time of executing the deed she was twenty-three years of age, and that the same was not done in expectation of her marriage, as she was not married for two years afterwards.

§ 373. *Where in a bill a deed is alleged to have been without consideration, proof of payment of \$2,000 is admissible in rebuttal, although that payment is not set out in the answer.*

The mere nominal consideration expressed on the face of the deed was enough to pass the estate to the grantee, no uses being declared in the deed. It is true, as a general proposition, that he who pays the consideration means, in the absence of all rebutting circumstances, to purchase for his own benefit; and there may be a resulting trust for the use of the party paying the consideration. But this is founded upon a mere implication of law, and may be rebutted by evidence showing that such was not the intention of the parties. And in the present case the evidence is conclusive to show that no such resulting use was intended. But it is unnecessary particularly to notice this evidence, as this part of the case was not very much pressed at the argument. And in addition to this, the evidence shows that on the 3d of November, 1813, the day her deed was offered for record in Alexandria, George Jenkins paid to his daughter \$2,000, which, under the situation of the property, might well be considered nearly, if not quite, an adequate consideration. The property being in a dilapidated state, requiring great expense in repairs, and the grantee, George Jenkins, having a life estate in it, which, from the circumstance of his living eighteen years after the date of the deed, there is reason to conclude that the state of his health and constitution was such at that time as justly to estimate his life estate of considerable value.

The evidence of the payment of \$2,000, in addition to the nominal consideration of \$1 mentioned in the deed, was admissible without any amendment of the answer. It rebutted the allegation in the bill that the deed was made wholly without consideration.

§ 374. *A deed from a daughter to her father is not prima facie void.*

But the grounds mainly relied upon to invalidate the deed were that being from a daughter to her father rendered it at least *prima facie* void. And if not void on this ground, it was so because it was obtained by the undue influence of paternal authority. The first ground of objection seeks to establish the broad principle that a deed from a child to a parent conveying the real estate of the child ought, upon considerations of public policy growing out of the relation of the parties, to be deemed void; and numerous cases in the English chancery have been referred to which are supposed to establish this principle. We do not deem it necessary to travel over all these authorities; we have looked into the leading cases, and cannot discover anything to warrant the broad and unqualified doctrine contended for on the part of the appellees. All the cases are accompanied with some ingredient, showing undue influence exercised by the parent, operating upon the fears or hopes of the child; and sufficient to show reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child; and in some cases, although there may be circumstances tending, in some small degree, to show undue influence, yet, if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed.

It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject; for should the cases be found to countenance it, we should not be disposed to adopt or sanction the broad principle contended for, that the deed of a child to a parent is to be deemed, *prima facie*, void. It is undoubtedly the duty of courts carefully to watch

and examine the circumstances attending transactions of this kind, when brought under review before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial as well as parental duty and affection; and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child. Whereas, the presumption ought to be, in the absence of all proof tending to a contrary conclusion, that the advancement of the interest of the child was the object in view; and to presume the existence of circumstances conducing to that result. Such a presumption harmonizes with the moral obligations of a parent to provide for his child, and is founded upon the same benign principle that governs cases of purchases made by parents in the name of a child. The *prima facie* presumption is, that it was intended as an advancement to the child, and so not falling within the principle of a resulting trust. The natural and reasonable presumption in all transactions of this kind is, that a benefit was intended the child, because in the discharge of a moral and parental duty. And the interest of the child is abundantly guarded and protected, by keeping a watchful eye over the transaction, to see that no undue influence was brought to bear upon it.

In the present case, every allegation in the bill tending to show that any undue influence was used is fully met and denied in the answer, and is utterly without proof to sustain it. And indeed this allegation seemed to be abandoned on the argument.

§ 375. *Lapse of time and the death of a party to a deed are of much weight in determining its validity.*

But if anything was wanting to resist the claim on the part of the appellees, and to establish the deed, and the interest derived under it, it will be found in the lapse of time. The deed bears date the 3d of November, 1813; the grantor, Eleanor Jenkins, then being twenty-three years of age. She was married about two years thereafter, and died in the year 1818; and not a whisper of complaint was heard against the transaction during her life-time. George Jenkins, the grantee, lived until the year 1831, and no complaint was made in his life-time; after a lapse of eighteen years, it is difficult, if not impracticable, fully to explain the transaction. Lapse of time and the death of the parties to the deed have always been considered, in a court of chancery, entitled to great weight, and almost controlling circumstances in cases of this kind.

But the circumstances, as disclosed by the proofs, not only rebut every presumption of unfairness on the part of George Jenkins, but disclose circumstances tending to show that he was governed by motives highly honorable and commendable. He was a man of large estate. The property conveyed to him by his daughter was in a dilapidated and unprofitable condition. He had a life estate in it. And it would have been unreasonable, if not unjust to his other children, to have required him to incur great expenses in improving this property, which would inure to the exclusive benefit of this daughter. His object, as well as that of his daughter, seem to have enabled him the more easily and satisfactorily to make an equal distribution of his property among all his children; as well the said Eleanor as those he had by a second marriage. This was a measure well calculated to promote harmony among

his children; and his intention to carry that disposition of his property into execution was manifested by the will he made, which failed, however, of its full operation, by reason of some informality in its execution. But the appellees have succeeded to a full and equal share of his estate, under the distribution which the law has made; which is all that in equity and justice they could claim.

This view of the case renders it unnecessary to notice the points made on the argument in relation to the accounts which the appellees were called upon to render. The decree of the court below is accordingly reversed, and the bill dismissed.

MR. JUSTICE CATRON concurred in the reversal of the decree, but dissented as to the reasons on which the opinion proceeds.

§ 876. Parent and child.—A deed of gift from a young daughter to a wealthy father, conveying all her property and leaving herself destitute, was held to be void in this case, on account of the relation of the parties. *Pye v. Jenkins*, 4 Cr. C. C., 541.

§ 877. The fact that the relation of the parties to a deed is that of mother and son, that she had instituted a suit against him and arrested him and held him to bail, and prevailed on him to execute the deed to her, when he had during his infancy made a deed of the same land to another, and so informed her, will not authorize the conclusion that the deed is fraudulent. *Tucker v. Moreland*, 10 Pet., 58.

§ 878. A conveyance without consideration, by a female just become of age, to her parents, of all of certain property which had been left to her by her deceased uncle, was set aside in this case because procured by undue influence. Such a conveyance will not be avoided on account of the relation of the parties alone. But the courts will often interfere in such cases, where, but for the relation, they would not. *Taylor v. Taylor*, 8 How., 183.

§ 879. It seems that a deed to a clergyman by a member of his church is not void on account of the relation of the parties. It is decided in this case that the relation does not vitiate such a deed or mortgage made after it has ceased. *Jackson v. Ashton*,* 11 Pet., 229.

§ 880. Where heirs, just coming of age, ignorant of the nature and value of their title to land, released the same, for an inadequate consideration, to one in possession of both the land and the legal title, who was well acquainted with the nature and value of their claim, who informed them that it was worthless, and who so complicated and covered up their title that they could not comprehend it, the deeds were held to be void as fraudulently procured. *Hallett v. Collins*, 10 How., 174.

§ 881. Mental weakness.—The degree of weakness of a grantor's mind, or the degree of imposition practiced upon him which ought to induce a court of chancery to set aside a conveyance, is proper for the consideration of the court itself, without the intervention of a jury. *Harding v. Handy*, 11 Wheat., 103.

§ 882. Where a deed is obtained by undue influence from a person of weak mind, a court of equity has power to set it aside. But the grantee may be allowed his just claims for improvements and repairs. *Ibid.*

V. CONCEALMENT.

SUMMARY — *Omission to communicate a fact*, § 883. — *Contract between stockholder and corporation for sale of stock*, § 884.

§ 883. Whether the omission to communicate a fact will be considered a fraud depends largely on the circumstances attending the particular transaction, and what duty, in respect to the matter in question, the party charged with improper concealment owes to the other party. *Britton v. Brewster*, §§ 885-87.

§ 884. A stockholder in a corporation, pending a suit by him against the directors of the company charging them with frauds and breaches of trust in the managing of its affairs, and praying for an account of all the business of the company, came to an amicable settlement with them of the matters involved in the suit, by which the defendants in the suit and the corporation agreed to purchase his stock, and pay him therefor such sum as, upon a fair examination of the affairs of the company, and a proper and fair estimate of the money, property, and assets

of the company, the stock should be found to be worth. He afterwards brought this suit to have the settlement corrected and to be paid such additional sum as, upon an accounting, his stock should be found to be worth, alleging that he had been defrauded by the exhibition of a false abstract of the books of the company and by fraudulent concealments. *Held*, that he was entitled to relief in equity on proof of the allegations, but that the burden of proof was upon him, and especially as he had access to the books and had examined them as fully as he desired, expressed his satisfaction with the examination and called for no other books; that he had failed to make out the charges of fraud; and that his refusal to do equity by correcting a mistake made in his favor in the settlement was also some objection to the relief sought. *Hager v. Thompson*, §§ 388-90.

[NOTES.—See §§ 391-404.]

BRITTON v. BREWSTER.

(District Court for New York; 2 Federal Reporter, 160-168. 1890.)

Opinion by CHOATE, J.

STATEMENT OF FACTS.—This is a bill in equity brought by the assignee in bankruptcy of Theodore E. Baldwin and Edward W. Burr, who constituted the firm of Theodore E. Baldwin & Co., to recover moneys alleged to have been fraudulently diverted from the assets of that firm to pay the individual debts of Baldwin, and also to recover a carriage fraudulently transferred by Baldwin to the defendant Brewster, and to enjoin the proof of certain notes held by the defendants against the firm or Baldwin individually. The defendants are James B. Brewster and a manufacturing corporation, "J. B. Brewster & Co.," of which the defendant Brewster is the president and principal stockholder.

The bill alleges that the firm of Theodore E. Baldwin & Co. was formed on the 10th day of August, 1870, and was adjudged bankrupt November 25, 1871, upon a creditor's petition, filed November 6, 1871; that Burr had no knowledge or experience in the business, which was that of selling carriages at No. 736 Broadway, New York; that from January 1, 1860, to January 1, 1869, and again from March 1, 1869, to December 1, 1869, Baldwin and the defendant Brewster had been in partnership, carrying on a like business upon the same premises; that their business in 1869 had been largely unprofitable, their losses amounting to over \$46,000; that upon the settlement of their copartnership business Baldwin assumed all the indebtedness of the business, amounting to \$73,000, and besides that sum was found to be indebted to Brewster individually about \$14,000, for which Brewster held his notes; that a part of these notes were transferred to "J. B. Brewster & Co.," with Brewster's guaranty of their payment; that at the time of this settlement Baldwin was largely insolvent, which the defendants well knew, and that on and before August 10, 1870, Baldwin was, to the knowledge of defendants, contemplating the stoppage of business, and an assignment for the benefit of his creditors; that thereupon and in view of these facts the defendant Brewster, "fraudulently combining and confederating with said Baldwin, formed the fraudulent plan and design of inducing said Burr to make a copartnership agreement with said Baldwin, and to contribute to the capital stock of the firm so to be formed the sum of \$50,000, upon the corrupt and fraudulent agreement with said Baldwin, and with the fraudulent design and intention that said Baldwin would and should thereafter use said \$50,000, and the funds, property and credits of the firm so to be formed, in paying the said indebtedness due from Baldwin to Brewster and 'J. B. Brewster & Co.,' and the said indebtedness of Brewster & Baldwin assumed by Baldwin." ♦

It is then alleged that in pursuance of said fraudulent combination and in-

tention the defendant Brewster falsely and fraudulently represented to Burr that the business carried on by Brewster & Baldwin had been largely profitable to the extent of over \$100,000 a year; that Baldwin was the best man for the business in the city of New York, and that they could make \$40,000 to \$50,000 a year in the business; and that the defendant Brewster fraudulently advised and urged Burr to go into the partnership and to put in his \$50,000, and concealed from him the losses of the last year, and the fact that Baldwin was largely indebted and insolvent, and contemplating an assignment; that Burr, believing and trusting to these representations, made the partnership agreement, and contributed his capital, in all \$65,000, to the firm; that in pursuance of the same fraudulent design and conspiracy, and in violation of the terms of the partnership agreement, the defendant Brewster induced Baldwin to pay to him and to "J. B. Brewster & Co." nearly all of the debts so owing to them from Baldwin, out of the funds of the firm and the moneys so contributed by Burr, and that by these fraudulent practices, and this use of the assets of the firm, it was compelled to stop payment and go into bankruptcy; that to cover up the real nature of these payments the defendants pretended to loan money to the firm on their notes, knowing that the proceeds were to be used for the aforesaid fraudulent purpose.

It is then averred that the defendants have made claims and filed proofs of debt for a large amount against the joint estate, upon certain notes and a check described purporting to be the obligations of the firm; that all of said notes and said check were given by Baldwin in pursuance of the said fraudulent design and intention, and that for one of these notes the defendant Brewster holds a carriage, which was the property of the firm, and was delivered by Baldwin to Brewster as security for Baldwin's individual indebtedness, in pursuance of the aforesaid fraudulent design and intention; that all these acts and all this application of the funds, property and credits of the firm were without the knowledge or consent of Burr, and in fraud of his rights and of the copartnership creditors of the firm, and of the individual creditors of Burr, and of the complainant as assignee.

The bill then prays for relief that these transactions be decreed to be in fraud of the firm and of Burr, and of the firm creditors, and of the individual creditors of Burr, and of the complainant as assignee; that the defendants refund the moneys so paid to them; that the delivery of the carriage be decreed to have been in fraud of the creditors of the firm, and that the complainant recover it or its value; and that they be enjoined from any proceedings in bankruptcy or otherwise touching said notes, and for general relief.

From this recital of the allegations of the bill it will be seen that the whole basis of the suit is the fraudulent conspiracy between Brewster and Baldwin — first, to inveigle Burr into a partnership with Baldwin; and second, that being accomplished, to divert the funds of the copartnership from their legitimate use, in carrying on its business and paying its debts, to the payment of the individual debt of Baldwin to Brewster.

All the alleged illegal and invalid acts complained of are charged to have been done in pursuance of this fraudulent purpose and design, and the sole ground for relief against them in equity is this alleged fraud. The bill, therefore, very properly avers, and probably necessarily does so, that the diversion of the firm assets complained of was without the consent of Burr. The first question, therefore, to be determined in the cause is whether the complainant has proved the fraud alleged. Upon a careful consideration of the testimony

and documentary proofs relied on by his counsel as establishing the existence of this fraudulent design and purpose on the part of the defendant Brewster, I think there is an entire failure to prove the fraud, either in its whole scope as alleged in the bill, or in any part.

The alleged fraud of Brewster in getting Burr into the partnership consists of three parts: *First*, statements of matters of facts averred to be false; *second*, concealment of facts, the knowledge of which would, if known, have prevented Burr from going into the partnership; and *third*, expressions of opinion as to the probable profits of the business of the proposed firm, known at the time to Brewster to be grossly extravagant and misleading. As to the first they were not shown to be false. The proof, on the contrary, is that the business carried on by Brewster & Baldwin had been largely profitable, to the extent of over \$100,000 in a single year; that Baldwin was the best man in the city of New York, as a salesman for carrying on the business, and that their place of business, Broadway, corner of Tenth street, was the best stand for the business in the city of New York. This is a more correct statement of the representations made by Brewster to Burr than that contained in the bill, and they were true in every particular.

§ 385. *Whether an omission to communicate facts is a fraud.*

The facts claimed to have been concealed were Baldwin's embarrassed financial condition, and the extent of the losses of the firm of Brewster & Baldwin while that firm did business in 1869. Whether the omission to communicate a fact will be considered a fraud depends largely on the circumstances attending the particular case, and what duty in respect to the matter in question the party charged with improper concealment owes to the other party. Brewster undoubtedly had an interest in Baldwin's obtaining a partner with capital, and when the connection with Burr was first proposed he certainly desired, and had reason to desire, its consummation. He knew, also, that in the interviews between himself and Burr that possible partnership was in contemplation, and that the interviews, or one of them, were specially arranged for the purpose of considering this subject.

Assuming, however, that the circumstances were such as called for the communication on his part of anything known to him which might influence Burr, and which he had any reason to believe Burr was ignorant of or would desire to know—and this, I think, is as strongly as the complainant's case at this point can be put,—there is still no proof of fraudulent concealment. Brewster knew that Baldwin and Burr were intimate friends and constantly together; that for several months Burr had been aiding Baldwin financially; that he had obtained from him the preceding April a pledge of a large part of his stock of carriages as security for his loans of some \$35,000. He had good reason to believe, and did believe, that Burr knew that Baldwin was, and had for several months been, in financial straits; that he found it difficult to meet his current maturing obligations in his business.

The fact that the business had been poor, and carried on at a loss for the last year, was not concealed from Burr. On the contrary, it was matter of discussion between the parties. In the settlement of their partnership affairs Baldwin & Brewster agreed upon a certain sum, about \$46,000, which was treated as the amount of the losses in the business, for the purpose of such settlement. It was not strictly and exclusively losses in business. It included allowances for depreciation in what had been spent on the premises leased by the firm and other matters. The account had been made up very favorably

for Baldwin, particularly in this item of losses, of which Brewster bore two-thirds. In view of these facts, and of Burr's intimacy and close business relations with Baldwin, known as it was to Brewster, I think there was clearly no fraud in not communicating to Burr the details as to the losses of the firm, and as to Baldwin's financial troubles, as he made no special inquiries about them.

§ 386. *It is difficult to prove fraud from mere statements of opinion.*

In respect to the alleged exaggerated estimates of future profits given by Brewster, it is very difficult to prove fraud in such a matter, since this was the expression of an opinion only, and known to Burr to be so. It was not, however, shown that Brewster did not honestly entertain the opinion that he expressed. The complainant has put in evidence, and relies upon, the private letters of Brewster to Baldwin. It is claimed on the part of the defendants that in some respects these letters do not represent the real sentiments, feelings and opinions which on their face they appear to express; that they were written for a purpose, which required and accounts for great exaggeration of the financial difficulties referred to in them. But the complainant insists that they must be taken as truthful expressions of the thoughts and opinions of the writer. Taking them at his own estimate of their proper construction, they abundantly show that Brewster really entertained the most sanguine expectations, fully up to those expressed to Burr, of the probable success of a firm in which Baldwin's great abilities as a salesman should be aided by an amount of capital such as Burr proposed to put into the concern. There was, therefore, no proof of the alleged fraud in inducing Burr to go into the partnership.

It was also shown clearly by Burr's own testimony that the representations of Brewster, whatever they were, were not the operative inducements by which he was led to take this step; that he had made up his mind not to go in, but was induced to change his purpose by the report and advice of his own book-keeper, whom he specially directed to make a thorough examination of Baldwin's books. The complainant's case is equally unfounded as to the other part of this supposed conspiracy and fraud. So far is it from being proved that the use of the copartnership assets to pay Brewster's debt was without the knowledge or consent of Burr, that the contrary expressly appears by the testimony of Burr himself, who was complainant's witness.

Brewster's interest in having Burr join Baldwin, and furnish capital enough to do a successful business, was that Baldwin might be able to pay off his debt to him. This was perfectly well understood by all parties, and one of the inducements held out to Burr to come in was that if he did Brewster would give up \$20,000 of his debt against Baldwin, upon the balance of it being promptly paid. Baldwin was to turn into the concern all his business assets, which were very valuable.

Under the circumstances, which it is unnecessary to detail more at large, it would be absurdly improbable that there should be any other expectation or understanding between the parties than that after the formation of the firm Baldwin should go on and reduce Brewster's debt down to the limit of \$20,000 by using the funds of the firm. Burr himself, who is alleged to have been defrauded by this having been done, testified that he expected Brewster to be paid out of the proceeds of the sales of the stock of goods which, by the formation of the copartnership, was to become its property. He says, indeed, that as between himself and Baldwin he understood such payments were to be charged to Baldwin and not to the firm. In other words, while he admits that he understood that Baldwin was to be allowed to use the firm's funds to pay

Brewster, the firm did not assume as its own Baldwin's debt to Brewster. This qualification is of no importance. It simply affects a settlement of copartnership accounts between Baldwin and Burr. So far as Brewster's rightful or wrongful receipt of the money goes, Burr's testimony distinctly negatives the alleged fraud of Brewster upon him or his firm in the receipt of these moneys.

It is, however, urged that by the copartnership articles the debt to Brewster was not assumed, and the copartners were expressly prohibited from using the firm's funds to pay the debts of the individual partners. The suggestion has no force. The articles constituted an agreement between Baldwin and Burr alone. Brewster was no party to them, and, as is proved, did not know what they contained. The question here is of the agreement between Brewster on the one hand and Baldwin & Burr on the other, and of a fraud practiced by Brewster on Burr. If it was the understanding between Brewster on the one part and Baldwin & Burr on the other that the firm funds, after the formation of the partnership, should be used in a particular way, no agreement between Baldwin & Burr to which Brewster is not a consenting party can possibly affect Brewster's right, as against them both, to have the funds so used. Still less can such a secret agreement between them be adduced as proof that such use availed of by Brewster is a fraud upon either of them.

§ 387. *A party who has failed to prove the facts alleged as grounds of relief is entitled in equity to no relief on other grounds.*

The complainant having failed to prove the fraud is entitled to no relief in this suit. The complainant claims that the debt due to Brewster was reduced below \$20,000, and that therefore such of the notes now held by the defendants as represent a part of that original debt should be delivered up to be canceled. The defendants insist, with better reason, I think, that the debt never was so reduced; that new loans were made from time to time to pay the notes representing this debt, and that within the true spirit and meaning of the agreement the debt has always exceeded \$20,000. It is unnecessary, however, to determine this question. If the complainant is right the proper mode of raising the question is by proceedings under the bankrupt law for re-examining the proofs of debt. He can have no relief in this suit, because the fraud alleged as the sole ground of relief is not proven.

So, as to the carriage, if Baldwin exceeded his authority as a copartner in pledging it, and the pledge was without Burr's knowledge or consent, or for any other reason Brewster's claim to it is invalid, the remedy of the assignee is obvious enough. The only claim made in equity in this suit to recover it or its value is the same alleged fraud. Nor can the bill be sustained on the ground that the funds were diverted from an insolvent firm, to the knowledge of the defendants, to pay a partner's individual debt, and, therefore, operated as a fraud on the creditors of the firm. Such seems not to be the scope of the bill. But without regard to this question, it was not proved that at the time of the payments made, the firm was known to the defendants to be or was in such a situation financially that such use of the firm's funds was a fraud upon its creditors. Moreover, the payments, such as they were, having been made in pursuance of an agreement between Brewster and other partners before the formation of the firm, to remit a part of his debt against Baldwin, the consideration of the payments to be so made out of the firm assets, I do not see how either the firm or its creditors can claim that the payments were merely voluntary, or without consideration. The consideration inured indirectly to the benefit of the firm, inasmuch as the remission of part of his indebtedness would en-

hance the credit and financial ability of one of the partners. It is, therefore, unnecessary to consider the legal questions raised and discussed, touching a suit for the purpose of recovering firm assets fraudulently diverted as against its creditors alone.

I have attributed no weight to the evidence offered by the defendants tending to show that the complainant has been actuated by motives of personal animosity in bringing and carrying on this suit. His motives would be immaterial if he had proved a case against the defendants. Bill dismissed with costs.

HAGER v. THOMPSON.

(1 Black, 80-94. 1861.)

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—This was a bill in equity, and the case comes before the court on appeal from a decree of the circuit court of the United States for the district of New Jersey, dismissing the bill of complaint. It was filed on the 18th day of May, 1852, and was brought by the appellant. Some brief reference to the introductory allegations of the bill of complaint, and to the transactions out of which the controversy has arisen, is indispensable, in order that the foundation of the claim made by the complainant may be fully understood.

It appears that the New Brunswick Steamboat and Canal Transportation Company, usually called the New Brunswick Company, was incorporated on the 18th day of January, 1831, and that the charter expired, by its own limitation, on the 18th day of January, 1852. Shortly after the charter was granted the company was duly organized, with a capital of \$25,000. Seven and two-thirds shares of the stock were taken by the appellant, and he was elected secretary of the company. They purchased a steamboat in 1831, which was employed in the transportation business between New Brunswick and the city of New York; and they also purchased a sloop, which was employed in carrying wood for the steamboat, and was also engaged in the transportation of merchandise on the Raritan river.

Two other companies were also created by the legislature of the state of New Jersey, and authorized to engage in the transportation business. One was called the Delaware & Raritan Canal Company, incorporated in 1830, and the other the Camden & Amboy Railroad Company, incorporated contemporaneously with the New Brunswick Company. Those companies were united in 1831, and were subsequently known as the joint companies. Most or all of the respondents were largely interested in those companies, and in 1834 they purchased about four-fifths of the stock of the New Brunswick Company; but the complainant still retained his shares and his position as secretary of the company and clerk on the steamboat. Whatever might have been the object of the purchasers, it is evident that the transfer of the shares had the effect to impart new energy and efficiency to the management of the company, for they increased the capital stock to \$50,000, making the par value of the shares \$250; and, during the early part of the year 1835, made an arrangement with the joint companies for transporting freight through the canal and over the railroad between New York and Philadelphia, and other intermediate places on the route. Under this arrangement they also built and procured canal boats and barges, and ran them on the Delaware and Raritan rivers and through Staten Island sound to the city of New York, operating

them by means of steam-tugs furnished by the joint companies. They also did a large business on the Camden & Amboy Railroad, using the locomotives, cars and steamboats of the railroad company for that purpose. Throughout this period they also continued to operate their steamboat line between New Brunswick and New York; and, in 1837, they engaged in the coal business, purchasing and transporting coal to market, as is more fully set forth in the pleadings. Large profits were made by the company under these various arrangements; but they also incurred very large expenses, and the complainant became dissatisfied with the management of the company. Failing to get any redress for his supposed grievances, he, on the 25th day of March, 1847, filed a bill in equity in the chancery court of the state against three of the present respondents, charging them, as directors of the company, with divers frauds and breaches of trust in the management of its affairs, and praying for an account of all the business of the company. To that bill of complaint the respondents in the suit made answer, denying the charges, and exhibiting what they alleged to be the actual circumstances of the case. Pending that suit, the complainant, with two other persons, purchased four additional shares of the stock of the company, and the same were held in the name of one of those persons for the equal benefit of the purchasers at the time the suit was brought.

With these explanations as to the origin of this controversy, we will proceed to state the foundation of the claim made by the complainant. Among other things, he alleged that after he had proceeded to take testimony in that suit in support of his bill of complaint, propositions of compromise were made in behalf of the defendants, and that the propositions so made were entertained by him in the spirit of conciliation. Those propositions of compromise, he alleged, were made to him through R. F. Stockton, one of the respondents in this suit, who was the agent of the company and of these respondents; and he also alleged that it was agreed and arranged that the suit should be compromised and settled in the manner and upon the basis set forth in the present bill of complaint. Both parties agree that the suit was settled in consequence of that arrangement, and that the stock of the complainant, including the four shares purchased during the pendency of that suit, was transferred to the company; but they differ, in some respects, as to the terms of the agreement providing for the transfer, and still more widely as to the circumstances under which the transfer was made. As alleged in the bill of complaint, R. F. Stockton applied to the complainant, about the 2d day of September, 1847, to ascertain whether there could not be an amicable settlement of the matters involved in that suit, and that the conference resulted in an agreement that the company and the defendants in that suit should purchase his stock in the company, and pay him therefor such price or sum as, upon a fair examination of the affairs of the company, and a proper and fair estimate of the money, property and assets of the company, the stock should be found to be worth. Having set forth the supposed agreement, the complainant proceeded to allege that he and R. F. Stockton, accordingly, met at Princeton, on the 13th day of January, 1848, to carry out and complete the same, for the sale and purchase of the stock; that from a partial examination of the books kept by the treasurer, and from assurances there given by R. F. Stockton and others that a certain abstract account there exhibited, and which was taken from the books, was correct, and contained a fair statement of the business of the company, and of the moneys received and of the disbursements made, and not know-

ing that there were other books of the company not produced at the time the abstract was prepared, he was induced to believe that the account was true and correct, and consequently did, upon the payment of his proportionate part of \$289,000, transfer the stock owned by him, including the four shares purchased during the pendency of the suit, to the company, and received pay for the same from the company's funds. But he alleged that he had since discovered that the abstract account was false and fraudulent in very many particulars, as specified in the bill of complaint; and, therefore, insists that he is entitled to have the settlement corrected and reformed, and to have an account taken of the entire property and estate of the company, and to be paid such additional sum for his stock as the same, upon such accounting, be found to have been worth.

On the other hand, the respondents, in their answer, admitted that they, by virtue of their being the last president and directors of the company, became and were the trustees of the corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property of the company among the stockholders, after paying the debts due and owing from the corporation; but they allege that the agreement was, that the complainant should sell the stock, held and represented by him, at such price as the same should be found to be worth upon a fair valuation of the property of the company, and that the complainant, if he desired it, should have an opportunity of examining the company's books to satisfy himself of their correctness. Substantially adopting the language of the bill of complaint, they admitted that the complainant and R. F. Stockton met at Princeton, on the 13th day of January, 1848, to make a valuation of the property, and carry out the agreement; but aver that the counsel of the complainant and the defendants in that suit were present, as well as several other directors, and the treasurer and clerk of the company. According to the answer, all those persons, with others connected with the company, were present to aid and assist in making the valuation and statement of the property, and in such examination of the books of the company as the complainant or his counsel might desire to make. In this connection, they also allege that the books of the company were produced at the meeting and were examined by the complainant and his counsel as fully and for such length of time as they desired; and that all such explanations of the same as the complainant or his counsel required were fully and freely given by the persons present, who were the persons best qualified to make such explanations. It was at that meeting that the valuation was made; and the respondents alleged that all of the property of the company, according to the best of their judgment, information and belief, was fairly and liberally appraised, and to the satisfaction of the complainant; and they also alleged that he finally agreed that the settlement should be made on the basis that the books were correct as they stood on the 2d day of April, 1847, when the abstract exhibit was made out, without taking into the account any subsequent transactions.

One matter only, and that not now in dispute, was left in doubt, and provision was made for its satisfactory adjustment. Assuming the abstract to be correct, it showed a balance in favor of the company of \$42,156.60. That sum, added to the appraised value of the property, ought to have been taken, as the respondents alleged, as the true value of the capital stock of the company; but they alleged that, at the suggestion of the complainant, and by mistake on their part, the sum of \$50,000, being the whole amount of the

original capital, was added to that amount as the basis of the settlement, making the sum of \$289,000, as alleged in the bill of complaint. Pursuant to that settlement, the company paid to the complainant \$1,445 for each share, paying therefor, as they alleged, \$250 on each share more than they ought to have paid according to the terms of the agreement; and they denied that there was any fraud or deception practiced by them or their agents in any part of the transaction. Some eighteen witnesses were examined by the complainant in support of the allegations of the bill of complaint, but the respondents took no testimony; and, after a full hearing in the circuit court, a decree was entered dismissing the bill of complaint.

§ 388. *Where a stockholder of a corporation agrees to sell his stock at its fair value, to be ascertained from the affairs, books, etc., of the corporation, equity may grant relief, where he has been deceived by concealments and misrepresentations in his examinations of the affairs and books of the corporation. But the burden of proof is on the plaintiff.*

1. It is contended by the complainant that the agreement obligated the respondents to pay him such price for the stock he transferred to them as, upon a fair examination of the affairs of the company, and a proper and fair estimate of the moneys, property, and assets of the same, the stock was found to be worth; and if the examination of the books at Princeton was not a fair examination of the affairs of the company, and the estimate there made of the moneys, property and assets of the company was not a proper and fair estimate of the same, and in consequence thereof he was induced to accept a less price than the agreement authorized him to expect and demand, then he is entitled to have an examination of the books and the accounts, and to be paid such additional sum for his stock as it may be found to have been worth upon such restatement. Suppose the proposition to be correct as a general rule of law, still it remains to be ascertained whether the theory of fact on which it is based is sustained by the evidence. Undoubtedly, if there was any fraud or deception practiced upon the complainant, as alleged in the bill of complaint, to induce him to transfer his stock for a less price than he was entitled to receive upon the reasonable fulfillment of the condition of sale to which he had agreed, and, in consequence of such fraudulent acts or misrepresentations, he actually parted with the stock at less than its value on the basis of the agreement, then clearly he would be entitled to relief, but the burden of proving the charge of fraud is upon the complainant.

§ 389. *Fraud must be proved.*

Fraud cannot be presumed or inferred without proof in a court of equity, any more than in a court of law; and in both the rule is, that he who makes the charge must prove it; and there are some circumstances in this case, besides the fact that the charge is denied in the answer, that render the application of that rule peculiarly proper. As appears by the complainant's own showing in the present bill of complaint, he became dissatisfied with the manner in which the affairs of the company were conducted as early as the 25th day of March, 1847; and he accordingly alleges that on that day he filed his bill in the chancery court of the state of New Jersey against three of the present respondents, charging them, as directors of the company, with divers frauds and breaches of trust in the management of its affairs. Answer was made to that suit by the respondents, and the complainant continued to prosecute it until the 13th day of January, 1848, when the settlement took place,

and he transferred his stock. Most of the substantial matters now in controversy were more or less involved in that litigation; and, during the pendency of the suit, both the complainant and his counsel, on two or more occasions, were allowed to inspect the books of the company, and his own testimony shows that they examined them as fully and for such length of time as they desired. On one occasion the treasurer and book-keeper appeared before the master in chancery, and, in obedience to a subpoena *duces tecum*, produced the books, and they were examined for several days. His own testimony also shows that he was present at the meeting of the stockholders on the 3d day of April, 1847, when the abstract in question was made, and several of his witnesses testify that the books were produced and submitted to the examination of the stockholders. No suggestion was made that any other books or vouchers, not produced, were necessary to a full exhibition and understanding of the affairs of the company; and none of the circumstances elicited on the various occasions when the books were produced afford any countenance whatever to the theory that any concealment, deception or evasion was practiced by the respondents. On the contrary, they furnish indubitable evidence that the complainant had every reasonable facility and the most ample means to ascertain the true state of the accounts. Whatever means of information the respondents had upon the subject appears to have been laid before the complainant, and surely he had no right to ask for more; and he is equally unfortunate, if the testimony adduced by him as to what occurred at Princeton on the 13th day of January, 1848, be compared with the allegations of his bill of complaint. It was at that meeting, it will be remembered, that he accepted the propositions of compromise and transferred his stock, and the witnesses substantially agree that the allegations of the answer are correct; that his counsel was present, and that he examined the books to his satisfaction, without even suggesting that any others were desired. Complaint is now made that the books of the agents in New York and Philadelphia were not produced on that occasion; but his own witnesses testify that he called for no others at the time; expressed himself as satisfied with the examination, and the bill of complaint admits that he agreed to the settlement, accepted the estimated price of his stock and transferred it to the company.

Looking at the whole evidence, therefore, it is obvious that the charge of fraud and deception is wholly unsustained by proof, and we think the allegations of mistake, so far as the complainant is concerned, are equally unfounded. But it is fully proved that a mistake in his favor was made in the basis of the settlement to the amount of \$50,000. That mistake, as appears by the evidence, was made by adding the capital stock to the estimated amount of all the moneys, property and assets of the company, when in point of fact the whole of the capital stock had been expended in purchasing the property already included in the valuation. Before the consideration was paid for the stock the mistake was discovered, and the complainant was requested to consent to the correction by a corresponding reduction from the basis of the settlement, but he replied that it was too late to correct errors. That refusal is a circumstance of some significance, plainly indicating that the complainant did not then think it for his interest to rescind the contract, or that he had been circumvented by the respondents. He who seeks equity should do equity is a maxim in equity jurisprudence, and we think that rule has some application to this case.

§ 390. *This case is not like one of settlement between debtor and creditor, which is only prima facie evidence of its correctness, but is a sale, and the complainant has not shown fraud or other matter to impeach it.*

2. Numerous mistakes in the basis of the settlement are alleged in the bill of complaint, and some eighteen in number were urged upon the attention of the court at the argument by the counsel of the complainant. It was held by this court, in a case between creditor and debtor, that a settled account is only *prima facie* evidence of its correctness; that it may be impeached by proof of unfairness, or mistake in law or fact; and if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it. *Perkins v. Hart*, 11 Wheat., 256. Granting the correctness of that principle as applied to the case then before the court, still it is obvious that it cannot have any very direct application to the case under consideration. Much the largest number of controversies between business men are ultimately settled by the parties themselves, and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement, and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement and afterwards maintain a suit for that which he voluntarily surrendered. But the present case is one between vendor and vendee, and the rights of the parties must be measured by the terms of the agreement under which the sale and purchase were made. Assuming that the agreement was as is alleged in the bill of complaint, all the complainant could claim was such a price for his stock as upon a fair examination of the affairs of the company and a proper and fair estimate of its moneys, property and assets, the stock should be found to be worth. That examination into the affairs of the company was made by the parties to their satisfaction, and they also made the estimate; and there is no evidence of any unfairness, or that they committed any error except the one already mentioned in favor of the complainant. On this point the complainant called and examined the agents of the railroad line and the agents of the canal lines, and the agents of the coal-barge lines, and they all testified, in substance and effect, that the accounts or the results of the business as ascertained by the monthly settlements were correctly entered on the company's books. All of the accounts of the steamboat line were kept by the treasurer, and it has already appeared that those books were exhibited to the complainant at the time of his settlement. Nothing need be remarked respecting the steam-towing business, except to say that the matter was fully settled between the two companies in 1846, and the result of the settlement was duly entered on the books of the company. Without entering more into detail, suffice it to say that the gravamen of the bill of complaint is that the complainant was induced to sell his stock for less than its worth, but he has not introduced one word of truth to sustain the allegation, and his own testimony shows that by mistake he received \$250 on each share more than he was entitled to according to the agreement. In view of the whole case, we are of the opinion that the complainant has wholly failed to support the allegations of the bill of complaint, and the decree of the circuit court is accordingly affirmed, with costs.

§ 391. *In general.*—A fraudulent concealment is as effective to vitiate a contract as a fraudulent representation. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-96).

§ 392. There is little if any difference between a suppression of the truth and a statement of

a falsehood, where such reprehensible measures are resorted to for the purpose of inducing a purchase. *Smith v. Babcock*, 2 Woodb. & M., 246 (§§ 399-17).

§ 393. To avoid a contract on the ground of fraud there must be a concealment of something which the purchaser is bound to communicate to the seller, or some misrepresentation on a matter material to the contract, which misleads and deceives him, or is calculated to do so. But a purchaser may avail himself of information which affects the price of the article, though it is not known to the seller; and he is not bound to answer if the seller inquires if there is any news which affects the price. But there must be no unfair concealment of such news by the use of art or circumvention, or the assertion of what is not strictly true as meant to be understood, though true in another sense different from the ordinary import. If the purchaser does answer the question he must do it fully, fairly, and in good faith. *Blydenburgh v. Welsh*, Bald., 331.

§ 394. In a court of equity deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him. *Crosby v. Buchanan*, 23 Wall., 420.

§ 395. Miscellaneous.—If grantees of property in a prior deed have no knowledge of a subsequent incumbrance at the time it is executed, and at the time they advance their money, their subsequent silence cannot justify a charge of fraud and collusion. *Bank of United States v. Lee*, 5 Cr. C. C., 319.

§ 396. A vendee having the exclusive intelligence of extrinsic circumstances, which may influence the price of the commodity, such as the conclusion of peace between two countries at war, is not bound to communicate them to the vendor. But in such a case the question whether any imposition was practiced by the vendee upon the vendor ought to be submitted to the jury. *Laidlow v. Organ*, 2 Wheat., 178.

§ 397. If a trustee for creditors withhold from the creditors or the assignor any information which is in his possession, and which affects the value of the trust property, it is such a fraud as will vitiate any settlement or compromise made by him with the assignor or the creditors, acting in ignorance of the facts within the knowledge of their trustee. *Carpenter v. Robinson*, 1 Holmes, 67.

§ 398. If an owner stands by and knowingly suffers an innocent person, without giving him notice of his title, to purchase his property, and to be misled by his silence in not asserting that title, a court of equity will treat it as a fraud upon the purchaser, and grant an injunction against the positive assertion of that title. *The Brig Sarah Ann*, 2 Sumn., 206.

§ 399. Fraud vitiates all contracts. And if it attaches to the sale of a horse, as where the vendor, knowing that the horse has hidden defects, does not disclose them to the vendee, the sale is void, and no recovery can be had upon the note given for the price, unless by an innocent holder. *Pease v. McClelland*, 2 Bond, 42.

§ 400. If an agent who, according to his principal's understanding, is to act mainly for his (the principal's) benefit and interest, and knowing this conceals from his principal his intention to act solely and exclusively for his own interest, such a concealment is, in contemplation of equity, a meditated fraud upon the principal. *Jenkins v. Eldredge*, 8 Story, 181.

§ 401. If the concealment of a mortgage is procured by fraudulent means, it cannot operate to the prejudice of those who claim under it. *McLean v. Lafayette Bank*, 3 McL., 587.

§ 402. Notes secured by a provision in a marriage settlement were transferred in settlement by way of compromise of a debt. The creditor attempted to set aside the compromise on the ground of a fraudulent concealment in not disclosing the fact that a suit was pending at the time of the compromise, questioning the *bona fides* of the marriage settlement. The fact that the creditor was not aware of the existence of the suit, and that it was not mentioned in the transaction, was held not to show a concealment. *Chapman v. Wilson*, 5 Fed. R., 305 (§§ 207-10).

§ 403. Where an action was brought for deceit against the agents of a corporation in making a sale of property of the corporation to the plaintiff, and judgment was rendered for the defendants, it was held that this judgment was not a bar to a subsequent suit by the plaintiff against the corporation to rescind the sale for the same fraud, where the bill alleged that the sale was agreed to on behalf of the complainant, which was also a corporation, by a board of directors who were not the independent representatives of the stockholders, but who were, with one exception, either the agents of the vendors, or qualified as directors by receiving from the vendors or promoters of the company the requisite number of shares to constitute them directors; that some of them had other agreements with the promoters of the company which tended to create in them a personal interest in assenting to the sale that was inconsistent with the true interests of the complainant corporation; and that these facts were concealed from those persons who, by subscription to the stock, became members of the corporation. The decision was

upon the ground that the fact that the complainant corporation, unknown to the stockholders, did not have an independent board of directors, was of itself a ground of rescission, while it was not a ground of recovery in the action for deceit without proof of actual fraud on the part of the agents. *Emma Silver Mining Co. (Limited) v. Emma Silver Mining Co. of New York*, 7 Fed. R., 401 (§§ 416-25).

§ 404. In a suit by a New York insurance company on the bond of its agent in Alabama, given to secure the faithful discharge of his duties, the sureties pleaded that the company required the giving of this bond as a condition on which only they would retain the agent in their employment: that they required, further, an agreement by the agent that all his commissions thereafter earned should be applied to his past indebtedness to the company; that they were so applied; that they, the sureties, were ignorant of the indebtedness and of this agreement; that if they had been informed of them they would not have executed the bond; and that the agreement as to the commissions and its execution was a fraud upon them, and that the bond as to them was thereby avoided. It was held that, as the plea did not set forth any of the circumstances attending the execution and delivery of the bond, and did not aver that there was any misrepresentation, anything fraudulently kept back, or any opportunity to make disclosures on the part of the company, or any inquiry by the sureties, before the bond was delivered, or that the company were aware that the sureties were ignorant of the facts complained of, a demurrer to it must be sustained. And it was further held that there was nothing fraudulent in the agreement. *Magee v. Manhattan Life Ins. Co.*, 2 Otto, 93.

VI. RELIEF.

SUMMARY — *Fraud renders contract voidable, § 405.— Contract must be rejected as a whole, §§ 406, 407.— Defense of prior suit in which the fraud might have been set up, §§ 408, 409.— Action against agent for damages not inconsistent with a disaffirmance, §§ 410, 411.*

§ 405. Fraud does not render a contract void, but voidable only at the election of the party defrauded, both at law and in equity, whether the fraud be committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction, the rule being that where fraud is committed by one of the parties upon the other, the contract remains operative and in force until it is disaffirmed by the injured party. *Foreman v. Bigelow*, §§ 412-15.

§ 406. Where there is a contract, even if fraud be imputed, the party seeking redress must disaffirm the contract, or proceed for damages against the perpetrators of the fraud. He must throw over the agreement altogether, or he must take it as a whole. He cannot adopt it as to part, and reject it as to part. *Ibid.*

§ 407. The assignee in bankruptcy of a corporation, under a decree of the bankruptcy court adjudicating that for the purpose of paying off the indebtedness of the company a call and assessment be made on the stock of one hundred per centum, less any sum or sums that may have been paid thereon, brought a bill in equity seeking to enforce from the respondents the payment of the entire capital stock of the company, or such portion as might be necessary to pay its debts, less the amount any particular stockholder may have paid on his shares. Three classes of shares had been issued, but under the pleadings the respondents were considered as charged as the holders of the first class of stock only. The shares of stock of this class had been issued to the directors in exchange for mineral lands which were fraudulently overvalued. This transaction was unsustainable on account of the fraud, but the contract had been duly executed by the conveyance of the lands and the issue of fully paid up shares. The respondents were *bona fide* holders and purchasers of the shares as fully paid up, and so entered on the books of the company, and with nothing on their face or on the books to show unfairness or to call for inquiry. It was held that the assignee could not maintain the action and recover the difference between the lands and the estimated value of the shares, since this would be disaffirming the contract in part only, and affirming it as to the residue; and that his remedy was against the guilty perpetrators of the fraud in their individual capacity, the decree of the bankruptcy court for the assessment and call being considered as not opposed to this holding. *Ibid.*

§ 408. A suit by one corporation against another corporation and its agents to procure the rescission of a contract of sale upon the ground of fraud, also sought an injunction against the collection of certain notes of the complainant, given to a third party and held by one of the defendants, on the ground that they were obtained by the latter in fraud of the rights of the complainant, and for the purpose of protecting himself at the expense of the complainant company, of which he was a director, against a claim on its part against him for deceit in the sale. It was held to be a defense to the injunction that in a prior suit on the notes by the defendant

against the complainant, in which the fraud might have been set up in defense, judgment was obtained by default after jurisdiction obtained by proper service, the bill not having alleged a discovery of the facts constituting the fraud subsequent to the commencement of the suit, or their continued concealment, and the transaction being so distant from the original sale that the rescission of the sale would not of itself affect the question of the liability of the complainant on the notes. *Emma Silver Mining Co. (Limited) v. Emma Silver Mining Co. of New York*, §§ 416-25.

§ 409. A corporation sought an injunction against the collection of moneys advanced by the defendant to the complainant to pay dividends on its capital stock. The ground alleged was that the loan was in fraud of the stockholders, being made in order to continue false impressions produced by defendant's misrepresentations, made to induce the complainant to make a purchase, and to enable him to dispose of his stock. It was held that the maintenance of this action was precluded by a prior action for the repayment of the advances, in which the fraud might have been set up in defense, in which the court obtained jurisdiction by proper service, and in which judgment was regularly obtained by default, and where such judgment had been satisfied by execution sale of complainant's property. *Ibid.*

§ 410. The commencement of an action by a vendee against the agents of the vendor to recover damages for their deceit in effecting the sale is not inconsistent with a disaffirmance of the sale. It is consistent either with its affirmation or disaffirmance, and will not necessarily preclude a subsequent suit to rescind. The complaint may be so framed as to be an affirmation or a disaffirmance by containing a deliberate adoption of the sale as valid and in force, or a deliberate rejection of it as void. If there is nothing in the complaint that amounts to an affirmation or disaffirmance, neither the commencement of the action nor a judgment for defendants therein will constitute an adoption of the contract. *Ibid.*

§ 411. An action by a vendee against the agent of the vendor to enforce the contract of sale, claiming damages for the non-delivery of part of the goods sold by the agent on his own behalf as well as on behalf of the vendor, his principal, is inconsistent with a rescission of the contract, and will preclude a suit for that purpose, if the action was brought deliberately and with full knowledge of the facts. But the plea alleging such prior suit must show such full knowledge of the facts. *Ibid.*

[NOTES.—See §§ 426-502.]

FOREMAN v. BIGELOW.

(Circuit Court for Massachusetts: 4 Clifford, 508-549. 1878.)

STATEMENT OF FACTS.—This was an action by the assignee in bankruptcy of the Central Coal Mining Company against certain shareholders in that company. It appeared from the bill that the company was organized with a capital of \$400,000; that the whole amount of its shares were issued to five persons, who were the incorporators and directors; that a part of the shares were issued without any consideration; that the remaining shares were paid for by the conveyance by the directors to the company of certain coal lands at a fraudulent overvaluation; and that the capital stock had been increased by the amount of \$100,000, and shares issued to persons who bought the bonds of the company at ninety cents on the dollar. The bankruptcy court, on the application of the assignee, had ordered a call and assessment, and the bill in this case called for an account of stock, and the payment of the par value, less any amount paid thereon.

§ 412. *Fraudulent contracts voidable.*

Opinion by CLIFFORD, J.

Fraud does not render a contract void, but voidable only at the option of the party defrauded, both at law and in equity, whether the fraud was committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction, the rule being that where the fraud was committed by one of the parties upon the other, the contract remains operative and in force until it is disaffirmed by the injured party. *Chit. Cont.*, 10th ed., 626; *Add. Cont.*, 7th ed., 228; *Clough v. Railway, L. R.*, 7 Exch., 34; *Jones v. Carter*, 15 M. & W., 72; *Upton v. Englehart*, 3 Dill., 496 (*CORP.*, §§ 197-209).

Due consideration will be given to both defenses, but it will be more convenient to examine the one addressed to the merits before considering the question whether the claim is barred by the statute of limitations. Considered broadly, the bill of complaint seeks to enforce from the respondents the payment of the entire capital stock of the company, or such portion of the same as may be necessary to pay the debts of the corporation less the amount any particular holder of the stock may have paid towards his shares. Three classes of shares were issued, as plainly appears from the allegations of the bill of complaint. 1. Shares to the amount of \$350,790, fraudulently issued to the directors in payment for the mining lands which they, at a greatly overvalued estimation, conveyed to the corporation. 2. Unpaid shares to the amount of \$46,210, issued to the directors without any consideration. 3. Shares to the amount of \$100,000 issued by the corporation to such persons as took an equal amount of the mortgage bonds of the corporation at ninety per cent.

§ 413. *Pleadings which are uncertain or ambiguous are taken in the sense most adverse to the pleader.*

Viewed in the light of these suggestions, it is plain that it is sufficient for the respondents to show that the complainant cannot sustain any claim against them as holders of the first issue of the original stock, as the bill of complaint does not charge that the respondents are holders of any particular issue of the stock or either of the other issues. Such being the state of the pleading, it is open to the several respondents to assume that his stock, as charged, is wholly of the first class of the stock which was issued to the directors in payment for the mining lands, the rule being that pleadings which are uncertain or ambiguous must be taken in the sense most adverse to the pleader. Story, Eq. Pl., 7th ed., § 257; *Foss v. Harbottle*, 2 Hare, 503; *Simpson v. Fogo*, 1 Johns. & H., 23; *Ayckbourn*, Ch. Pr., 113; *Parker v. Nickson*, 7 L. T., N. S., 461.

Certificates of shares of that kind were issued to the amount of \$350,790; and, nothing being alleged to the contrary, the several respondents in this controversy may properly assume that they are charged with holding of shares in the capital stock, the certificates of which were of that issue which were entered upon the books of the company as shares paid up in full. Issued, as these shares were, to the directors in payment for the mining lands, they were, as between the grantors of the land and the directors issuing the shares, fully paid up, as the shares paid for the land, and the land conveyed paid for the shares; and all this appears upon the books of the company. Transferees of the shares took the certificates with nothing on their face to show any unfairness, and with nothing appearing on the books of the company to put them upon inquiry. Suppose that is so, still the complainant contends that such payment was made in mineral lands at a fraudulent valuation, not binding on the corporation. Admit that, and still the fact remains that the land was actually received by the company in full payment for the stock, and that the shares were issued and delivered as fully paid up shares. Taken as a whole, the averments of the bill of complaint show that the transaction in purchasing the mineral land, and in issuing the first class of stock in payment for the same, was a gross fraud upon the company which cannot be sustained; but it does not follow that the present suit against the respondents is the proper remedy to redress the injury, for the reason that the contract was duly executed by the execution of the deed of conveyance to the corporation, and by issue

of fully paid up shares to the corporation for the whole amount of the agreed consideration of the mineral land.

§ 414. *Party defrauded may either rescind the contract or affirm and proceed for damages. He cannot do both.*

Nothing can be plainer in legal decision than that the title to the mineral land passed to the corporation, and that the title to the paid-up stock passed to the directors. Being formally executed the contract must stand until it shall be rescinded, or the assignee, if he prefers that course, may retain what the company received for the stock, and seek redress in damages against those who defrauded the corporation. And the redress is at his command, but he certainly cannot be allowed to disaffirm the contract only in part, and affirm it as to the residue, as he must do in order to maintain the present suit against the respondents.

§ 415. *Innocent purchasers of stock in a corporation, shown by the books to be paid up, will hold them as paid.*

Beyond all question the present respondents are *bona fide* purchasers and holders of shares in the capital stock of the company, which the books of the company show were fully paid for by the directors, and which, by the terms of the contract between the directors and the grantors of the mineral land, were fully paid in the manner stipulated by the contract. Under such circumstances it cannot be that the complainant, without disaffirming the contract, can be allowed to set up the theory that the property taken in payment of the shares was less than their estimated value, and to seek redress for the difference against *bona fide* purchasers of the same in the open market. Gross fraud may have been perpetrated between the parties to the sale and purchase of the mineral land; but it is nevertheless true, so far as the shares of the capital stock are involved, that the shares, as between the corporation and innocent purchasers of the stock in open market, without notice, knowledge, or means of knowledge of the fraud, were paid up, as shown by the books of the corporation. Notice of the fraud as respects the respondents is not alleged, nor is there an intimation in the bill of complaint that any facts or circumstances were known to the respondents to put them upon inquiry in respect to any such imputation.

Innocent purchasers of the stock in the open market are not liable in such a case; but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. Support to the opposite theory is attempted to be derived from the adjudication of the bankrupt court; but the decree of the bankrupt court was only an adjudication that, for the purpose of paying off the indebtedness of the company, a call and assessment be made on the stock of one hundred per cent., less any sum or sums that may have been paid thereon. Properly considered, as a whole, the decree of the bankrupt court does not absolutely fix and determine the amount to be assessed. Instead of that, it merely calls for one hundred per cent. less all payments; nor does the decree in any respect contradict the theory that the class of stock first issued was fully paid up before it was put upon the market; and, if so, the court is of the opinion that the proper remedy of the complainant is against the perpetrators of the alleged fraud, which he might have enforced the moment he was appointed assignee of the bankrupt's estate. Holders of shares issued improperly stand on a different footing from the holders of shares which the company had no power to issue, as the purchaser in the latter case acquires nothing, and cannot, in general, be held as a contributory.

2 Lindl. Partn., 3d ed., 1381; *Bank v. Alison*, L. R., 6 C. P., 54; S. C., id., 222. But the mere fact that a person has become a shareholder pursuant to a scheme which is *ultra vires* will not relieve him from liability as a contributory, if the shares he has taken can be considered as legally existing, and he was himself a party to the scheme, or had knowledge of the fraud. Even where the shares were fraudulently issued, it is necessary to give strict attention to the precise facts in order to ascertain what are the rights of the parties in the case. The respondents were not subscribers to the stock, but the purchasers of the shares in the open market as paid-up shares. It was held in *Carling's Case*, that, where the contract was to take paid-up shares, the court could not convert the contract into one for unpaid shares, for reasons which are obviously sound and correct. *Carling's Case*, L. R., 1 Ch. D., 124.

Where there is a contract, even if fraud be imputed, the party seeking redress must disaffirm the contract, or proceed for damages against the perpetrators of the fraud. Such a party must throw over the agreement altogether, or he must take it as a whole. He cannot adopt as to one part, and reject it as to the rest. *De Ruvigne's Case*, L. R., 5 Ch. D., 323. Certain shares of capital stock were allotted as fully paid up shares, and the court held that, as the shares had been allotted to a stranger as paid-up shares, they could not be considered otherwise, and that neither he nor his alienees could be liable to contribute in respect of the shares. *Ex parte Currie*, 7 L. T., N. S., 486.

Argument to show that the transaction of issuing the stock in payment for the mineral land would have been valid if unmixed with fraud is scarcely necessary, as the proposition is one which finds support in the daily transactions of life. *Spargo's Case*, L. R., 8 Ch. App., 413. Shareholders are not required to suspect fraud or to institute inquiries where all seems fair and conformable to the requirement of law and fair dealing. *Waterhouse v. Jamieson*, L. R., 2 H. L. Sc. App., 29. Where certificates of shares were issued as fully paid up, when in fact no payment had been made, it was held in the chancery court of appeal, reversing the vice-chancellor, that by the issue of the certificates the company were estopped from alleging that the stock was not paid up, and that an innocent holder of the shares could not be placed on the list of contributories in respect to such shares as unpaid shares. *Nichol's Case*, 26 W. R., 334.

Three of the judges gave opinions. The master of the rolls said: Where you have a receipt given you by the company, a final receipt as a certificate of payment, what more is a *bona fide* purchaser to ask for, and what occasion has he to make inquiry? He has the representation of the company by the certificate that the shares are fully paid up. It appears to me the company, having made that representation by the certificate to be used by the vendor as evidence of title, is estopped from saying afterwards that the company has not received the money. . . . It appears to me impossible that the company should be allowed to say the shares were not paid up in due course. *James, L. J.*: Every person connected with the company who issues a certificate for paid-up shares in money, when the money or value has not been paid, is guilty of a personal wrong towards the company, and may be made answerable for it in exactly the same way and to the same extent as if the money had been taken out of the coffers of the company to pay up the shares, or as if, by some fraud of the directors and officers, receipts had been given for the payment when payment had not been made. If any person is a party to such a breach he can be made answerable for it, but that cannot affect the position of one

who says, you made a representation to me, and you are bound by every principle of law and equity to make good the representation upon the faith of which I was induced to act. Thesiger, L. J., held that any such shareholder may show either that the shares have been paid up in fact, or that the company whom the liquidator represents have, by their words or conduct, estopped themselves from disputing that the shares have been so in fact paid up.

Certificates of shares in due form were issued as paid-up shares, and there is much reason to hold that the corporation, as to innocent holders of the same, is estopped to set up the defense that they are void. They admit that the shares were paid up to the extent of fifty per cent., and the opinion of the bankrupt court contains a finding of the same import, which strengthens the position that the corporation is estopped to set up the defense that the certificates are void. *Riche v. Railway*, L. R., 9 Ex., 264. Power to issue shares was possessed by the company, and hence the rule, that the holder takes nothing where the power is entirely wanting, does not apply. *Ferguson v. Landram*, 436; *Stace's Case*, L. R., 4 Ch., 688. Cases arise, however, where the suit was against the perpetrators of the fraud, or against holders of the stock, with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry, in which the rule is different. Equity, in such a case, regards the property of the corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it in whosoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, or to any dividend of the profits, until all the debts of the corporation are paid. *Railroad v. Howard*, 7 Wall., 409.

Assignees in bankruptcy in such a case represent creditors as well as the bankrupt, and may disaffirm the contract, or retain what passed to the bankrupt and proceed for damages against the perpetrators of the fraud, or against subsequent transferees of the stock with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put him upon inquiry. Decided cases which assert that rule are quite numerous and decisive. Two or three cases of the kind deserve consideration, of which the following is, perhaps, the most important.

Money was owed to the corporation for a subscription to the capital stock, and the debtor and the officers of the company entered into an agreement to extinguish the stock debt, and to convert it into a debt for the loan of money. Bankruptcy of the corporation ensued, and the assignee claimed that the stock debt was due. Justice Miller gave the opinion, and, in replying to the argument that the assignee can assert no greater right than the bankrupt, said: "The assignee is the representative of creditors, as well as of the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt would be bound. . . . Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation." *Sawyer v. Hoag*, 17 Wall., 619 (CORP., §§ 150-56). To the same effect also is the case of *Upton v. Tribilcock*, where the opinion was given by Justice Hunt. He decided that the original holder of stock in a

corporation is liable for unpaid instalments of stock without an express promise to pay the amount, and that a contract between such a subscriber and the corporation or its agents, limiting the liability therefor, is void, both as to the creditors of the company and its assignee in bankruptcy; that representations by the agent of a corporation, as to the non-assessability of its stock beyond a certain percentage of its value, constitute no defense to the action against the holder of the stock to enforce payment of the entire amount subscribed, where the holder has failed to use due diligence to ascertain the truth or falsity of such representations. *Upton v. Tribilcock*, 91 U. S., 45 (CORP., §§ 192-96). Due care and diligence was not exercised by the purchaser in that case, although the proof was full to the point that he was legally put upon inquiry. *Thomas v. Bartow*, 48 N. Y., 193. Half a century before these cases were decided, Judge Story held that the capital stock of a corporation was a trust fund for the payment of the debts of the corporation, and that it might be followed into the hand of the stockholders or of any persons having notice of the trust attached to it. *Wood v. Dummer*, 3 Mason, 312.

Trusts are enforced not only against those persons who are rightfully possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust and with notice of the same, and whoever comes so into possession is considered as bound, with respect to that special property, to the execution of the trust. *Taylor v. Plumer*, 3 Maule & S., 574; *Adair v. Shaw*, 1 Sch. & Lef., 262. Reported cases almost without number lay down the same rule, but those referred to will be sufficient to illustrate the principle. Nothing is alleged in the bill of complaint tending to show that the respondents were participants in the fraud, or that they had notice of the transaction, or knowledge of any facts or circumstance tending to put them upon inquiry; and if there were any such matters alleged in the bill of complaint it could not benefit the complainant, as it is settled law that in such a case the cause of action arose in favor of the complainant when the estate of the bankrupt corporation vested in him as the assignee in bankruptcy.

Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills, in proportion to the number of shares held by the stockholders respectively, the supreme court held that the liability of the stockholder arose when the bank refused or ceased to redeem, and became notoriously insolvent. *Terry v. Tubman*, 92 U. S., 156. Just the same question, with others, was presented to the supreme court in a subsequent case in which the court held — the chief justice giving the opinion — that the liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank, and that all such balances passed to the assignee under the assignment, which, by the bankrupt act, is of all the property, estate, credits and assets of the bankrupt, whether a corporation or an individual; and, for all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them as such stockholders. *Kennedy v. Gibson*, 8 Wall., 505 (BANKS, NAT., §§ 6-12); *Com. v. Bank*, 3 Allen, 42; *Barker v. Bank*, 9 Met., 182; *Terry v. Anderson*, 95 U. S., 632. Apply that rule to the case before the court, and it follows that, even if the bill of complaint had charged that the respondents had notice of the fraud, or were put upon inquiry in that regard, it would not have benefited the complainant, as in that event his claim would have

been barred by the two years' limitation of the bankrupt act. *Bailey v. Glover*, 21 Wall., 342 (DR. AND CR., §§ 996-98).

Purchasers of stock, where it appears upon its face that it was only partially paid up, may be held liable to pay up the unpaid instalment; but the authorities to that effect have no application in this case. *Webster v. Upton*, 91 U. S., 65 (CORP., §§ 496-99); *Upton v. Hansbrough*, 3 Biss., 427. Adjudged cases in which it has been held that creditors or assignees in bankruptcy may enforce such payments when the corporation would be estopped to do so, are suits against original subscribers or transferees implicated in some way in the fraudulent transaction. *Upton v. Tribilcock*, 91 U. S., 45 (CORP., §§ 192-96). Failure to use due diligence when put upon inquiry was the ground of the decision in that case. *Oakes v. Turquand*, L. R., 2 H. L., 325. Whatever remedy for the fraud the assignee had, it is evident he might have pursued at any time after he acquired title to the bankrupt's estate. *Ec parte Currie*, 7 L. T., N. S., 486; *Carling's Case*, L. R., 1 Ch. D., 124; L. R., 9 Ch. D., 60; *De Ruvinne's Case*, L. R., 5 Ch. D., 323.

Demurrer sustained. Bill of complaint dismissed.

EMMA SILVER MINING COMPANY (LIMITED) v. EMMA SILVER MINING COMPANY OF NEW YORK.

(Circuit Court for New York: 7 Federal Reporter, 401-426. 1880.)

STATEMENT OF FACTS.—In April, 1871, defendant company owned a mine in Utah called the Emma mine. Park and Baxter were large stockholders in the company, and Park, representing Baxter and the company, went to London and sold to the plaintiff company the mine and an (alleged) large quantity of ore, the amount of which, and the title to the mine, Park individually guaranteed. The consideration paid was £500,000 in money and twenty-five thousand shares in plaintiff company.

In 1872 plaintiff was involved in litigation with the Illinois Tunnel Company, which resulted in a settlement by which plaintiff gave the Illinois Company notes for \$100,000. Park advanced plaintiff \$120,000 to enable it to pay dividends, etc., as the mine proved unremunerative.

In December, 1874, plaintiff sued Park and Baxter for damages on account of deceit practiced in the sale of the mine. This suit resulted in a judgment for defendant.

In May, 1875, plaintiff brought another action against Park for failure to deliver the ore on hand and the property sold according to his contract.

This suit was dismissed upon failure of plaintiff to prosecute it. Park having obtained the notes given by plaintiff to the Illinois Tunnel Company, brought suit upon them, recovered judgment, had the mine sold under execution and bought it in through Lincoln, in 1876.

This suit was brought in November, 1877, for a rescission of the contract and to recover back the purchase money paid by plaintiff for the mine.

The defense consisted of several pleas, one by the defendant company setting up in bar of the action the judgment in the suit brought by plaintiff against Park and Baxter, three pleas by Park alone, setting up the judgment of the court in the suit against him as a bar to the action, the judgment on the Illinois Tunnel Company notes and the proceedings under it, and the purchase by Lincoln for Park of the mine under a judgment recovered by him for cash advances

made by him to plaintiff. Several other pleas were filed which will sufficiently appear in the opinion of the court.

§ 416. *Judgment in favor of an agent a bar to a subsequent action against the principal.*

Opinion by CHOATE, J.

The three pleas in bar of the defendants Park and Baxter, and the plea in bar of the defendant the Emma Silver Mining Company of New York, may be conveniently considered together. These pleas all raise the same question, namely, whether the judgment in the suit at law in this court, in favor of the defendants Park and Baxter, is a conclusive determination of the cause of action on which this bill proceeds for the avoidance of the contract of sale or of the facts constituting that cause of action. It is contended on the part of the complainant that, whatever may be the effect of the judgment as to Park and Baxter, the defendant corporation cannot avail itself of the judgment as a bar, or as a conclusive determination of the facts, because the defendant corporation was not a party to that suit. The weight of authority, however, is that where an agent in a transaction is sued after the determination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible for the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both. *Castle v. Noyes*, 14 N. Y., 329; *Emery v. Fowler*, 39 Me., 329, and cases cited.

§ 417. *Doctrine of res adjudicata. Inquiry as to the identity of the two actions.*

The question then under these pleas is whether the former suit was for the same cause of action as the present suit. For, however the defendants may be concluded or estopped by the determination of the facts necessarily determined in the former suit, if that judgment is offered as evidence in this suit as proof of such facts, yet the former judgment is not a bar to this suit if this suit is not upon the same cause of action as the former. *Cromwell v. County of Sac*, 94 U. S., 352. The test is whether the issue actually determined in the former suit is identical with that upon which the complainant must recover in this suit, if he is entitled to recover at all. I shall assume, for the purpose of these pleas, as claimed by the defendants, that, so far as this bill proceeds for the avoidance of the sale on account of the fraud of Park and Baxter, it states the same identical fraud that was set forth as the ground of action in the former suit. No very material differences in this respect between the complaint and the bill have been pointed out, and if any differences exist, they may, perhaps, be deemed differences only in the mode of stating the same fraud, or in stating the acts done in furtherance and execution of the same alleged

fraudulent purpose or design, and these differences might not affect the present question.

If, however, there is a fact which must have been established in the former suit, to authorize the verdict and judgment, which the complainant is not obliged to prove to entitle it to a decree avoiding the sale in this suit, or if such decree may, in this suit, pass upon proof of any of the allegations of the bill not necessarily determined against the complainant in the former suit, then the judgment is no bar, and those pleas must fail. A careful comparison of the former complaint and the present bill shows that there is a fact which the plaintiff in the former suit was obliged to prove in order to recover, which is not necessary to be proved in the present suit to entitle the complainant to a decree of rescission, and that there are facts alleged as the ground for relief in the bill not necessarily determined adversely to the complainant in the former suit. Without going more into detail, it is clear that the bill alleges that the sale sought to be avoided was agreed to on behalf of the complainant corporation by a board of directors who were not the independent representatives of the stockholders, but who were, with one exception, either the agents of the vendors, or qualified as directors by receiving from the vendors or promoters of the company that number of shares which, by the articles of the association, it was requisite that they should hold in order to constitute them directors, and that some of them had other agreements with the promoters of the company, which created, or tended to create, in them a personal interest on their part in assenting to the sale that might be inconsistent with the true interests of the complainant corporation, which they were, as directors, bound alone to subserve. And it further appears by the bill that this mode of qualifying the directors, and these agreements, were in fact concealed from those persons who, by subscription to the stock, became members of the corporation. Proof of such want of an independent board of directors, at the time of the transaction of sale, without the knowledge of the stockholders, would entitle the corporation to a rescission, as a matter of course, if applied for with that diligence which a court of equity requires for the institution of such a suit. *Sombrero & Phosphate Co. v. Erlanger*, 5 Ch. D., 108; S. C., 3 App. Cas., 1226. It is true that the payment of money or other valuable consideration to induce various persons to become directors is alleged in the complaint in the former suit, and it may have been intended thereby to describe the same transactions mentioned in the bill; and it is alleged in the complaint that such payments were made by the defendants Park and Baxter in pursuance of that fraudulent purpose and design on their part which is made the basis of the former action for deceit, and which is evidently also relied on in the bill as one of the grounds for avoiding the sale for fraud. But it is evident that, so far as these allegations of facts are concerned, in order to make them a basis for a recovery in the former action, the jury must have been satisfied by a fair preponderance of the evidence that the acts so alleged to have been done by Park and Baxter were done with an actual intent to defraud the complainant company. No such intent need be proved in the present case to entitle the complainant to rescind. It will not do, as argued by defendants' counsel, in order to test the present question, to strike out of the bill all allegations of acts done with a fraudulent intent on the part of Park and Baxter. If that were done, there might, indeed, be nothing left of the bill. The proper test is what will remain of the material allegations of the bill if the alleged fraudulent in-

tent of Park and Baxter were disproved. Judged by this test there remains enough of the bill to entitle the complainant to a rescission, as matter of law and equity, if no successful defense to such remaining allegations shall be interposed. It is, however, insisted on the part of the defendants that the bill cannot be properly construed as a bill to rescind, except upon the ground of fraud; that it does not state the facts above referred to, or other facts independently of fraud, as the apparent ground or basis on which the pleader relied; and that it does not contain any prayer for rescission, except on the ground of fraud.

§ 418. — *form of the prayer may be referred to.*

The form of the prayer for relief may undoubtedly be referred to, where the purpose of the pleader is fairly doubtful, in the stating part of the bill, to ascertain the grounds on which he proceeds; but in the present case the prayer of the bill is not inconsistent with an intent on the part of the pleader to rely on the facts above referred to, with or without proof of actual fraud. The prayer is that the transaction of sale be declared to be fraudulent and void; that the complainant be decreed to be entitled to a return of the consideration; and for general relief. The special relief thus prayed for seems to me to be enough to indicate that the pleader may have had in view an avoidance of the sale, even without proof of the alleged fraud. The prayer that it be decreed fraudulent and void is not necessarily to be understood as a prayer that it be declared void simply because fraudulent; and the prayer for the return of the consideration, which is the substantial part of the relief to follow a rescission, is equally appropriate in either view of the bill. Nor is there in the body of the bill anything to show that the pleader relied wholly on the alleged fraud or framed his bill on the theory of fraud alone. I do not think, upon a fair perusal of this bill, that the defendants have been misled as to the grounds on which the relief sought is asked for. The defendants cite *Hickson v. Lombard*, L. R., 1 H. L., 321, as an authority for treating this bill as a bill for fraud only. There is nothing in that case to sustain this view of the bill, except a *dictum* of Lord Cranworth, which, however, is not sustained by the opinion of the lord chancellor, and is opposed to the views of all the learned judges in the courts below, and is only applicable to the present case if it appears that the bill was so framed as to mislead the defendants into the belief that the complainant relied alone on his charges of fraud. I think that case fails to sustain this position of the defendants. These pleas must therefore be overruled.

§ 419. *A judgment by nonsuit not a bar to another action.*

2. The separate plea in bar of the defendant Park to that part of the bill praying for an injunction against him in respect to the notes given for the settlement of the claims of the Illinois Tunnel Company, that the complainant has commenced a suit against him to recover damages upon the same cause of action, which suit proceeded to a judgment in favor of the defendant, is clearly bad, because it appears, by the record filed with and made part of the plea, that the judgment was rendered upon a *nonsuit* of the plaintiff and not upon the merits. It is therefore no bar to a new suit upon the same cause of action, nor does it estop or conclude the plaintiff as to the facts alleged both in that action and in this suit as the ground or cause of action.

§ 420. *Effect of a judgment by default; what is sufficient proof of service of process; estoppel.*

3. The second separate plea in bar to the same part of the bill last above

referred to is based on the judgment recovered in the district court of the third judicial district of the territory of Utah, upon the same notes, the collection of which is here sought to be restrained by injunction. Whether this judgment is binding and conclusive upon the complainant depends upon the question whether the court acquired jurisdiction of the person of the defendant in the action, the present complainant. The plea avers that the said defendant Park, plaintiff in that action, "caused the service by summons in said action to be made by the United States marshal for said district upon the orator, through its duly authorized agent resident in said Salt Lake county aforesaid." By setting the plea down for argument this averment is admitted to be true, except so far as the record, since produced and made part of the plea, shall contradict the averment. The record contains nothing inconsistent with this averment. On the contrary, the record recites that the defendant, the Emma Silver Mining Company (Limited), was regularly served with process and failed to appear and answer, and accordingly judgment was entered by default against the defendant. Although it is competent for a defendant in a judgment record to contradict the record to the extent of showing that no personal service was made upon him, and thereby to avoid the effect of the judgment, showing in fact that the court acquired no jurisdiction of his person, yet every intendment is to be made in favor of the truth of the record. It is in this case *prima facie* proof that process was regularly served upon the present complainant in that action. A judgment by default, where the court has acquired jurisdiction of the party defendant, is equally conclusive with a judgment upon a verdict, or after trial of the merits, in respect to the particular cause of action sued upon. Such a judgment by default admits, for the purpose of the action, the legality of the demand or claim in suit. *Cromwell v. County of Sac*, 94 U. S., 356. The utmost effect, however, that can be given to this record is that it estops the complainant from setting up any defense to these notes which he could have availed himself of by way of answer in the action at law brought upon them; and the question as to the sufficiency of this plea is whether, upon the case made in the bill, the complainant may, in equity, as part of the relief that it may show itself entitled to, claim an injunction against the further enforcement of the claim embodied in these notes given for settlement of the claims of the Illinois Tunnel Company, or of the judgment recovered thereon, either because their only defense against the notes was one available in equity and not by answer in a suit at law, or because such an injunction is a proper part of the relief to which complainant would be entitled upon a rescission of the contract of sale.

It is insisted on the part of the complainant that the relief claimed in this bill against the collection of these notes, as well as that prayed for against the collection of the moneys advanced to pay dividends, is only asked for as part of the relief to which complainant will be entitled in case a rescission of the contract is awarded by the decree of the court; and that these parts of the bill thus pleaded to are not and were not designed to be set forth as separate and independent causes of action. But if this claim be in fact a distinct cause of action, it is no objection to the relief asked that this claim also has been included in the bill, because the bill has not been objected to as being multifarious. It must be assumed in considering this plea that a rescission of the sale may be decreed, because this plea is not to that part of the bill which seeks a rescission. The case stated in the bill against the Illinois Tunnel Company notes is briefly this: That in the year 1872, while the chairman of the com-

plainant's board of directors was in this country, the Illinois Tunnel Company made an excavation which struck a portion of the ores which the defendant Park had claimed to be within the patent of the Emma mine, and that a suit was instituted by the complainant against the tunnel company to recover damages for this trespass; that the notes were given in settlement of this interfering claim of the Illinois Tunnel Company, and upon a transfer to complainant of its rights; that the settlement was made under the advice of Park, and collusively between him and the Illinois Tunnel Company, for the amount of the notes, but really for a smaller consideration, the object of Park being to acquire some interest or color of title for the complainant in the ores claimed by the Illinois Tunnel Company, and which he had led the complainant to believe were, but which in fact were not, within the purchase of the Emma mine, and thus also to protect himself at the expense of the complainant company, of which he was director, against a claim on its part against himself for deceit in the sale; that he deceived the complainant by concealment of the facts as to the nature and effect of the agreement thus made between the complainant and the tunnel company. It is not alleged in the bill that this was a dishonest claim on the part of the Illinois Tunnel Company, or that that company knew of the fraudulent purpose of Park in making this agreement for a transfer of its claims to complainant. It appears to me that if the facts alleged in the bill with reference to these notes were true, they could have been availed of as a defense against Park in the suit at law if discovered by complainant at the time it was required to defend the suit, and that this transaction is so distinct from the original sale that the rescission of the sale would not of itself affect the question of the liability of the complainant upon these notes. They purport to represent the consideration due to a third party upon the purchase of other property, or at least other and different claims to property. I think, therefore, that the complainant is estopped by this record from showing that, by reason of the facts alleged in the bill, the complainant did not owe him the amount of these notes. Those facts are in effect negatived by the judgment, and it seems that the burden is on the complainant to aver and show, if the facts be so, a subsequent discovery of those facts which might have given it a case for relief in equity, which it could not avail itself of at law, and which would excuse its failure to defend the action, and thus to deprive the judgment of its character as an estoppel. The notes were given in 1874. The suit was commenced in 1876. The bill certainly does not allege a discovery of the facts subsequent to the commencement of the suit, or their continued concealment all that time. Assuming, then, that the complainant is estopped to deny that the notes were due to Park, it further appears to me that there is no such connection between these notes, or the agreement between complainant and the tunnel company, under which they were given, that the amount paid to or recovered by the defendant Park upon them can be set off or charged against any sum that complainant may recover against him upon the rescission of the sale. What he has so recovered was recovered upon a distinct cause of action, disconnected with the sale. This plea must, therefore, be sustained.

§ 421. *A plea that a claim has been merged in a judgment which has been satisfied is good against a prayer for an injunction against such demand, but will not avail against proceedings for rescission of a contract by which that demand was created.*

4. The third separate plea of the defendant Park is to that part of the bill

which prays relief by injunction against the collection by said Park of his alleged claim for moneys advanced to pay dividends. The plea alleges that a judgment in a suit at law has been recovered upon the identical claim in the United States district court for the territory of Utah; that the process was "duly served upon the orator, defendant therein, through its authorized agent." It also avers that the defendant therein, this complainant, duly appeared in said action, and filed a demurrer to the complaint, and made a motion to discharge an attachment made in the suit. These acts constitute a voluntary appearance of the defendant. They are not contradicted, but confirmed, by the recitals contained in the records produced as part of the plea. It must be held, therefore, that the court had jurisdiction of the person of the defendant, and the judgment, though by default, for want of answer or appearance on the day of trial, is binding on the complainant. The plea, however, further alleges that the judgment has been satisfied by the sale on execution issued under said judgment of the property of the complainant, being the same property which is sought to be recovered by the decree of rescission. The bill avers, in reference to this sale on execution, that the property was bid in by one Lincoln, as the agent and for account of the defendant Park. It is suggested on behalf of the defendants that the fact of the sale on execution of the subject-matter of the contract sought to be rescinded, which fact must be held to be admitted by setting down this plea for argument, puts an end to complainant's right to rescind, because it makes it impossible for complainant to restore the property to defendants upon a rescission. This point, however, is immaterial, so far as this plea is concerned, for this is not a plea to the bill as a bill for rescission, and, therefore, the question cannot be raised on this plea, whether the complainant is entitled to rescind. It must be assumed for the purpose of this plea that there may be a decree of rescission.

Aside from this consideration, I see no reason why, if the defendant Park took the property under the sale in execution, as is in effect alleged in the bill, with full knowledge of the equitable rights of complainant to have the original sale rescinded, the defendant Park may not be treated in equity as having bought the property subject to those equitable rights. By suffering judgment to be taken against it in that action the complainant cannot be deemed to have consented to or joined in the transfer of the property under the sale on execution, nor to have waived or forfeited its equities against one having full notice of them. It is enough, however, to say that the question, though discussed by counsel, does not fairly arise on this plea. The record must be held to estop the complainant from availing itself against the defendant Park of the facts averred in the bill which would have constituted a valid defense at law to a suit for the recovery of these moneys advanced. The fraud alleged is that Park falsely represented the money so advanced to be in fact the moneys of complainant—earnings of the mine and proceeds of its ores. If this would constitute a good defense to the action for money lent, it is now too late for the complainant to prove it; but if it were consistent with the plea that the claims of this defendant were still outstanding and in existence, although complainant might be estopped by the record to deny the validity of his claim for these advances, it would seem that upon a rescission of the contract, and the granting of the relief prayed for against Park consequent thereon, an injunction against the collection of this claim might be a part of the relief to which the complainant would be entitled. Upon a rescission of a sale, full equity will be done between the parties in respect to their dealings

with the subject of the sale subsequent thereto, and this advance of money to pay dividends seems to me to be so connected with the sale itself, and the subsequent use of the property, that account would and must be taken of it in determining the whole relief to be given upon a rescission of the sale. So far as the facts relating to this advance of money are set forth as ground for complete relief upon a rescission of the sale, this plea does not purport to be a defense to the bill, nor if this plea is sustained will it prevent the taking of such advance of money, and its repayment into account upon a decree of rescission; but, as regards the separate claim of the complainant to an injunction against its collection, the plea does allege facts which make such an injunction inappropriate as part of the relief to which the complainant will be entitled. It shows that this claim for money lent has been merged in a judgment, which has been satisfied by payment. This plea is on this ground sustained.

§ 422. *An action for deceit against agents is no bar to a proceeding against the principal to rescind the contract in which the (alleged) deceit was practiced. What is not an election to affirm a contract.*

5. The only plea remaining to be considered is the joint plea in bar of the defendant the Emma Silver Mining Company of New York, and the defendants Park and Baxter. It is a plea to the whole bill, except the parts to which the pleas by the defendant Park, last considered, are pleaded. It sets forth the commencement and prosecution to judgment of the action for damages against Park and Baxter for the frauds alleged in the bill, and also the commencement of the other suit in this court brought against the defendant Park, among other things, to recover damages for failure on his part to deliver certain ores mentioned in the contract of sale, and therein agreed to be delivered to complainant, and which, by the original contract of sale, the defendant Park bound himself personally to deliver. The record produced shows that this second action resulted in a judgment of nonsuit by reason of the complainant's failure to appear and prosecute it after issue joined.

The plea avers that by said actions the complainant has elected to affirm, and has thereby in legal effect affirmed the contract, and elected to hold the property thereby obtained, and cannot be heard after such election to demand the rescission of the sale. The first question raised under this plea is as to the meaning and scope of the plea itself. It is insisted by the defendants that the plea should be sustained on the ground that the facts therein alleged show laches and inexcusable delay on the part of the complainant in bringing this suit. The plea indeed avers that this suit was not commenced until November, 1877, about six years after the sale sought to be rescinded. The averment of the time of the commencement of the suit for the purpose of showing that it was after the commencement of those prior suits, which are relied upon as indicating or constituting an election to affirm the contract, was a proper averment in a plea designed to raise the defense of an election to affirm the sale by the bringing of those suits; and it is not to be argued from this averment that the plea was intended also as a plea of laches. The plea itself states with great exactness the point by way of defense to which its averments are designed to converge, namely, the affirmance of the sale by electing to take remedies inconsistent with its rescission. This is a different defense from laches or delay in proceeding to bring the suit to rescind. Moreover, the court refused to allow a plea of laches or of general acquiescence to be filed, and if the plea were ambiguous, as it is not, it would be construed as being designed to be in conformity with the leave to plead given by the court; nor

could it be construed as a plea of laches, as well as a plea of election to affirm, without being held bad as setting up two defenses in the same plea. For these reasons it must be held that the only question raised is whether, by one or both of the former suits, the complainant has elected irrevocably to affirm the sale in such manner that he has lost the right to rescind it, if that right ever existed. That the sale, if impeachable at all, was voidable only, and not void by reason of the facts alleged in the bill, is entirely clear. That in such a case the vendee has an election to affirm or to rescind, upon coming to a full knowledge of the facts, is also well settled. Any deliberate act on his part, done with the full knowledge of his rights, inconsistent with an intention to rescind, and in effect taking advantage of the sale for his own benefit, will constitute an election to affirm the sale, by which he will be bound. This doctrine seems to rest not upon the principle of a new contract between the parties, nor yet upon the ordinary principle of estoppel *in pais*, but rather upon a distinct principle of public policy, that all that justice or equity requires for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowledge of his rights, to decide whether he will affirm and take the benefits of the contract, or disaffirm it and demand the consequent redress. Any other rule would be regarded as unjust, even towards the party guilty of the wrong out of which grows the right to rescind. Hence, also, it is a consistent part of the same rule that the election to affirm or disaffirm must be made with reasonable diligence after the cause for disaffirmance is fully discovered. It is clear enough that the taking of legal remedies, by action against the other party to the contract, which are consistent only with a purpose to affirm and take the benefit of the contract, if deliberately done with full knowledge of his rights, will extinguish the right to disaffirm the contract. The difficulty in this particular case is to determine whether the remedies taken against the defendant Park, and relied on in this plea, are consistent only with such a purpose to affirm the sale. I think the authorities are clearly to the effect that the act constituting an election to affirm need not be a transaction with the other party to the contract personally; as, for instance, a suit against him personally. It may be an unequivocal dealing with the property itself inconsistent with an intention to restore it, or a suit against another person, which proceeds upon an unequivocal affirmation of the contract, and seeks relief for its enforcement.

§ 423. *Whether a suit against an agent for damages for deceit is an affirmation of the contract.*

Whether the bringing of the action brought against Park and Baxter for deceit, to recover damages for the alleged frauds committed by them in effecting the sale, while they were acting as agents of the vendors, was such an affirmation of the sale, has been debated with great earnestness and learning by the counsel in this case.

Authorities almost without number have been cited as bearing upon the question, yet no case has been referred to which is a direct and decisive authority upon the question. Numerous *dicta* have been found to the general proposition that a vendee has his election to affirm the sale and recover damages for the fraud, or to disaffirm it and recover the consideration. The case which comes nearest to sustaining the position of the defendants, that bringing an action of deceit to recover damages for the fraud will constitute an election to affirm the sale, is *Kimball v. Cunningham*, 4 Mass., 505. This case contains a ruling of Chief Justice Parsons to that effect, which perhaps can hardly be

called a mere *dictum*, although the ruling is made after disposing of the case upon other grounds. The opinion of that learned judge is certainly entitled to the greatest consideration, but it is to be observed that the case does not disclose the precise form of the declaration in the prior action for deceit. No doubt a declaration in an action for deceit may be so framed as expressly and unequivocally to affirm the contract of sale; as, for instance, if it sets forth the sale, the fraud and deceit, the use or retention of the property, and claims damages for the difference between its actual value and the value which it was represented to have. The learned chief justice, in the case referred to, based his ruling on a particular suit brought, and unless it can be ascertained what was its precise form it cannot be affirmed with certainty that the case holds, as a general proposition of law, that suing the guilty party for deceit in a sale *ipso facto*, and in all cases, is to be deemed to be an election to affirm and not to disaffirm the contract. It is impossible to notice in detail all the authorities cited, most of which, indeed, have no bearing on this precise question, except as they affirm the general doctrine to the effect of the election of inconsistent remedies as constituting an affirmation of the contract. Nearly all the cases are such that the prior suit relied on as an election is an unequivocal act adopting the contract and seeking to recover the fruits of it, or a benefit to which the party was entitled only upon its being continued in force; as, for instance, suits by the vendor to recover the purchase money, and the like. There are, however, several cases which appear to hold that an action to recover damages for deceit in a sale does not imply an affirmation of the contract, but is consistent with its disaffirmance. *Hersey v. Benedict*, 15 Hun, 282; *Whitney v. Allaire*, 1 N. Y., 305; *Hubbell v. Meigs*, 50 N. Y., 480; *Henderson v. Bacon*, L. R., 5 Eq., 249. Upon principle I can see no necessary inconsistency between an action against the agents of the vendor to recover damages for their deceit in effecting the sale, and its disaffirmance as against the vendor himself. The deceit practiced, resulting in damages, is a valid cause of action against the agents to the full extent of the damages suffered. That damage may be reduced, indeed, by partial reparation made by the vendor himself. So, too, if the vendee elects to keep the property, and it has value in computing the amount of damage recoverable against the guilty agents, that value must be credited; and if, at any time before the damages for the deceit are assessed, there has been an election to affirm, that fact may be shown in reduction of the damages; but I can see no principle of law or justice that requires me to hold that the retention of the property as against the vendor discharges or waives this valid claim for damages against the agents. On the contrary, so to hold would in many cases operate most injuriously against a party defrauded, and in favor of the wrong-doer, and such a rule would in many cases operate practically to protect him from all the consequences of his fraud when once it had been successfully accomplished. Take, for instance, a case like the present, as stated in the bill,—a purchase of property for an immense price paid, but of comparatively small, yet of some considerable value, the sale being effected through the deceit of the agents of the vendor. Suppose, also, as is often the case, that it is impossible to recover full compensation or any considerable part of the price from the vendor himself. Would there be any justice or reason in making the retention of the slight benefit which the vendee has received from the vendor, to the exclusion of some other remedies, a condition for his recovering the damages which he has actually suffered against parties by whose fraud that damage was effected,

against whom alone he may have any fair expectation of full reparation, or in releasing such parties from their liability to make good the loss on account of any dealing with their principal short of full reparation for the injury?

§ 424. — *an action for deceit against an agent is not inconsistent with a disaffirmance of the contract.*

I have therefore come to the conclusion that an action for deceit against the agent is not inconsistent with the disaffirmance of the sale. It is consistent either with its affirmance or its disaffirmance. The complaint against the agent may be framed so as to be an affirmance or a disaffirmance by containing a deliberate adoption of the sale as valid and in force, or a deliberate rejection of it as void. There is nothing in the form of the complaint in the former suit here relied upon which amounted to an adoption or a disaffirmance of this contract of sale. It did not unequivocally show an election to affirm or disaffirm. It left the plaintiff free, consistently with all the averments of fact contained in the complaint, to insist that the same facts therein set forth as to the ground of damages for fraud also entitled the plaintiff to restore the property to the vendee, and demand any further reparation for the wrong against the vendor. It does not ask to have the value of the property retained set off against the price paid, in measuring the damages. On the contrary, it claims as damages for the fraud an amount equal to the whole price paid. The complaint contains an *ad damnum* of \$5,000,000 — the same amount as the purchase price of the property, — but this is demanded, not *as the price*, but as damages for the deceit. The complaint, indeed, states that the plaintiff was, by the deceit charged, induced “to purchase” and did “purchase” the property; but this averment must not be understood as an election to consider the purchase as one not voidable. It was properly averred to be a purchase for the purpose of that action, though voidable. The terms used are to be construed merely as descriptive of the transaction, and the plaintiff was not called upon then and there to declare his intention to avoid or to affirm it. The commencement of that action must, therefore, be held not to preclude the complainant from its remedy by rescission, if it has such remedy, on other grounds. Nor has the judgment for the defendants in that action any such effect. Even a judgment against the defendants would not so operate unless it were satisfied for the reason above stated.

§ 425. *Effect, as indicating an election to affirm a contract, of bringing a suit charging the other party with a breach of it.*

The other suit set forth in this plea as an act electing to affirm the sale is an action brought by this complainant against the defendant Park to recover damages for the non-delivery of ore agreed to be delivered in the contract of sale which was executed by Park on his own behalf, as well as on behalf of the vendors, his principals in the transaction. The complaint alleges the making of the executory contract of sale; that by said agreement Park agreed to sell to the plaintiff, this complainant, the ore in question; that said contract was afterwards performed in all respects on the part of the plaintiff, but that it had not been performed on the part of defendant Park, or by the Emma Silver Mining Company of New York, the vendor, in certain respects, including this: that the defendant Park, though often requested, has not delivered or caused to be delivered to the plaintiff, or accounted to the plaintiff, for a certain specified part of the ore so agreed to be delivered, whereby the plaintiff is alleged to have suffered damages to the amount of \$350,000. This was, in effect, unlike the action for deceit, an action brought to enforce the contract

of sale. The claim made for damages on account of the partial non-delivery is wholly inconsistent with the claim now made, that the sale was void, and with a purpose to rescind and set it aside. Upon the authorities and within the principle hereinbefore laid down, the bringing of such an action deliberately and with full knowledge of the facts is an election to affirm the contract. *Clough v. Railway, L. R., 7 Ex., 36*; *Conanhan v. Thompson, 111 Mass., 270*, and other cases cited. In fact, it was a suit to recover the fruits of the contract, to which the plaintiff could be entitled only on the theory that the sale was valid and to continue in force. If such an action is brought by mistake, through inadvertence or misunderstanding of counsel, it may not have the effect of an estoppel; but the presumption certainly is that so solemn and deliberate an act, done in plaintiff's behalf by attorneys of the court, is done advisedly and by the plaintiff's authority; and if there is any circumstance depriving the act of this character, such circumstance, in excuse or avoidance of the act, must be alleged by the complainant. It is insisted, however, by the complainant, that it does not sufficiently appear on this plea that the act so relied on as an election to affirm was done with a full knowledge of the facts now alleged in the impeachment of the contract. I think that it does not sufficiently appear on the plea and the records, which, upon complainant's motion, have been made part of the plea, that this second action was commenced with a full knowledge of all these facts. The plea alleges that this second suit was commenced long after the complainant, in his bill, claims to have become fully cognizant of all said facts. I have looked into the bill in vain to find any statement whatever therein as to the time when the facts alleged therein in impeachment of the sale, and therein alleged to have been concealed, were discovered by or became first known to the complainant. The complainant does not claim in the bill to have so become cognizant of these facts at any time prior to verifying the bill itself. This allegation of the plea, therefore, cannot be taken to be an averment of such knowledge at the time of the commencement or during the pendency of that suit. Nor is this defect of averment on this material point aided by the other parts of the plea, or by the records which are produced as part thereof. It is true that it appears by these papers that the complaint in the action for deceit was verified and served before this second suit was commenced; and it is also true that, as to the greater part of the alleged fraudulent acts set forth in the bill, they are also set forth with little difference of detail in that complaint.

But other facts stated in the bill — those, for instance, relating to the giving of qualification shares to all but one of the directors, other than Park and Baxter, and the secret agreement with the American minister under which he also became a director — are not stated in the complaint nor alluded to, unless it be in the general statement near the close of the complaint that the defendants did "by the like devices," that is, among other things, "by the payment of large sums of money and other valuable considerations," etc., "and by bribery in various forms, the particulars whereof are unknown to the plaintiff," "induce various persons to become directors and trustees of the plaintiff company." Giving full effect to this as an admission of what the complainant knew at a time prior to the commencement of this second suit, I do not think it comes up to that full knowledge of the material facts which is necessary to make the commencement of that suit an act of election, precluding the plaintiff from proceeding for a rescission on those facts. The complaint shows a very imperfect knowledge of these facts as alleged in the bill; indeed, it does

not certainly show any accurate knowledge or information as to the dealing with any of the several directors, as detailed in the bill. In this view of the case it is unnecessary to consider the point raised by the complainant, that this plea is too broad, on the ground that the part of the bill to which this plea is pleaded states a case, and justifies relief against Park and Baxter, beyond the rescission of the contract and the relief consequent thereon; that it is, in fact, a bill against them also for the recovery of profits made by them while acting in a fiduciary relation to the complainant, independently of the case for rescission. The plea must be overruled for want of the necessary averment that at the time of the commencement or during the prosecution of the second action the complainant was cognizant of the facts alleged in the bill for avoiding the contract.

The three pleas in bar of the defendants Park and Baxter, the plea in bar of the defendant the Emma Silver Mining Company of New York, and the joint plea in bar of all the defendants, overruled. The first plea in bar of defendant Park overruled; the second and third sustained.

§ 426. Jurisdiction.—Fraud is cognizable in a court of law as well as in a court of equity. *Swayze v. Burke*,* 12 Pet., 11.

§ 427. A court of law has concurrent jurisdiction with a court of equity in some cases of fraud, though the action be one of ejectment. *Seabury v. Field*,* 1 McAl., 60.

§ 428. Courts of equity and common law have concurrent jurisdiction to suppress and relieve against fraud. *Rhoades v. Selin*, 4 Wash., 715.

§ 429. Courts of equity possess a general concurrent jurisdiction with courts of law in cases of fraud cognizable in the latter. *Cady v. Whaling*, 7 Biss., 490.

§ 430. A state court of equity may set aside a patent to lands obtained by fraud and imposition upon the officers, at the suit of the party entitled to a patent. *Garland v. Wynn*, 20 How., 6.

§ 431. Courts of equity have jurisdiction of fraud, misrepresentation and fraudulent suppression of material facts in matters of contract. But where the cause of action is purely legal, and it does not appear that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained. *Gindrat v. Dane*, 4 Cliff., 280.

§ 432. Although courts of equity have concurrent jurisdiction with courts of law in cases of fraud, yet the court which first has possession of the subject must decide it; and when decided at law it cannot afterwards be brought before a court of equity without the addition of some purely equitable circumstance. *Smith v. McIver*, 9 Wheat., 532.

§ 433. A court of equity has jurisdiction to relieve in cases of fraud in the settlement of probate accounts. *Gould v. Gould*, 3 Story, 516.

§ 434. In a case of asserted fraud, a court of equity has jurisdiction, wherever the person be found, although the lands affected by the decree are not within the jurisdiction of the court. *Briggs v. French*, 1 Sumn., 504.

§ 435. Equity has concurrent jurisdiction with courts of law in cases of fraud. Especially has equity jurisdiction in such cases where the bill goes for discovery and other equitable relief which cannot be obtained at law; as where the plaintiff is in possession and cannot sue at law, and seeks to remove out of his way a title fraudulent in its nature, and a release from the fraudulent party. *Ibid.*

§ 436. To relieve against fraud and to set aside and cancel fraudulent conveyances are among the ordinary duties of courts of chancery. Courts of law, however, have concurrent jurisdiction of questions of fraud, when properly raised; and, although they cannot cancel or set aside fraudulent instruments of writing, yet when they are produced in evidence by a party claiming any right under them, their fraudulent character may, under proper circumstances, be shown, and their validity in the particular case contested. But when the question of fraud is determined in a court of one class it cannot be re-examined in a court of the other class. *Miles v. Caldwell*, 2 Wall., 35.

§ 437. Constructive fraud is *per se* sufficient to support the jurisdiction of a court of equity, where the bill in which it is charged is nothing more than an action for money had and received. *Harmanson v. Bain*, 1 Hughes, 188.

§ 438. If defendants to a bill for partition file a cross-bill alleging that the complainants' title was procured by fraud, and the complainants answer, denying the fraud, and evidence is taken on the issue, the court will take jurisdiction of the question. It seems that it is then too

late to object to the jurisdiction of the court to examine the question of fraud. *Vint v. King*,* 2 Am. L. Reg., 712.

§ 439. Fraud in a sale and other proceedings under a judgment is a subject of equity jurisdiction. *Surget v. Byers*,* *Hemp.*, 715.

§ 440. Equity has jurisdiction of fraud, misrepresentation and concealment, and it does not depend on discovery. And where an agreement complained of is perpetual in its nature, and the only effectual relief against it, where the keeping of it on foot is a fraud against the parties, is the annulment of it, equity alone has jurisdiction, since a court of law can give no adequate relief. Thus where one filed a bill against a corporation and one Jones for an injunction to restrain Jones from demanding against the corporation the purchase money of a certain tract of land, alleging that he (the complainant) was induced to purchase a large amount of stock in said corporation by the false and fraudulent representation of Jones that the land belonged to the corporation and that he had no claim upon it, whereas Jones had a secret agreement with the corporation by which he claimed a large amount as due him for rents and purchase money of said land, and threatened to bring an action therefor, it was decided that equity had jurisdiction; and these allegations having been proved, the court granted the injunction, directed Jones to execute a release, and declared the agreement between him and the company void. *Jones v. Bolles*,* 9 Wall., 864.

§ 441. At law and in equity.—Equity will give relief against presumptive frauds, and therein will go farther than courts of law, where fraud must be proved and not presumed. The *dictum* of some judges that a deed cannot be fraudulent, unless fraudulent both in law and equity, is not correct. There are many cases in which fraud will affect instruments concerning lands in equity, of which the law could not take notice. *Burt v. Keyes*, 1 Flip., 61.

§ 442. Frauds cognizable in a court of law will not be re-examined in equity after adjudication at law. *Blanchard v. Brown*, 3 Wall., 245.

§ 443. Fraud in the execution of a sealed instrument can be shown in an action thereon at law. But fraud in the inducement cannot be shown in such an action. *Hartshorn v. Day*, 19 How., 211.

§ 444. If there be one ground upon which a court of equity affords relief with more unvarying uniformity than on any other, it is an allegation of fraud, whether proved or admitted. *Atkins v. Dick*, 14 Pet., 114.

§ 445. Rescission — Discovery of fraud — Delay.—One who claims to have been drawn into a fraudulent purchase must exercise care and diligence to discover the fraud, and must be prompt in repudiating his contract on the ground of such fraud. *Upton v. Tribilcock*, 1 Otto, 45.

§ 446. Where a representation is such a fraud as to avoid a contract, whether the defendant in an action thereon has discharged his duty in discovering the fraud, and repudiating the contract on account of that fraud, and not on the ground of another fraud not in issue, is a question which should be submitted to the jury. *Ibid.*

§ 447. A party to a contract must be prompt in communicating fraud when discovered, and must also be consistent in his notice to the opposite party of the use he proposes to make of the discovery. *Boyce v. Grundy*, 3 Pet., 210 (§§ 803-8).

§ 448. A court of equity will never entertain a bill for relief in cases of alleged fraud, if the plaintiff has been guilty of gross laches or unreasonable delay. And where relief is sought against an alleged fraud in the settlement of a probate account, and the suit is not instituted until nineteen years after the transaction, and after most of the parties interested are dead, the court will require the most full and satisfactory proofs. *Gould v. Gould*, 3 Story, 516.

§ 449. Where fraud is imputed and proved, length of time ought not to be admitted to repel relief. On the contrary, it would seem that the length of time during which the fraud has been successfully concealed and practiced is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant relief. But length of time, as it necessarily obscures all human evidence, operates, by way of presumption, in favor of innocence and against the imputation of fraud. *Prevost v. Gratz*, 6 Wheat., 481.

§ 450. Delay is no bar to the rescission of a contract on the ground of fraud, where it is satisfactorily explained. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-86).

§ 451. In cases of concealed fraud the rule is that what amounts to laches or undue delay in bringing suit after discovery of the fraud depends on the facts of each particular case. *Forbes v. Overby*, 4 Hughes, 441.

§ 452. Inexcusable delay in rescinding a contract induced by fraud will amount to a ratification. Six months after discovery of the fraud was held in this case to be a sufficient delay to operate as a ratification. *Cummins v. Lods*, 1 McC., 338.

§ 453. An allegation in a bill to set aside an alleged fraudulent contract, that the fraudulent acts were not discovered "until within a few weeks last past," or that the complainant had

no knowledge of the fraud "until within a few days last past," or that the discovery was made "within the three months last past," does not upon its face show that the complainant has been guilty of laches. *Northern Pacific R. Co. v. Kindred*, 8 McC., 627.

§ 454. On a bill to set aside an alleged fraudulent contract entered into by complainant in ignorance of the fraud, it is a good defense to show that the complainant, after knowledge of the fraud, acquiesced in the contract, or that he failed, upon being advised of the facts constituting the fraud, to repudiate them. *Ibid.*

§ 455. When fraud is alleged as a ground to set aside a title, the statute of limitations does not begin to run until the fraud is discovered. But the bill must be specific in stating the circumstances which constitute the fraud, and also the time it was discovered. *Moore v. Greene*, 19 How., 69.

§ 456. Equity will not presume a ratification of a fraudulent contract by the injured party, if he files his bill to set it aside with reasonable promptness. *Northern Pacific R. Co. v. Kindred*, 8 McC., 627.

§ 457. No particular form of rescinding a fraudulent contract is required. It need not be in writing. It is enough if, from the time of discovering the fraud, the injured party abstains from any acts recognizing the fraudulent contract, and within a reasonable time brings suit or institutes some other measures to set it aside. *Ibid.*

§ 458. An averment of fraud and its concealment, in order to avoid the statute of limitations, must set forth distinctly the particular acts of fraud and concealment, and the time when the fraud was discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been made before. *Beaubien v. Beaubien*, 23 How., 190.

§ 459. If a bill for relief on the ground of fraud is filed after the time limited by law or the principles of equity for filing such bills, it must be alleged that the fraud was not discovered until within that period. *Northern Pacific R. Co. v. Kindred*, 8 McC., 627.

§ 460. If a suit to set aside judicial proceedings, upon the ground of fraud, is brought five years after the proceedings were completed, a sufficient cause for the delay must be set out. If the plaintiff relies on ignorance of the fraud, he should allege the time of the discovery of the fraud. *Harwood v. Railroad Company*, 17 Wall., 78.

§ 461. If, in making a contract, one of the parties has been overreached, and that in some material degree, by impositions or concealments or misrepresentations practiced by the other, on which he properly relied, he is entitled to relief in equity. And nothing should prevent this but great and unexplained delay in seeking it, or an adequate and ample remedy at law, or a condition of the property in controversy which renders it impracticable for the court on any sound principle to grant redress. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-86).

§ 462. It is no bar to recovery that a suit for the rescission of a sale of lands was instituted two years after the purchase and a little more than one year after the discovery of the fraud. *Smith v. Babcock*, 2 Woodb. & M., 246 (§§ 300-17).

§ 463. On a bill brought in 1841 by a purchaser of land to set aside for false and fraudulent misrepresentation a sale made in 1835, it was held that, as the fraud was not discovered by the purchaser until a short time before bringing the suit, lapse of time was not a bar. *Doggett v. Emerson*, 3 Story, 700 (§§ 293-97).

§ 464. In 1867 a firm, being indebted to C., transferred to him, by way of compromise, in settlement of the debt, certain notes made by one P., and secured by a provision in a marriage settlement made between him and his wife before their marriage. The compromise was effected through a mutual friend of both parties, the lawyer who drew the marriage settlement, and who assured them that it was valid. At the time of this transaction a suit was pending in which the creditors of P. were seeking to set aside the marriage settlement as fraudulent. A decree was rendered in 1874 sustaining the marriage settlement, from which an appeal was taken to the supreme court of the state. In 1878 the assignee in bankruptcy of P. procured a decree of the bankruptcy court declaring the marriage settlement fraudulent and void, and an appeal from the decree was taken to the supreme court of the United States. In 1879, while both of these appeals were pending, C. brought suit to set aside the compromise on grounds of fraud, mistake, and want of consideration. *Held*, that by a delay of twelve years the plaintiff had lost his right to the relief sought, and that his delay was not excused by the fact that he did not discover the fraud until 1870, nor by the fact that the question of the validity of the marriage settlement was pending and undecided in the courts during the whole period. *Chapman v. Wilson*, 5 Fed. R., 305 (§§ 207-10).

§ 465. A deed or a judgment or decree of twenty years' standing may be set aside for fraud, but it must be clearly alleged and proved. *Lenox v. Notrebe, Hemp.*, 251.

§ 466. The effect of fraud practiced to induce a contract to subscribe to stock or purchase shares of stock in a corporation is, as respects the company and the person deceived, the same as in other contracts, with the modification that the purchaser must take prompt measures, on discovering the fraud, to repudiate or rescind the contract. The reason for his acting promptly

is that his remaining in the company may mislead others into becoming members on the credit of his name, when they otherwise would not do so; and also because it may induce others to deal with it and give it credit for the same reason. *Upton v. Englehart*, 3 Dill., 496.

§ 467. If an auctioneer, by pretending to have received bids which were not made, advances the price of the property beyond what it would have been, the vendors, though ignorant of the fraud, must either restore what has been obtained by the fraud, that is, all received beyond the amount of the last real bid, or restore all and have the property back. *Veazie v. Williams*, 8 How., 134.

§ 468. If a purchaser wishes to disaffirm the sale on the ground of fraud, he must return the property to the vendor, or offer to return it. If this is not done, and the vendor sues for the price, he can recover only the actual value of the property if fraud exists. *Henckley v. Hendrickson*, 5 McL., 170.

§ 469. It is no bar to a suit to rescind a sale and recover the consideration paid, on the ground of fraud, that the purchaser has another remedy on the guaranties of the seller. *Smith v. Babcock*, 2 Woodb. & M., 246 (§§ 309-17).

§ 470. Pleas in bankruptcy will not be sustained against a claim in equity to rescind a contract for the purchase of land on the ground of fraud. *Ibid.*

§ 471. Province of jury.—When matters alleged to be fraudulent are investigated in a court of law, it is the province of the jury to find the facts and determine their character. *Seabury v. Field*,* 1 McAl., 60.

§ 472. Damages on rescission.—In rescinding a contract for fraud, a court of equity will go as far as it can in specie and give damages for the residue. *Warner v. Daniels*, 1 Woodb. & M., 90 (§§ 277-86).

§ 473. If the condition of the property in controversy is such that a contract obtained by fraud cannot be rescinded, damages should be given instead. If damages alone are sought, and alone can be given, and the fraud related to personal property, the relief is usually at law. But in cases of fraud in the sale of real estate, when a court of equity can set aside the sale, and a court of law cannot, the jurisdiction of equity is clear. Equity also has jurisdiction where discovery is sought, and where this has been obtained will proceed to give damages if it is necessary in order to make the relief perfect. *Ibid.*

§ 474. Amount of recovery.—This was an action for fraud and deceit on the part of the defendant in selling to the plaintiff a vessel as a British vessel when she was not a British vessel, and had not a British register. It was held that the plaintiff ought to recover to the extent of the actual injury sustained by him, that is, the difference between the value of the vessel, if her real character had been known, and the price at which she was bought under the faith of her being a vessel entitled *bona fide* to the privileges and benefits of such a British character, and in addition such repairs as he had made upon the faith of the representation as were not compensated by subsequent earnings of the ship or otherwise. *Sherwood v. Sutton*,* 5 Mason, 1.

§ 475. Refunding purchase money.—Where a contract for the sale of lands is made through an agent of the seller, the price being \$6.50 per acre, \$1.50 per acre of which is retained by the agent for his services, and the contract for the whole \$6.50 is set aside as contaminated with fraud, the seller must refund the whole amount paid by the purchaser on the contract, and not merely what he has received after deducting the amount retained by the agent. Especially is this so where the agent pays over the whole amount to the seller, and takes a conveyance of a part of the township to which the lands belong in lieu of the \$1.50 per acre. *Doggett v. Emerson*,* 1 Woodb. & M., 195.

§ 476. Allowance of interest.—It seems that, in an action for obtaining goods from the plaintiff by false and fraudulent representations, the court should not direct the jury to add interest to the value of the goods, interest not being allowable as a matter of law, but its allowance being in the discretion of the jury. *Lincoln v. Clafin*, 7 Wall., 132 (§§ 287-92).

§ 477. Where a contract for the sale of land is rescinded at the instance of the purchaser on the ground of fraud practiced by the seller, interest is to be allowed on the sum paid from the time of payment till the judgment; and the party occupying the land is to be charged with rents and profits during possession, deducting taxes and improvements. But where only a part of the consideration was to be paid at the time, and the rest on credit, the interest should be computed according to the truth of the transaction, and should be cast on the different sums from the times actually paid, whether principal or interest, until the time of final judgment. *Doggett v. Emerson*,* 1 Woodb. & M., 195.

§ 478. Form of action.—Where one in possession of a sealed instrument, which recited that he had a claim against a bank, fraudulently procured another to take an assignment of it, when he had no such claim, and the latter paid money for it, taking an assignment under seal upon the back of the instrument, it was held that the assignee, being thus defrauded, might recover of his assignor the money paid by him, in an action of *assumpsit* containing common counts,

and special counts setting out the instrument as inducement and averring the falsity of the recitals, and that the action need not be brought upon the written assignment. *Burton v. Driggs*, 20 Wall., 125.

§ 479. Pleading.—A court will not compel a complainant who is ignorant of the particulars of a fraud to set them out in a bill in which he is calling for a disclosure of them. *Forbes v. Overby*, 4 Hughes, 441.

§ 480. Affirmative relief cannot be given in equity upon the ground of fraud unless it be made a distinct allegation in the bill, so that it may be put in issue. *Voorhees v. Bonesteel*, 16 Wall., 16.

§ 481. A party cannot avail himself of a fraud not charged on the record and brought out for the first time by the voluntary statements of a witness in answer to no question, and resting at last upon mere hearsay. *Very v. Levy*, 13 How., 345.

§ 482. General allegations of fraud which aver a concealment by the respondent, and thus show upon their face a reason for not being more specific, are not demurrable. *Northern Pacific R. Co. v. Kindred*, 3 McC., 627.

§ 483. A general averment of fraud, without stating the facts of which it is constituted, is no foundation for an equity. *Bank v. Cooper*, 20 Wall., 171.

§ 484. A bill in equity to set aside a patent of the United States on the ground of fraud or mistake should set out the particulars of the fraud or the manner in which the mistake occurred. *United States v. Atherton*,* 12 Otto, 372.

§ 485. Failure to set up fraud in former suit.—A complainant seeking in equity to set aside a contract for the sale of lands upon the ground of fraudulent misrepresentations is not prevented from obtaining relief on account of his failure to set up the fraud in defense to a suit for the purchase money. *Boyce v. Grundy*, 3 Pet., 210 (§§ 803-8).

§ 486. A bill of review may be conjoined with a bill for relief against a fraudulent decree. *Campbell v. Railroad Company*, 1 Woods, 368.

§ 487. A bill of review cannot be sustained on the ground of fraud in procuring the original decree, where the fraud is denied in the answer and not sufficiently proved. *McMicken v. Perin*, 22 How., 282.

§ 488. If a party desires to set aside a decree because it was obtained by fraud, his remedy is by bill of review. *Terry v. Commercial Bank of Alabama*, 2 Otto, 454.

§ 489. The positive denial of fraud in an answer in equity should, in the absence of evidence to sustain the charge, be taken as a complete refutation of it. *Ladd v. Ladd*, 8 How., 10.

§ 490. Parties.—In a suit to set aside as fraudulent proceedings completed according to the forms of law and sanctioned by the decree of the court, the person who instituted the proceedings and who is responsible for them must be made a party. *Harwood v. Railroad Company*, 17 Wall., 78.

§ 491. Where a release given by one to two joint contractors is fraudulent, and the other brings a bill against the other party to the contract, the one giving the release is not an indispensable party. *Canal Company v. Gordon*, 6 Wall., 561.

§ 492. Fraud must be proved.—Where fraud is charged as the ground of relief, it must be proved, and not other facts which would afford relief under a distinct head of equity. *Fisher v. Boody*, 1 Curt., 206.

§ 493. Although cases of constructive fraud are equally cognizable by a court of equity with cases of direct or positive fraud, yet the two classes of cases are to be met by a defendant in a very different manner. And when a bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree by establishing some of the facts quite independent of the fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. *Eyre v. Potter*, 15 How., 49 (§§ 351-56).

§ 494. Where fraud is alleged as the only ground of relief in a suit in equity, and is not proved, the complainant can have no relief upon other grounds. *Britton v. Brewster*, 2 Fed. R., 160 (§§ 385-87).

§ 495. Burden of proof.—Where an agent was employed to redeem certain lands which had been sold for taxes, under an agreement that he was to have one-half of all redeemed, and the principal sought to set aside the contract for fraud and misrepresentations on the part of the agent, the agency having commenced with this contract, the burden of proving the fraud and misrepresentations was held to be on the principal. *Teakle v. Bailey*, 2 Marsh., 44.

§ 496. As between the parties to a fraudulent combination to injure a third person, no relief can be given either at law or equity. *Warburton v. Aken*, 1 McL., 460.

§ 497. When property is acquired by fraud, or under such circumstances as to render it inequitable for the holder of the legal title to retain it, a court of chancery will treat him as a trustee for the true owner. *Norton v. Meader*, 4 Saw., 608.

§ 498. A plaintiff in ejectment cannot show that the trusts in a deed to a trustee under

whom he claims are fraudulent. His remedy is in equity. *Smith v. McCann*, 24 How., 398.

§ 499. *Set-off*.—Frauds are forbidden in equity, and they cannot be set off one against the other. But each separate transaction must stand or fall by itself. *Lord v. Doyle*, 1 Cliff., 453.

§ 500. If a patent for land has been obtained by fraud, the court will direct it to be canceled, and the holder will be enjoined from setting up title to the land included in it. *United States v. Hughes*, 11 How., 553.

§ 501. *Notes*.—Where notes given as consideration for a fraudulent purchase have been assigned by the grantor to a creditor as collateral security for present or future liabilities, or to one with notice of the fraud, they are open to any defense which would be good against the grantor. *Smith v. Babcock*, 2 Woodb. & M., 246 (§§ 809-17).

§ 502. *Fraud of complainant*.—K., the president of a railroad company, bought from R., a farmer, one thousand one hundred acres of land, worth about \$10,000, giving him in payment bonds of the company amounting on their face, with coupons, to about \$6,000, falsely and fraudulently representing that they were perfectly good and that R. could enter with them one thousand one hundred acres of land belonging to the railroad company. The bonds had no market value, the railroad company had no lands subject to entry with the bonds, and R., having no knowledge of the facts, made the contract relying on these representations. At the same time, and as a part of the same transaction, K. transferred to R. a large amount of other bonds, which the latter took upon trust to enter lands of the company with them, sell the lands, and pay the proceeds to the wife of K. Being unable to enter any lands with these bonds, R. sold all which he had received for about eight cents on the dollar, and retained the proceeds. As to whether R. had a right to sell any of the bonds taken in trust, on his being unable to enter lands with the others, was not clear. On a bill by K. and his wife to compel R. to account for the proceeds of the bonds taken by him in trust, it was held that the complainants were deprived of all standing in a court of equity by the fraud in obtaining the contracts. *Kitchen v. Rayburn*,* 19 Wall., 254.

B. FRAUDULENT CONVEYANCES.

[*Chattel Mortgages*, see CONVEYANCES, D, V, VI. *Assignments for Creditors*, see DEBTOR AND CREDITOR, p. 89. *Under Bankrupt Laws*, see DEBTOR AND CREDITOR, p. 626. *Marriage Settlements*, see DOMESTIC RELATIONS, p. 191. *Creditors' Bills*, see EQUITY, p. 631.]

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| I. IN GENERAL, §§ 503-630. | V. CONDITIONAL SALES, §§ 988-995. |
| II. CONTINUED POSSESSION BY VENDOR OR MORTGAGOR, §§ 631-793. | VI. NOTICE TO VENDEE, §§ 996-1016. |
| III. VOLUNTARY CONVEYANCES, §§ 706-976. | VII. JUDGMENT CREDITORS, §§ 1017-1027. |
| IV. RESERVATION OF AN INTEREST, §§ 977-987. | VIII. RELIEF, §§ 1028-1053. |

I. IN GENERAL.

SUMMARY—*Conveyance cannot stand as security for advances*, § 503.—*Relief where land is not subject to execution; grantee held as trustee*, § 504.—*Conveyances to children on insufficient consideration*, § 505.—*Right of subsequent creditors to question a conveyance where the grantor has been defrauded*, §§ 506, 508.—*Subsequent creditors*, § 507.—*Vendee protected as to payments made before notice*, § 509.—*Promise to pay debts of vendor as part of consideration*, § 509.—*Confession of judgment in trust for infant devisees; no declaration in writing; non-delivery of property*, § 510.—*Conveyance on the eve of the rendition of a decree; non-delivery of possession; question as to consideration*, § 511.—*Statute of Elizabeth in force in Texas*, § 512.—*Declarations of grantor after conveyance*, § 513.—*Proceeding to set aside conveyance to B., and from B. to debtor's wife; discrepancies in answers*, § 514.—*Right to prefer creditors*, §§ 515-518.—*What sufficient to set aside composition*, §§ 519, 521.—*Assignment for benefit of creditors*, § 520.—*Conveyance by insolvent to nephew; previous debt as a consideration; actual fraud*, § 522.—*Composition; omission of property*, § 523.

§ 503. Actual intent to defraud creditors makes a conveyance utterly void, and it cannot be permitted to stand as security for any sums which have been advanced or paid by the fraudulent grantee for the fraudulent grantor, subsequent to the execution of the instrument. It is otherwise if the conveyance is only constructively fraudulent. *Bean v. Smith*, §§ 524-32.

§ 504. It was objected to the maintenance of a bill in equity by a judgment creditor to set aside a conveyance of land by the debtor as fraudulent, that under the local law (that of Rhode

Island) real estate was not subject to be taken in execution except in a few cases, in which the plaintiff's case was not included. It was held that while the property could not be directly subjected to the payment of the judgment, it was indirectly liable, since the debtor, when his body had been taken in execution, could not be discharged without yielding up the property to the creditors, and having procured a fraudulent discharge of his person by a fraudulent transfer of his property, the law would hold the latter as a substitute for the former. It was therefore decided that the creditors were defrauded by such a conveyance; that the bill could be maintained; and that the purchasers, unless *bona fide*, for value and without notice, would be held as trustees of the land for the judgment creditors, or accountable to the creditors for the full value of the property, without allowance for any of the purchase money paid by them. *Ibid.*

§ 505. A debtor, pending suits against him for large sums of money due his creditors, conveys to his children, who are privy to the conveyances, all of his property real and personal, and even including his household goods, thus reducing himself to absolute beggary. The consideration of several of the deeds is mere love and affection, and the property conveyed by them is of great value. Upon other conveyances no money is paid at the time, all resting in confidence, and the utmost that the children become bound to pay or do pay is less than one-third the value of the property. The consideration for the remaining conveyances is unliquidated debts due for services by children to whom he has already made voluntary conveyances of valuable property. It is held that the whole of these conveyances are fraudulent and void as to creditors. *Ibid.*

§ 506. A transfer of property by a corporation cannot be questioned by subsequent creditors upon the ground that the company has been defrauded in the transaction, any more or in any other circumstances than a like transfer by an individual. *Graham v. Railroad Company*, §§ 593-99.

§ 507. If an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. But if the grantor intends by the conveyance to defraud those to whom he expects to become immediately or soon indebted, it is a fraud as against them. Thus where the officers of a railroad company, perfectly solvent and not indebted in any considerable amount, sold a piece of land for the sum of \$25,000, which was the highest price they could get after repeated efforts to sell, and the officers having first aided the purchaser in buying subsequently took the property off his hands, it was held that subsequent creditors of the company could not question the sale, it not having been pretended that the company made the sale for the purpose of defrauding existing creditors, much less subsequent ones. *Ibid.*

§ 508. Where a person in making a transfer of his property is defrauded in the transaction, his creditors, who become such after the transfer, cannot maintain a suit to set it aside, where the debtor acquiesces in the transaction, manifesting no desire to disturb it, and does not unite with the creditors in their suit. Thus where the officers of a railroad company sold land belonging to it and personally aided the purchaser in making the payment, and subsequently in their individual capacity took it off his hands, and the board of directors afterwards confirmed the sale, and subsequent creditors of the company brought a bill to set aside the sale on the ground that the company had been defrauded by it, it was decided that the suit could not be maintained, the company not having united therein. *Ibid.*

§ 509. It is a sound principle in equity that where the vendee buys in good faith, and without notice of fraud on the part of the vendor, and pays a part only of the consideration, agreeing to pay the remainder at a future day, if, before such remainder is paid, he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice. But it is doubtful whether this principle can be applied at law, and in a case in which no issue is made except upon the validity of the sale. However this may be, the whole of the purchase price will be considered to have been paid, as far as this rule is concerned, where a part of the purchase price is paid down, before notice of the fraud, and a promise made by the vendee at the same time, as the remainder of the consideration, to pay debts of the vendor, upon which the holders of such debts may sue him. *Sousteby v. Keeley*, §§ 540-42.

§ 510. An executor purchased property belonging to the estate of the deceased, and, in order to secure the payment of the purchase money to the infant devisees who were entitled to it, confessed a judgment in favor of a third person, who accepted the trust, though it did not clearly appear that he made a written declaration of the trust. It was held that this was not fraudulent and void as to creditors, and that it was not essential to the validity of the judgment that the distributive shares of the devisees should have been ascertained, provided that they exceeded the amount for which the judgment was entered. It was further held that the continued possession of the property by the executor, being perfectly consistent with the judgment, was not evidence of fraud. *Bank of Georgia v. Higginbottom*, §§ 548-49.

§ 511. A person, upon the eve of the rendition of a decree for a large amount against him, which it was admitted would go far to his ruin, conveyed his whole property, real and personal, to his brother-in-law, for an asserted consideration equal to its whole value. The grantee was not known to possess at the time sufficient means to pay the purchase money, and suffered the property to remain in the possession of the grantor. The deed did not disclose what the considerations really were, but the grantee alleged that part was money which he actually paid, and that the residue of the consideration was the assumption by him of the payment of the amount which would fall due from the grantor to certain wards of which the latter was guardian, the grantee being the surety on his bond. There was a want of certainty as to the amount due the wards, and there was no security taken for the fulfillment of this promise. Besides, the grantee already held a mortgage on the same property as security against liability on his undertaking as surety on the bond of the grantor. Money borrowed by the grantee to pay the money part of the consideration was proved to have been returned to him after payment and by him returned to the lender. There were damaging confessions of the grantor, and the explanations of the transaction by the parties were ambiguous. The conveyances were held not to be *bona fide* and for a valuable consideration, but fraudulent and void as to creditors. *Venable v. Bank of United States*, §§ 550-52.

§ 512. The statute of 13th Elizabeth has been substantially enacted in Texas, and the same legal principles apply there as in other states where similar statutory provisions exist. *Clements v. Moore*, §§ 553-57.

§ 513. Declarations by the grantor in a fraudulent conveyance, made after the conveyance, are inadmissible as evidence against the grantee. *Ibid.*

§ 514. In a proceeding to set aside a conveyance by an insolvent debtor to B., and one from B. to the debtor's wife, the answers of the debtor and B. contradicted the deeds as to the amount of the consideration paid by B., and this was not explained by them. Both answers were silent as to the mode of payment. There were striking discrepancies between the answers of the debtor and his wife. The latter admitted that she paid for the lots by notes which B. had given to the debtor in payment for another purchase, and failed to prove how she became entitled to the notes. It was decided that the conveyances were fraudulent and void as to creditors. *Ibid.*

§ 515. An insolvent debtor may prefer one creditor to the exclusion of all others. While the motive is immaterial, yet the transfer, to be valid, must be in good faith and solely in payment of an honest debt. There must be no design to secure an advantage to the debtor over his other creditors, or to delay them in the collection of their debts. *Smith v. Craft*, §§ 558-59.

§ 516. An agreement by a debtor with a creditor advancing him money, that he will prefer or secure such creditor to the exclusion of all others, if he becomes insolvent, is in the nature of a secret lien which the law will not allow to be enforced as against creditors who become such without knowledge of it. As to them it is deemed to be fraudulent. *Ibid.*

§ 517. Where an insolvent merchant conveyed his stock of goods, his fixtures, and the unexpired lease of the premises, in payment to one of his creditors, to the exclusion of all the others, and as a part of the consideration of the transfer was to be employed to continue the business as agent for the creditor at a stated salary for an indefinite period, it was held that he thereby obtained such a personal benefit or advantage over his other creditors, who had sold him on credit goods still in stock, as to render the preference fraudulent and void. *Ibid.*

§ 518. Where judgment creditors, who procure a preference to be set aside in equity as fraudulent, would have acquired a lien on the property to the exclusion of other creditors, if it had remained in the hands of the debtor until the bill was filed, they are entitled to a decree against the preferred creditor for the full amount of their judgments, where he has realized as much from the goods. *Ibid.*

§ 519. That a debtor has previously made a fraudulent conveyance is not of itself sufficient to avoid a release by a creditor agreeing to a composition. But if there be a concealment of property or a fraudulent conveyance by the debtor with intent to mislead the creditor, and, under such circumstances, the creditor, trusting to the good faith and honesty of the debtor, signs a release, it may be set aside in equity. *A fortiori* may this be done where there is a direct or actual misrepresentation. *Phettiplace v. Sayles*, §§ 560-65.

§ 520. It cannot be objected to an assignment for the benefit of creditors, by those assenting thereto, that it stipulates for benefits on the part of the debtor which he has no right to demand. For it is impossible that there can be any fraud upon those who deliberately, voluntarily, and with knowledge of all the facts, assent to the terms of the debtor. *Ibid.*

§ 521. The petition to the legislature by a debtor seeking the benefit of the insolvent act is a representation to his creditors as to his actual condition, and they are presumed to have knowledge of it. And such representation, if false and fraudulent, will invalidate a release made on the faith of it by a creditor agreeing to a composition. *Ibid.*

§ 522. A sale by an insolvent person to his nephew, if *bona fide* and for a valuable consider-

ation, and without any design to defraud creditors, is valid in point of law. A previous debt is just as good a consideration for this purpose as money paid at the moment. But if there is fraud, no consideration, however valuable, will make it valid against those injured by it. *Ibid.*

§ 523. A debtor proposing a composition to his creditors, and making an assignment of what purports to be all his property for the benefit of creditors, with a proviso that they shall execute releases, is not guilty of a fraudulent misrepresentation in omitting from his inventory property which he has disposed of by a sale valid as between the parties and voidable only at the instance of his creditors. *Ibid.*

[NOTES.—See §§ 568-680.]

BEAN v. SMITH.

(Circuit Court for Rhode Island: 2 Mason, 252-301. 1821.)

Proceeding in equity by a creditor of the defendant Simon Smith, to set aside certain conveyances made by him of his lands to his co-defendants, as made with the intent to defraud his creditors, and therefore void. The facts fully appear in the opinion.

Opinion by STORY, J.

A preliminary objection has been taken to the jurisdiction of the court, upon two grounds: 1. That the plaintiff claims as assignee of a chose in action, on which, independent of such assignment, no suit could be sustained in this court. 2. That there is a complete and adequate remedy at law, and therefore no reason for the interposition of a court of equity.

§ 524. *The federal courts may properly entertain a suit in equity by a judgment creditor to set aside fraudulent conveyances if the parties are citizens of different states, and this though the original judgment was recovered upon a negotiable chose in action assigned to the plaintiff.*

The suit is between citizens of different states, and plainly within the general jurisdiction of the circuit court, unless it falls within the restrictive clause of the eleventh section of the judiciary act of 1789, chapter 20, which declares that the circuit court shall not "have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." The bills in which the transactions disclosed in the present case originated were drawn by a person resident in one state, upon a person resident in another state, and whether they be foreign or inland bills in the sense of the statute is a question worthy of serious deliberation, upon which much contrariety of opinion has been entertained. As this question has not been argued at the bar, and is not indispensable to a correct decision of this case, I pass it over with the single remark that I do not wish to be understood as acquiescing in the doctrine that bills drawn in one state upon drawees living in another state are to be deemed inland bills. I entertain great doubts as to the correctness of that doctrine, and am not alone in these doubts, and before I come to a decision, I should choose to hear the question fully discussed with all the learning and principles that belong to it.

The present suit is not brought upon any bills of exchange, but at most upon a judgment rendered in favor of the plaintiff against Simon Smith, one of the defendants, upon certain protested bills of exchange, indorsed by Simon Smith, in the state court of Rhode Island. The chose in action has therefore passed *in rem judicatem*; and so far as Simon Smith is concerned is absorbed and extinguished by the judgment. The claim of the plaintiff is not now in virtue of any assignment, but of a direct judgment in his favor; and if the suit

were now at law upon the judgment itself, there cannot be a doubt of the jurisdiction of this court to sustain it. In deciding on its jurisdiction, the court can only look to the immediate ground-work of the suit, not to any remote or collateral considerations in which it had its origin. It is no objection to the jurisdiction, that at some anterior period the transaction assumed a shape not within the reach of that jurisdiction. It is sufficient if it has now become so modified by the act of the parties, or by the principles of law, that jurisdiction now rightfully attaches.

Taking, then, the case in the most favorable view for the argument of the defendants' counsel, it is a suit upon a judgment between citizens of different states, and does not fall within the statute prohibition. But in truth, the suit is not, strictly speaking, founded solely upon a judgment. The judgment is collateral. It forms an ingredient and an essential ingredient in the case; but it is not the whole of the case. The plaintiff seeks for relief against fraudulent conveyances of property, executed by the defendant Simon Smith to the other co-defendants, for the alleged purpose of defeating the plaintiff of his just rights as a creditor under the judgment. It is these fraudulent conveyances which constitute the immediate ground-work of the suit, and so far as respects all the defendants, except Simon Smith, the sole ground-work of the suit. They were never liable, either upon the original bills or judgment, nor had the plaintiff any claim against them in his mere character as assignee. If they are liable to him at all, it is because they are parties to a meditated fraud to his injury, or as trustees holding property for his use. His right to sue them is not a right which once vested in another person, and has passed to him by assignment. It is a right which originally sprung up after the assignment to him and from new transactions. And the same observations apply with equal force to Simon Smith. It is not his liability to the plaintiff under the original assignment of the bills of exchange indorsed by Simon Smith that is now in question, and is now sought to be enforced, but a new right collateral to that, growing out of a direct judgment between the parties, and an asserted fraud injurious to the plaintiff, which has been devised to avoid the satisfaction of that judgment. It is perfectly clear that the statute never contemplated an exclusion of jurisdiction in cases where a mere negotiable instrument, or chose in action, was mixed up in the ingredients of the case; but where that chose in action constituted the sole cause of action, and the assignment constituted the whole ground of the plaintiff's right. I have no difficulty, therefore, in overruling this objection to the jurisdiction of the court, for the reasons already stated, although the other arguments of the plaintiff's counsel would, in case of any doubt, have been entitled to great consideration.

§ 525. *A bill in equity lies to set aside fraudulent conveyances, there not being a plain, adequate or complete remedy at law for the same.*

The other objection is not so much to the competency of the court as in the nature of a demurrer to the bill for want of equity. Much stress has been laid upon that clause of the judiciary act of 1789 (ch. 20, § 16) which declares "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." I take this clause to be merely affirmative of the general doctrine of courts of equity and in no sense intended to narrow the jurisdiction of such courts. It has been repeatedly held by the supreme court that the equity jurisdiction of the courts of the United States does not depend upon what is exercised by courts of equity, or courts of law, in the several states; but de-

pend upon what is a proper subject of equitable relief in courts of equity in England, the great reservoir from which we have extracted our principles of jurisprudence. *Robinson v. Campbell*, 3 Wheat., 212, 221; *United States v. Howland*, 4 Wheat., 108, 115. If, therefore, a bill of this sort states a case properly within the cognizance of courts of equity, according to the general doctrines of their jurisprudence, I should have no difficulty in overruling this objection, although the state courts of Rhode Island might afford some sort of remedy at law to aid the plaintiff. There are many cases in which courts of law and equity exercise a concurrent jurisdiction, and the judiciary act never intended to disturb that jurisdiction. In such cases, it is supposed that the remedy at law is not adequate and complete for all the purposes for which the plaintiff may claim relief. *Herbert v. Wren*, 7 Cranch, 370, 376. There cannot be a doubt that this bill states a case which is entirely fit and proper, if it be proved, for the interference of a court of equity. Nothing is more common than for courts of equity, upon bills filed for the purpose, to set aside conveyances made to defraud judgment creditors. It is a case peculiarly belonging to its jurisprudence, and adequate and complete relief cannot be obtained at law. *Cooper*, Eq. Pl., 148; 1 Eq. Abridg., 77, pl. 13; *Smitkins v. Lewis*, 1 Vern., 398; *Mountford v. Taylor*, 6 Ves., 788; *Bennett v. Musgrave*, 2 Ves., 51; 3 Bac. Abridg., Fraud. D.; Com. Dig., Chancery, 3 M.; *Id.*, Covin, B., 2; *Bennett v. Musgrave*, 2 Ves., 51.

But I go yet farther in the case now before the court, and affirm not only that the bill presents a case of equitable jurisdiction, but that under the peculiar laws of Rhode Island, which do not, except in a few specified cases, make lands liable for debts, there is no remedy, at least no adequate remedy, at law; and that if the plaintiff be entitled to any relief, he must seek it exclusively in a court of equity. The case is wholly unlike that to which the supreme court alluded in the language cited at the bar, from *Russell v. Clarke's Executors*, 7 Cranch, 69, 89. The language there used supposes that the bill states no case for equitable relief, but only asks for a discovery on which to found equitable relief; and if the answer discloses none, then as neither bill nor answer shows any title to such relief, the parties must be dismissed to their remedy at law. Here, the bill does state a case for equitable relief; and though the answers of some of the defendants deny the facts on which that relief is sought, that is a question, not of jurisdiction but of proof. As to some of the parties the bill is confessedly true, for they claim under voluntary deeds of gift, which the law deems fraudulent as to creditors. We may then dismiss any farther consideration of the preliminary questions of jurisdiction, and pass to the merits of the case as they stand disclosed in the pleadings and evidence.

§ 526. *A bona fide purchaser, without notice, holds title though his grantor derived title through a conveyance in fraud of creditors.*

Before, however, proceeding to this discussion, it may be as well to dispose of another point urged at the bar, and which is of vast practical consequence; I mean the doctrine that a *bona fide* purchaser for a valuable consideration, without notice, cannot protect the estate in his own hands against creditors, where he derives his title to the estate through a grantee, to whom it was originally conveyed for the purpose of defrauding the creditors of the first grantor. This doctrine is certainly supported by high authority of a recent date, and the cases cited at the bar are fully in point. Until I had perused these cases, I am free to confess that I was not aware that there was in this respect any difference between the operation of the statute of 13th of Eliza-

beth (ch. 5), which avoids conveyances made in fraud of creditors, and that of the 27th of Elizabeth (ch. 4), which avoids conveyances made in fraud of subsequent purchasers. An unbroken current of authorities establishes beyond question that a *bona fide* purchaser for a valuable consideration, without notice, shall hold the estate, notwithstanding he claims through a grantee to whom it had been conveyed in fraud of purchasers. 1 Favel. Eq., b. 1, ch. 4, § 13, note f, p. 278; Roberts, Fraud. Convey., ch. 4, § 10, p. 496; Prodgers v. Langham, 1 Siderf., 133; Newport's Case, Skinner, 423; S. C., 3 Lev., 387; Doe v. Martyr, 4 Bos. & Pull., 332. But Mr. Chancellor Kent has held, in Roberts, etc., v. Anderson, 3 John. Ch., 371, (a) that the same doctrine does not apply where there has been a conveyance to defraud creditors. If this be so, it is certainly a departure from the general doctrine of courts of equity on the subject of *bona fide* purchasers without notice. So solicitous are courts of equity to preserve the rights of persons in this predicament, that Lord Chancellor Loughborough, in Jerrard v. Saunders, 2 Ves. Jr., 454, 458; Coop. Eq. Pl., 281 (and see Bassett v. Nosworthy, Cas. temp. Finch., 102; 2 Fonbl. Eq., b. 3, ch. 3, § 3, p. 307), emphatically declared that against them the court would not take the least step imaginable. They are not only treated as favorites of courts of equity, but the common law, in many instances, holds their titles good, although in the hands of the original grantees the titles were infected with the taint of fraud, or other analogous infirmity. Com. Dig., Covin, B.; Prodgers v. Langham, 1 Sid., 133; Woodcock's Case, 33 H. 6, 14; Shepp. Touch., 66; Hobart, 166; Bingham's Case, 2 Co., 91, 94; Gibbs v. Chase, 10 Mass. R., 125; Jackson v. Henry, 10 John., 185; Jackson v. Walsh, 14 John., 407; 1 Fonbl. Eq., ch. 4, § 11, note (Y), p. 268. If, therefore, the doctrine is to stand, it must stand either as an exception founded upon public policy, or upon the positive provisions of the statutes of 13th and 27th of Elizabeth. As to public policy, it remains to be demonstrated that it would be essentially promoted by the alleged exception; at least it does not strike one that there is any general reasoning on this head which would not apply with equal force to subsequent purchasers as well as to creditors. There is the same injustice and mischief in allowing a subsequent purchaser without notice from the fraudulent *grantor*, to be defeated in his rights by a prior conveyance to a like purchaser from the fraudulent *grantee*, as in the analogous case affecting creditors. The ground cannot be, that in the former case the conveyance is voluntary, and takes effect between the parties and their representatives, for that is equally true as to conveyances in fraud of creditors. The real ground of the doctrine must be, that where the parties are equally innocent and equally meritorious in their titles, the law will give a preference to that title which has a priority in point of time; upon the maxim *qui prior est in tempore potior est in jure*.

§ 527. *A conveyance to defraud creditors or purchasers is only voidable.*

A conveyance to defraud purchasers, or to defraud creditors, is not "utterly void," as has been sometimes supposed; it conveys the estate effectually as between the parties and their representatives; and the estate may be maintained against all persons but those whom it was intended to defraud. The grantor himself cannot convey the same title to any mere volunteer, nor can he avoid his own grant in his own favor; nor can a mere stranger contest the validity of the conveyance. Roberts, Fraud. Conv., ch. 4, § 10, p. 498; Dame

(a) This case was reversed. See 18 John., 515.

Burg's Case, Moore, 602; Fonbl. Eq., 6, 1, ch. 4, § 12, p. 273, note. The estate, therefore, passes *toties quoties* by every subsequent conveyance, and it is good against all the world, except creditors and purchasers, in the possession of every successive grantee, even with notice of the fraud. Mr. Chancellor Kent says (*Roberts v. Anderson*, 3 John. Ch., 371, 378), that "if the fraudulent grantee be enabled to sell, the grantor cannot call those proceeds out of his hands." This is very true; but neither can he recall the land itself, or avoid his own grant. He adds, "and the grantee can either appropriate them to his own use, or to the secret trusts upon which the conveyance was made." And he thence deduces the conclusion that "there is more danger of abuse, and that the object of the statute could be more easily defeated, in the one case (*i. e.*, of creditors) than in the other" (*i. e.*, of purchasers). It may be asked of that eminent judge, whether the doctrine here asserted be correct? Is it true that the grantee can appropriate the proceeds of a sale to his own use, or to the secret trusts of the fraudulent conveyance against a judgment creditor? Will not a court of equity decree that the fraudulent grantee shall account to the judgment creditor for the amount of the proceeds of the sale, considering them as a mere substitution for the original fund? It appears to me that such a course is within the established doctrine and practice of the court. Equity will permit a creditor of an estate to sue the debtor, where there is collusion between the latter and the executor (*Benfield v. Solomons*, 9 Ves., 77, 86; *Alsager v. Rowley*, 6 Ves., 748; *Doran v. Simpson*, 4 Ves. Jr., 651); *a fortiori* it will sustain a suit where the very fund appropriated by law for the payment of the debt is withheld by a fraudulent grantee. See *Handricks v. Robinson*, 2 John. Ch., 283; and see *Rob. Fraud. Conv.*, ch. 4, § 10, p. 502; *Gore v. Brazier*, 3 Mass., 541; 3 Pothier's Pand., lib. 42, tit. 3, art. 3, § 24, p. 195. If, then, the reasoning of the learned judge on this point proceeds upon principles which are inadmissible, the conclusion drawn from those principles may well be doubted. No peculiar principle of public policy has been shown to exist in respect to creditors which entitles them to a preference over the other *bona fide* purchasers. They stand in truth in the character of purchasers for a valuable consideration and not above them. The analogies of the law do not support any peculiar distinction in their favor. The policy of the law generally is to support *bona fide* purchasers for a valuable consideration in the titles acquired; and this policy is at least as ancient as *Woodcock's Case*, in 33 Hen. 6, 14, where a conveyance from a fraudulent grantee to such a purchaser was permitted to defeat highly meritorious and legal claims. The great object of the law is to afford certainty and repose to titles honestly acquired. It is of no public utility to destroy titles so acquired, on account of the taint of a prior secret fraud, which was unsuspected and unknown, and which probably no diligence could detect. If the creditor of the original grantor be cheated, by holding such titles valid, the innocent purchaser would be no less cheated by holding them void. And, therefore, the common law, which leans to equity, is unwilling to visit upon innocent persons the consequences of fraud. It enables them to hold estates acquired *bona fide* for a valuable consideration, purged of the anterior fraud that infected the title.

§ 528. *Construction and effect to be given the statutes of 13th and 27th Elizabeth.*

Then as to the statutes of 13th and 27th of Elizabeth. In their most material provisions, they have, in modern times, been held as merely affirmative of the common law (*Cadogan v. Kennett*, Cowp., 432, 434; *Sands v. Codwise*,

4 John., 536, 596; *Hamilton v. Russell*, 1 Cranch, 316; §§ 714-15, *infra*); and one should cautiously put upon them any construction which implies a departure from that law. In the only case where such a departure under the 27th of Elizabeth has been tolerated — I mean in respect to the rights of a subsequent purchaser *with notice*, to set aside a voluntary conveyance — courts and jurists in modern times have felt the difficulty of sustaining that doctrine upon any sound principles where the voluntary conveyance is not a meditated fraud; and if the point were new, it would be, I had almost said, immoral to adopt it. It stands drily upon authority, and we bow to it neither with reverence nor affection.

The statute of 13th of Elizabeth (ch. 5), in the first section, declares that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, etc., goods, etc., made with intent to delay, hinder, or defraud creditors and others of their just actions, suits, debts, etc., “shall be from henceforth deemed and taken *only as against that person or persons*, his or their heirs, etc., executors, etc., *whose* actions, suits, debts, etc., by such guileful, covinous, or fraudulent devices and practices as aforesaid, are, or shall, or might be in any wise disturbed, hindered, delayed or defrauded, to be clearly and utterly void, frustrate, and of none effect.” The sixth section of the same statute contains a proviso that “this act, or anything therein contained, shall not extend to *any estate or interest* in lands, etc., goods, etc., had, made, conveyed, or assured, or thereafter to be had, made, conveyed, or assured, which estate or interest is, or shall be, upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or incorporate, not having, at the time of such conveyance or assurance to them made, any manner of *notice or knowledge of such covin, fraud, or collusion, as is aforesaid*.” It is observable that this proviso does not use the expression feoffment, gift, or grant, etc., but *estate and interest*, and that there is not a syllable in it which points to any estate or interest derived directly from the fraudulent grantor, any more than from the fraudulent grantee. The language, in its just interpretation, applies equally well to an estate derived from either. And it would be somewhat strange if it were intended to apply to an estate or interest derived from the grantor. In the first place, if such estate or interest was *before* the fraudulent conveyance, it is manifest that it could not be affected by it in any manner whatsoever. In the next place, if it were *after* such conveyance, then, by excepting such cases from the operation of the act, it would leave such estate or interest exactly where the act found it, to be judged of according to the rules of the common law. And if the common law would give effect to such second grant as against creditors (as would probably now be held), then the creditors would be just as much defrauded as they would be by a second grant of the grantee being held valid. For if the second grant of the grantor could convey a good title *directly*, and purged of the fraud, the public mischief would be quite as great as if he conveyed *indirectly* through the medium of his fraudulent grantee. If, on the other hand, as it seems to be thought the old law stood (see *Halsey’s Case*, Lane, 105; *Upton v. Bassett*, Cro. Eliz., 445), the second grant from the grantor could not avoid the first grant, then there would be still less reason to suppose that the proviso meant to save only an estate or interest derived from the grantor, which the law held utterly defective and inoperative.

There seems, then, no reason founded on the intent of the statute, why

the language should be held less comprehensive in its operation than the terms import.

Then, as to the statute of 27th Elizabeth, chapter 4. The first section declares all and every conveyance, gifts, grants, etc., of lands, etc., made for the intent to defraud and deceive such person or persons, etc., as have purchased, or shall thereafter purchase, in fee simple, etc., the same lands, etc., "shall be deemed and taken *only as against that person and persons*, etc., his and their heirs, etc., and against all and every other person and persons lawfully having or claiming by, from, or under them, or any of them, which shall have purchased or shall thereafter so purchase for money, or other good consideration, the same lands, etc., *to be utterly void*, frustrate, and of none effect." Then comes a proviso in the fourth section, "that this act or anything therein contained shall not extend, or be construed to impeach, defeat, make void, or frustrate, any conveyance, etc., assurance, grant, etc., estate, interest, etc., of any lands, etc., heretofore at any time had or made, or hereafter to be had or made, upon or for good consideration, and *bona fide* to any person or persons," etc. And another proviso in the sixth section extends the same protection to every "lawful mortgage made or to be made *bona fide*, and without fraud or covin upon good consideration." Now it is observable that these enactments are substantially like those of the 13th of Elizabeth, as to their objects. In each, the fraudulent conveyance is declared "utterly void" as to the persons intended to be defrauded, and is limited to those persons. In each, there is an exception of estates acquired *bona fide* and upon good consideration; and the only marked difference of language is, that the proviso of the 27th of Elizabeth drops the expression of the 13th of Elizabeth as to notice of the fraud by such purchaser. In the proviso of the 27th of Elizabeth, there is no qualification or limitation as to the person from whom the conveyance or estate is acquired; and it has been always held to apply equally to estates derived from the fraudulent grantor and grantee. And this, not upon any necessary construction of the statute, but upon the principles of the common law. *Producers v. Langham*, in 1 Sid., 133, is a leading authority on this head. There the court agreed, that though a deed might be fraudulent in its creation, and voidable by the purchaser, yet it might be made good by matter *ex post facto*; as if one made a feoffment by covin, and the feoffee makes a feoffment for a valuable consideration, and then the first feoffor enters and makes a feoffment for a valuable consideration, the feoffee of the first feoffee shall hold the land, and not the feoffee of the first feoffor. The reason assigned by the court is, not that such is the construction of the language of the statute, forcing them to such a conclusion, but that such is the common law; for, say the court, though the estate of the first feoffee was in its creation "covinous and so voidable, yet when he enfeoffs upon a valuable consideration, this shall be preferred before the last." Precisely the same reasoning applies to the case of creditors under the 13th of Elizabeth. The estate is not utterly void as to all persons, but voidable, and voidable by creditors only; and a *bona fide* transfer by the grantee ought to convey the estate purged of the fraud.

I repeat it, that until I saw the case of *Roberts v. Anderson*, 3 John. Ch., 371, which professes in no small degree to be founded upon that of *Preston v. Crofut*, 1 Day (Conn.), 527, note, the asserted distinction which we have been considering between the operation of the statute of 13th Elizabeth, and that of 27th Elizabeth, was utterly unknown to me. I have searched with

some diligence to ascertain if that distinction has been recognized in any adjudged case, or in any elementary treatise in England. Hitherto my researches have been unsuccessful. In *Wilson v. Wormal's Case*, Godbolt, 161, however, Lord Chief Justice Coke, than whom no man was probably better acquainted with the statute, or its true construction, lays down a doctrine that in terms denies the distinction. He says, that "if lessee for years assign over his term by fraud to defeat the execution [upon a judgment against him], and the assignee assigneth the same over unto another *bona fide*, that in the hands of the second assignee, *it is not liable to execution*." In *Gore v. Brazier*, 3 Mass., 523, 541, Chief Justice Parsons manifestly understood the law in the same way. He says, "a *bona fide* alienation for a valuable consideration by a devisee has been compared by the counsel for the defendant to a case where a fraudulent purchaser has afterwards *bona fide* and for a valuable consideration conveyed, *in which case the last purchaser shall hold the land purged of the fraud*. But the two cases are not alike in principle, for the consideration money received by the devisee cannot be personal assets in the hands of the executor." The like doctrine is directly asserted by the supreme court of Massachusetts, in a recent case (*Inhabitants of Worcester v. Eaton*, 11 Mass., 363, 373; *Trull v. Bigelow*, 16 Mass., 406), and I may be justified in asserting that such has been in that state the received law of the land. The reasoning of the court in *Jackson v. Henry*, 10 John., 185, and *Jackson v. Walsh*, 14 John., 407, would have strongly led to the same conclusion, illustrated as the doctrine there is in analogous cases. In the latter case, the doctrine is broadly laid down, that "it has been a long and well settled principle that a purchaser for a valuable consideration, without notice, has a good title, though he purchase of one who had obtained the conveyance by fraud."

§ 529. *Doctrine of the civil law as to the rights of a bona fide purchaser from a fraudulent grantee.*

There is, too, the light of the civil law to guide our inquiries on this subject. The learned author of the treatise of equity has justly observed that "by the civil law; whatever debtors do to defeat their creditors is void; and there is a great resemblance between the civil law in this matter and the statute of 13th Elizabeth. But in each of them there was this exception, *that it should not extend to avoid any estate or interest made upon good consideration and bona fide*." 1 Fonbl. Eq., b. 1, ch. 4, § 12, p. 270. And the learned author is well warranted in his assertion; and his reference to the civil law, where the very case now under discussion is put, shows that he did not contemplate the existence of the present distinction. The case put in the digest is, "Is qui a debitore, cujus bona possessa sunt, sciens rem emit, iterum alii bona fide ementi vendidit. Quæsitum est an secundus emptor conveniri potest? Sed verior est Sabini sententia, bona fide emptorem non teneri; quia dolus ei duntaxat nocere debeat qui eum admissit. Quemadmodum diximus non teneri eum, si ab ipso debitore ignorans emerit. Is autem qui dolo malo emit, bona fide antem ementi vendidit, in solidum pretium rei quod accepit tenebitur." 3 Pothier, Pand., lib. 42, tit. 8, art. 3, § 25, p. 195. I trust that the doctrine of this latter clause is equally the doctrine of courts of equity with that which is so persuasively stated in the former. And the like doctrine is recognized by Voet in his commentaries. 2 Voet, Com., lib. 42, tit. 8, § 10, p. 822.

The case has thus far been reasoned upon as though it depended entirely on the statutes of Elizabeth, but in truth it turns upon the statute of frauds of Rhode Island. If any doubt could rest upon the proposition that both these

statutes should receive the same construction, that doubt would vanish upon an examination of the Rhode Island act; for that in the same enacting clause embraces both descriptions of persons, creditors and purchasers, and as to them avoids all fraudulent conveyances and contains no proviso of any sort. Rhode Island Statutes, ed. 1798, p. 473, § 2. The case of a *bona fide* purchaser must, under this statute, stand purely upon the principles of the common law.

The great deference which I feel for the chancellor of New York and the supreme court of Connecticut has occasioned no small solicitude on my part respecting this subject. I have weighed the reasoning which has directed their judgment with care, and, however reluctantly, I am constrained to declare that it does not carry conviction to my judgment. I cannot persuade myself to desert the doctrine of Lord Coke and the civil law, fortified as it is by the general analogies of the common law. If, therefore, it becomes material to the parties in this cause to establish the doctrine that a *bona fide* purchase for a valuable consideration without notice, derived under a grant made to defraud creditors, is not a good title against creditors, I shall decide against the proposition and leave the parties to their appeal to the supreme court.

§ 530. *Though by the laws of Rhode Island creditors cannot levy upon the real estate of their debtor, still circumstances exist under which a bill in equity will lie to set aside a fraudulent conveyance of such realty and charge the latter with the debts of the fraudulent grantor.*

There is another objection lying at the very foundation of this bill, which requires deliberate consideration. It is this: By the laws of Rhode Island real estate is not subject to be taken in execution by a judgment creditor, except in a few cases specified in the statutes of that state. Where the debtor is alive and resides within the state, the laws do not authorize an attachment or levy upon his real estate, unless he conceals himself, so that neither his body nor personal estate can be come at to satisfy his debts. Stat. Rhode Island, ed. 1798, p. 202, § 5. The present case does not (as it is said) fall exactly within this description, and it is hence inferred that however fraudulent may have been the conveyances sought to be set aside by the bill, the plaintiff is without remedy, since he had no lien on the real estate and could not acquire any title to it by his judgment. If conveyances are acknowledgedly made in fraud of creditors, and in cases circumstanced like the present a judgment creditor can have no redress either at law or in equity, the jurisprudence of the country is most shamefully defective in the first principles of justice. Men must rely altogether upon the private honesty of their debtors for payment of their debts and not upon remedies by the law. A dishonest debtor may lock up a splendid fortune from the reach of his creditors, and by the facile contrivance of a conveyance to defraud his creditors, secretly secure to himself or his family the whole profits of his corrupt conduct; and, if he can quiet his conscience, relieve himself afterwards from imprisonment under the plausible character of a poor prisoner. I am, however, of opinion that the justice of the country does not deserve such a reproach.

Here is a case where the judgment creditor took the body of his debtor in execution, and had a right to retain him in imprisonment, unless he could discharge himself by taking the poor prisoner's oath that he had no property to support himself in prison or to pay prison charges, and that he had not conveyed any part of his estate to any persons with intent to secure the same, or to defraud

his creditors. The laws of Rhode Island contemplate that a false oath taken by the prisoner on such an occasion incurs the penalty of perjury. Stat. Rhode Island, ed. 1798, pp. 229, 231. If, then, the debtor cannot, while he possesses property, be relieved from imprisonment, but his body is security for the debt, and he makes a fraudulent conveyance of his property (the natural fund for the payment of that debt) for the express purpose of cheating his creditors, and depriving them of every means of satisfaction, it cannot be possible that the law will authorize the party or his coadjutors in such conduct to reap the fruits of their dishonesty. If the property be not directly subjected to the judgment, it is indirectly liable, since the debtor can never be entitled to a discharge without yielding it up to his creditors. And if the debtor does procure a fraudulent discharge of his person by a fraudulent transfer of that property, the law will hold the latter a substitute for the former by his own consent. It is by no means universally true, that, because there is no lien directly created on land or other property by a debt or decree in favor of a creditor, therefore he can never be entitled to any relief in respect to them. *Herne v. Meeres*, 1 Vern., 465. He may acquire it by the conduct of the debtor himself. A sequestration upon a decree in chancery is only personal process, and does not affect the land immediately like an extent or a judgment. The contempt in not performing a decree is the foundation for a sequestration, for the decree acts only *in personam* and not *in rem*. *Bligh v. Darnley*, 2 P. Will., 620, 621. And yet a conveyance made in fraud of a decree or of a sequestration will be set aside in equity. *Self v. Madox*, 1 Vern., 460, and cases cited; *Simmonds v. Kinnard*, 4 Ves. Jr., 735; *Colston v. Gardner*, 2 Ch. Cas., 43; 1 Harris, Ch., ch. 26, p. 142. If the debtor, with the intent to defeat a particular judgment creditor, lend his money, this, though a mere chose in action, and on which the judgment did not attach as a lien, may yet be followed in equity by the creditor. *Smithier v. Lewis*, 1 Vern., 398; and see 1 Eq. Abridg., 132, pl. 15. I know that there are cases in which equity has refused to interfere to follow personal property into the hands of a fraudulent grantee, unless execution was first taken out which should bind that property. But this is not universally true, any more than the rule requiring, as to lands, the suing of an elegit. *Angell v. Draper*, 1 Vern., 399, and Raithby's note (1), and 1 Vern., 463. In a case of collusion between an executor and a purchaser of leasehold assets, a creditor on a bond debt was permitted to reach the purchase money in the hands of the purchaser, and in default of payment the leasehold estate was decreed to be sold, and payment ordered out of the proceeds of the sale. *Crane v. Drake*, 2 Vern., 616, Raithby's note (1). See *Hendricks v. Robinson*, 2 John. Ch., 283. It is far from being necessary in all cases that it should appear that a creditor will sustain a loss unless a fraudulent conveyance be set aside. In *Chamley v. Lord Dunsany*, 2 Sch. & Lefr., 690, 714, Lord Eldon in the house of lords declared, "it is every day's practice for a creditor, a puisne creditor, to have a conveyance of his debtor's estate declared fraudulent; and although the purchaser says that there is sufficient to pay the creditor, *still the plaintiff is not delayed for an inquiry into that effect*; and if the conveyance is proved fraudulent, or a trust, the court declares it so, though it is plain that the grantor may be benefited much more than the plaintiff."

But where there is a real injury to the creditor, where he does sustain a loss by the fraudulent conveyance, it would be a narrow obedience to mere technical rules to deny him relief. He must have a right to come into chancery and have the fraudulent conveyance set aside; and if the court be bound to go

thus far, there is no reason why it should not stretch out its arms to give him complete redress. The principle is not new that a party who obtains an estate in fraud of the rights of another shall be held the trustee of him whom he has defrauded. The doctrine has been applied even to those who claim as innocent parties, where it is directly through the fraud without any intervening acts or considerations of their own; for it is against conscience that one person should hold a benefit derived through the fraud of another. *Huguenin v. Baseley*, 14 Ves., 273, 290. And the fraudulent procurement of the omission of an act has been visited upon the party with the same effects as if the act had been done. *Ibid.*, and cases there cited; *Mestaer v. Gillespie*, 11 Ves., 621, 638. It is familiar that a person procuring a perfect legal title of property with notice of a prior title derived under the same party, and not yet perfected, shall be held a trustee of the prior purchaser and compelled to surrender his own title. That is the common case of a second purchaser having knowledge of a prior unrecorded deed. The doctrine is carried yet further, so that a party enabling another to commit a fraud is made answerable for the consequences, either personally or in his estate, as the case requires. *Evans v. Bicknell*, 6 Ves., 174. It appears to me that a court of equity may justly consider the grantees in this case, supposing the charges in the bill to be true, as holding the property conveyed to them in trust for the benefit of the judgment creditors who have been defrauded by the conveyances. If the precedent were to be made for the first time, I should have no difficulty in holding this doctrine upon the eternal principles of justice and morality. The debtor who conveys his property for the purpose of defrauding his creditors, and, upon the ground that he has no property, procures a discharge of his person (that pledge which the law had given them for their debt), ought to be estopped from denying that the property so conveyed stands bound for his debts, and that the person in whose hands they are deposited holds them in trust for this purpose. If the justice of the case could not be reached by this course, I should have as little difficulty in holding that a fraudulent purchaser should be held to account to the creditors for the full value of the property without any allowance for any of the purchase money paid by him, upon the ground that such payment, being fraudulent, is void as to the creditors; and that the case would be the same as if the whole purchase money still remained in his hands unpaid. In this latter case there could be no doubt of the fitness of a remedy in equity in Rhode Island; for certainly personal estate (and such would be the purchase money) is completely bound by a judgment and execution. By the civil law, fraud may also create obligations where is no direct agreement. For if debtors pass away their goods or estates to defraud creditors, it is declared by that law that he that receives them shall be forced to return them to the creditors. *Woods' Inst. Civ. Law*, b. 3, ch. 6, § 8, p. 248. If such doctrines be new here, they are not elsewhere; and they are so consonant with reason, with equity, and with conscience, that little effort can be necessary to persuade us to adopt them.

We have now discussed the principal questions of law applicable to this case, and may well return to a consideration of the facts. And the material question here is, whether the conveyances by Simon Smith to the other respondents are, as charged in the bill, fraudulent.

STATEMENT OF FACTS.—It appears that the plaintiff was on the 23d of December, 1808, the holder of certain bills of the Farmers' Exchange Bank, of which Simon Smith was a director; that he received in payment of those bills

two drafts drawn on one Andrew Dexter by the cashier of the bank, in favor of Smith, and indorsed by Smith, and also by the president of the bank in blank, one for \$3,063, and another for \$1,500. These drafts being dishonored, the plaintiff afterwards, on the 15th of March, 1809, brought two actions on the same drafts against Simon Smith in the state court of Rhode Island, and at the March term, 1810, of the supreme court of that state recovered judgment in the same actions to the amount of \$5,095.34 damages, and \$57.03 costs. Executions duly issued on these judgments, on which Simon Smith was committed to gaol in May, 1810, and afterwards, on the 10th of May, 1813, he was discharged from gaol on taking the poor prisoner's oath according to the laws of Rhode Island. That oath, as has been already stated, supposes the party to be utterly without property sufficient to support himself in prison, or to pay prison charges; and he is expressly required to swear that he has not, directly or indirectly, sold, conveyed, or disposed of, or intrusted any person with any of his estate, real or personal, to defraud his creditors or to receive any profit for himself.

During the pendency of the plaintiff's suits, and before judgment, Simon Smith being then in possession of a very valuable real estate, by his own confession worth \$12,000 or \$14,000, conveyed the whole of his real and personal estate, including his household furniture, to his children, thus stripping himself at once of all his property and means of support. The material facts are as follows: On the 15th of September, 1809, Simon Smith, for the asserted consideration of \$1,000, leased to his two sons-in-law, William Foster (one of the respondents) and William Stone (a respondent by the bill, but who died pending the suit, and it has not been revived against his representatives), for five years from the 1st day of April, 1810, two farms, one called the Wells farm of about two hundred and eighteen acres, and another called the Rounds farm of about one hundred and twenty acres. On the same day he conveyed the reversion of the same farms in fee to his daughters, Esther, the wife of the said William Stone, and Elizabeth, the wife of the said William Foster, for the asserted consideration of love, good will, and parental affection. The deeds are admitted to have been executed at the same time; and the respondents allege that the consideration money of \$1,000 was first secured and afterwards actually paid by them to one Zephaniah Andrews, to whom Simon Smith was indebted, and credited to his account. The testimony of the plaintiff's witnesses establishes that these farms were at the time worth from \$6,000 to \$7,000.

On the same 15th day of September, 1809, Simon Smith executed a lease for ten years, of a lot of land called the Waterman lot, containing about fifty-four acres, to his son Ziba Smith (one of the respondents), for the asserted consideration of \$738, and on the same day conveyed the reversion of the same lot in fee simple to his said son for the asserted consideration of love, good will, and affection. Three days afterwards Simon Smith conveyed to the same son a lot of woodland, containing about twenty-six acres, for the like consideration of love, good will, and parental affection. The respondent Ziba Smith alleges that upon these conveyances he paid about \$1,800, and as part of this sum he gave his note, which he afterwards paid, to Zephaniah Andrews, for \$1,500, on account of his father's debt. The plaintiff's witnesses establish the value of the Waterman lot to be about \$1,350. The value of the wood lot does not appear; but it was probably worth quite \$800 or \$1,000.

On the same 15th of September, 1809, Simon Smith executed a lease to his son Darius, for five years from the ensuing April, of a farm called the Daniel Eddy farm, containing about one hundred and thirty acres, for the asserted consideration of \$500. Three days afterwards Simon Smith conveyed the reversion of the same farm, for the asserted consideration of \$500, to his sons Darius Smith and Ahab Smith, and "to the eldest male heir of each of them, and their eldest male heirs, and so to descend in that line in equal moieties."

Darius died in March, 1816, insolvent, and on the 7th of February of the same year, Ahab and Darius (Thomas, the oldest son of Darius, joining in the deed) conveyed the same property to their nephews Amasa Stone and William Stone, Jrs. (the sons of William Stone the respondent), for the asserted consideration of \$2,000, and a lease was granted by them back to Ahab, of the premises, for and during his, Ahab's, life. The lease was executed on the same day, and purports to have been given in consideration of their uncle Ahab's having the same day executed *a deed of gift to them* of his estate in the same land, and for the further consideration of one dollar. It may not be unimportant to observe that the execution of these deeds is witnessed by Simon Smith and William Stone, and that there is an express reference in the first deed to the title of the grantors, as derived under Simon Smith's deed of the 15th of September, 1809. The respondent Ahab alleges that his father was indebted to him in the sum of \$3,040.99 (a specific return of the items of which, under date of 1815 and 1816, is annexed to the answer), of which about one-half is for services, and the other half is made up of items of a miscellaneous character, of which one item of \$875 is sufficiently remarkable, it being the estimated rent of the Daniel Eddy farm from the time of the original purchase by the father to the time of the conveyance. This is claimed on the ground that the father bought the farm originally for his sons in payment of their services; and the amount constitutes the payment made by Ahab to his father for his moiety. The Messrs. Stone in their answer allege that the \$2,000 mentioned in the deed to them was paid to Darius partly by the payment, with the assistance of their father, of debts due by Darius to his creditors, to the amount of \$1,060, and partly by payment of a mortgage of Darius to a Mr. Barton, in January, 1816, for \$300, and for the residue of \$640, they gave their note to Darius, which since his death has been paid to his creditors. As the plaintiff seeks only to subject to his claim the moiety of Ahab, so far as his life estate extends, it is not necessary to consider how that of Darius is sustained. It is clear that as the young Messrs. Stone claim through a voluntary gift of Ahab, by the very terms of their deed they cannot be permitted to set up, as they now pretend, a different pecuniary consideration (*Bridgman v. Green*, 2 Ves., 627; *Clarkson v. Hanway*, 2 P. Will., 203; *Watt v. Grove*, 2 Sch. & Lefr., 492, 501; *Hildreth v. Sands*, 2 John. Ch., 35, 42), and they must be deemed as mere volunteers standing in the same predicament as if the estate were now in Ahab. But as they are not parties to this bill, and that of *Dexter v. Smith* and others applies to them, I shall reserve all further remarks for that case.

It is deserving of observation, too, in this connection, that Simon Smith, by a deed purporting to be dated on the 7th of March, 1807, but not acknowledged until 7th of March, 1808, in consideration of love, good will, and parental affection, conveyed to the same Darius Smith, "and to his eldest male heir born unto him, and to his eldest male heir, and so to descend down to the eldest male heir," etc., a farm called the Lewis and Finkham farm, con-

taining about ninety-three acres. And yet the consideration set up to support the other deed in favor of Darius is founded in a great measure upon services which were unrequited by his father.

On the 22d of November, 1809, Simon Smith, for the asserted consideration of \$8,000, conveyed to his sons Ziba Smith and Simon Smith, Jr. (the respondent), in fee, his homestead farm, containing about three hundred acres. Afterwards on the 30th of May, 1812, Ziba Smith conveyed his moiety of the farm, excepting thirty-one acres, to Simon Smith, Jr., for the asserted consideration of \$4,000, and thus Simon became possessed of the whole farm with the above exception; and Simon Smith, Jr., on the same day conveyed his moiety of the thirty-one acres to Ziba Smith, for the asserted consideration of \$784. Simon Smith, Jr., further admits that he received at the same time all the personal estate that there was of his father's, consisting principally of household furniture worth about \$200, and paid for the same. He does not, however, upon his original answer state the manner in which he paid either for the personal or real estate so conveyed to him, and exceptions having been taken to it on this account, by his supplemental answer he asserts that on the 1st of October, 1809, he paid Zephaniah Andrews, on his father's account, \$1,250; that on the 1st of August, 1809, he became bound to one Seth Hunt, for his father (as it should seem), for the sum of \$2,273.80, which he afterwards in July, 1810, paid. He paid to other creditors about \$909.33, and he held notes against his father amounting to \$595.72. Some of these notes were given to him in 1805, some in 1806, one in 1808 and one in 1809. He further states that in 1805 or 1806 he assisted his father in building a vessel called the *Perseverance*, and for this and other previous services his father agreed to allow him one moiety of the price for which she should be sold; and that she was sold, as he believes, for about \$6,000. That he took one moiety of the farm above mentioned in payment of the debts due to him; and that he and his brother Ziba gave their father their several notes for \$4,000 each, for the purchase money, and that what was due him beyond the price of his moiety of the purchase money was to be paid by Ziba's note. That Ziba afterwards being embarrassed and unable to pay the note, he took the conveyance of the moiety of Ziba in 1812, in payment of the debt due to himself from his father; *and about this time* (1812) he took up his own note given to his father, and made a settlement with him, and in that settlement \$3,000 was allowed him on account of the sale of the *Perseverance*. He adds that he has paid other sums for his father, but cannot recollect particulars, and is positive in this manner that he paid \$8,000 for the homestead farm; and that in 1810 and 1811 he was obliged to sell some of his own lands to the amount of \$2,000 or \$2,100 to pay debts contracted on his father's account. The answer of Ziba only states the purchase of his father and his conveyance to his brother for the reasons stated by him, and that thus his note given to his father was discharged. He says nothing as to the thirty-one acres retained by him, not even mentioning the fact of the retainer.

It is material to state that previous to this fraud, on the 15th day of May, 1807, Simon Smith for the asserted consideration of \$1,000 "and other good considerations him thereunto moving," executed a lease to his son Simon Smith, Jr., and "to his eldest male heir, and to the eldest male heir of him, and so to descend," etc., for the term of one thousand years, a farm called the Absalona Hill farm, containing about three hundred and thirty-five acres. On the same day he conveyed to his said son, in fee, another tract of land contain-

ing about forty acres, for the asserted consideration of \$2,000; and also by a third deed on the same day he conveyed to him another tract of land, in fee, of twenty-five acres, for the asserted consideration of \$1,000. These three deeds, being all executed at the same time between the same parties, must be considered as one transaction; and they convey about four hundred acres of land for \$4,000, worth, as one of the witnesses declares, from \$12,000 to \$15,000. It is apparent, therefore, that paternal love and affection must have constituted a material inducement to the conveyance.

In respect to his son Ziba, too, there is no reason to suspect the father's want of liberality, for on the 12th of April, 1800, in consideration of \$1,500, and "more especially for the good settlement, well being, and advancement of Ziba in this world," the father executed to him and his heirs male, a lease of three farms, containing about three hundred and eighty acres, for the term of one thousand years. It may deserve a passing observation, that if, as the respondents now contend, the father was a man who had long been heavily oppressed with debts, and reputed much richer than he really was, and in truth having but little property beyond his debts, it seems somewhat extraordinary that he should have been so very liberal to his children; and it would require more faith than I profess to have, to believe that these prior conveyances did not meditate an evasion of the rights of creditors. No man has a right to be generous at the expense of his honest creditors.

We have now passed in review all the conveyances which were made during the pendency of the plaintiff's suit, with a few explanations of the character which is attempted by the respondents to be impressed on them. To these deeds, with a single exception, some one of his children were witnesses, and among these witnesses were Darius Smith, Simon Smith, Jr., William Foster, William Stone, and Elizabeth Foster. The money considerations apparent on the face of these deeds exceed \$15,000, and if the testimony of witnesses is to be believed, the property was at least worth \$22,000. Connecting this with the conveyances previously made, the children were possessed of property derived from their father, worth at least \$35,000.

Some additional facts ought not to be omitted. Notwithstanding the great diligence exercised in this case to obtain testimony in support of these conveyances, it does not appear that Simon Smith at the time was indebted in any considerable amount, excluding the debt set up by his children, but to Zephaniah Andrews, to whom he was indebted not exceeding \$4,500, and a debt due to the Farmers' Exchange Bank, of \$15,284. The debt due to Andrews appears to have been discharged ultimately by the children of Simon Smith at various times between December, 1810, and May, 1813. Notes were given in small sums, payable in one, two, three, and four years, some of which were signed by the children only; and some were indorsed or signed by the father; and on all, excepting two or three notes of about \$1,000, no payments were ever made except after suit and judgment at law against the parties. The debt due to the Farmers' Exchange Bank was paid between May and August, 1809, by bills of that bank (which had failed in the preceding February), bought at a very great discount, and, as seems admitted by the respondents' counsel, for a sum not exceeding \$3,000; and from the other evidence in the case, probably for a sum considerably less. The greater part, if not the whole, was purchased for Simon Smith by a Mr. Hunt, who received for the bills two notes, one for \$1,500, and one for \$773.80, signed by Smith, and indorsed by his sons William Foster and Simon Smith, Jr. These notes were afterwards sued by

the holders, and judgment recovered against the indorsers in the summer of 1810. So that it is apparent that neither of these debts were in fact discharged by the children at the time of the conveyances above stated, and that the father was not entirely exonerated from them, but as to a considerable part still remained liable as a party to the notes.

Upon the first blush of these transactions, it seems almost impossible not to pronounce the conveyances executed in September and November, 1809, as fraudulent, and made with the meditated design to injure and defeat creditors. The badges of fraud cluster about them in every direction. They were made pending suits brought for large sums of money due to creditors, after the failure of the bank whose credit Simon Smith had lent his own personal security to support. They were all made to the children of Simon Smith, who appear to have been privies to all the conveyances. The consideration of several of the deeds is avowedly an inadequate consideration as against creditors, founded on mere love and affection; and the property disposed of in this manner is of great value. The conveyances embrace the whole property, personal and real, of the father; thus reducing him to absolute beggary, and including even his household furniture. No money was paid at the time; all rested in confidence, and the utmost that the children ever became bound to pay to creditors, or ever did pay, was short of \$7,000, though the property then conveyed to them was in their own view worth more than double that amount; and beyond all question, upon the evidence, more than three times that amount. The remaining consideration for this property was either love, or affection or debts due, unliquidated debts due for services, from a father who had previously conveyed to the parties large and valuable farms, either confessedly or implicitly from parental affection, or for a very inadequate consideration. It is utterly impossible for a court of justice to sustain such conveyances as *bona fide*, unless it surrenders all judgment and discretion. The transactions can be viewed in no other light than that which the father avowed to one of the witnesses who wrote several of the conveyances, as having no other objects but to give his estate to his children. The inference deducible from the facts that this was the father's whole property, that the conveyances are professedly in part voluntary, and that he was then indebted beyond the amount of his whole estate, would alone be conclusive of the fraud. And if fraud applied to any of these transactions, it infected the whole. In a legal point of view, the *mala fide* which justly applies to one infects by its contamination the whole. I have no doubt that they must be declared fraudulent upon this broad and general examination of the case; and if there were any doubt here, a more thorough and minute sifting of the facts accompanying each conveyance, and the answers made in their support, would irresistibly lead to the same conclusion. I forbear, however, to dwell on these facts, as I cannot escape from that which stands so prominent on the face of the transactions. I have omitted to take any notice of the exception to the competency of Thomas Smith and Amasa Stone as witnesses, not because I am against that exception, but because it is not necessary to decide it. See *Roberts v. Anderson*, 3 John. Ch., 371, 375.

§ 531. *A deed fraudulent in fact is absolutely void and cannot be allowed to stand as a security for any purpose of reimbursement or indemnity.*

Taking this, then, to be the state of the case, for the reasons that have been already suggested, there do not appear to me to be any persons standing before the court as *bona fide* purchasers for a valuable consideration without

notice, and consequently none entitled to protection as such. The next question that arises is, whether the conveyances are to stand as securities for the sums which have been really advanced or paid by them for their father since the execution of these instruments. I agree to the doctrine laid down by Mr. Chancellor Kent, in *Boyd v. Dunlap*, 1 John. Ch., 478, and *Sands v. Codwise*, 4 John., 536, 549, that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent. At law, where a conveyance is found to be fraudulent against a creditor, he comes in and avoids all without repayment of any consideration. But it is said equity can deal differently with it, and decree *back* principal and interest; and, therefore, in equity, a lesser matter will in such a case set a conveyance aside. *Herne v. Meeres*, 1 Vern., 465; S. C. fully, 2 Bro. Ch., note to *Heathcote v. Paignon*, p. 177; *Att'y Gen'l v. Vigor*, 8 Ves. Jr., 256, 283. Cases are not unfrequent in equity, where the court upon setting aside a conveyance, has left some benefit to the grantee. But that is done only where there are circumstances which do not immediately affect the party against whom the decree is sought, with an original and meditated fraud; or if he holds a derivative title, where that title was attained without knowledge of the fraud. Such was the case of *How v. Weldon*, 2 Ves., 517 (see, also, *Proof v. Hines*, Cas. Temp. Talb., 111; *Grove v. Watt*, 2 Sch. & Lef., 492), etc., where an assignment of prize money having been obtained for an inadequate consideration, it was set aside even in the hands of a second assignee, but admitted, however, to stand security for the original purchase money.

In *Bennett v. Musgrave*, 2 Ves., 51, Lord Hardwicke decreed a conveyance of land, which was made in fraud of creditors, void *so far* as respected a creditor who had taken the same in execution on an *elegit*. And he is reported to have said, that "whether the party could recover [at law] or not, he is entitled to come into this court; the distinction in this court being, where a subsequent purchaser for valuable consideration would recover the estate and set aside, or get the better, of a precedent voluntary conveyance, if that conveyance was fairly made without actual fraud, the court will say, take your remedy at law; but wherever the conveyance is attended with actual fraud, though they might go to law by ejectment and recover the possession, they may come into this court to set aside that conveyance; which is a distinction between actual and presumed fraud, from its being merely a conveyance." I do not cite this case to show that the grantee was permitted here to retain a benefit; for Lord Hardwicke (whose decision seems very imperfectly reported) did not intend such benefit, but he considered the conveyance void for meditated fraud, though he seems to have thought there might be some difficulty in establishing that at law. He set aside the conveyance, so far as respected the creditor, as *void* against him; and he having an *elegit* executed on the land, this was all that the case required; for it will not be pretended that the conveyance was void as to third persons. What I cite it for is to show the distinction between actual and constructive fraud. The former makes the conveyance "utterly void" as to creditors and others whom it intends to injure, and therefore it cannot be permitted to stand as to them as a security for advances. But if no such actual fraud was originally in contemplation, but the law adjudges the conveyance fraudulent on motives of public policy, as in cases of voluntary or other conveyances, which are void against

creditors and purchasers, there, if any advances have been made, or any other equities arise, they may be enforced by the court in favor of the grantee.

In the present case it appears to me that the court is bound by the strict rule. The conveyances were in their very concoction fraudulent. They were, therefore, in the language of the statute, "utterly void" as against creditors, and cannot be permitted to stand as a security for any advances subsequently made, or any pretended debts then due. All the reasons of public policy, so forcibly urged in *Sands v. Codwise*, 4 Johns., 598, against such an allowance, command the court to be rigid in denying to those who are guilty of bad faith, any such indulgence. Let them reap the due reward of their own misconduct.

I have hesitated as to the nature of the decree which ought to be made in this case, whether under all the circumstances to hold the respondents according to their respective interests liable to account to the plaintiff for the full value of the estates conveyed, with interest, as a fund for the payment of his debt, leaving them in possession of their estates; or to decree the conveyances void, and, the plaintiff's debt a charge upon the land, and the rents and profits which have accrued since the conveyances, giving them an election to pay the debt really due him, and in default, to order the land to be sold, and, an account to be taken of the rents and profits, and out of these funds to give the plaintiff a priority of payment. I have concluded to adopt the latter course, not meaning to imply any doubt of the propriety of the former.

§ 532. *Though the complainant be a judgment creditor, a court of equity will look into the consideration upon which his claim is founded, provided the relief he seeks is to set aside a fraudulent conveyance.*

The only further point on which I have paused has been as to the extent of the plaintiff's demand. It originated in Farmers' Exchange bills, which at the time of the giving the drafts on which the plaintiff's judgment is founded were at a great discount. At law I am aware that the plaintiff might be entitled to the full amount of his judgment, notwithstanding any purchase of this sort. But I think a court of equity has a right to moderate his claim; and if he asks equity, to compel him to do equity. All that in conscience he ought to claim, under all the circumstances, against Simon Smith, is the value of the bills of the bank at the time he received them or bought them, with interest from that time to the present. I shall therefore direct an inquiry to be had before a master for this purpose, on which examination the plaintiff is to be examined in respect to this point on oath. A reference also must be made to the master to ascertain the rents and profits, making all proper deductions; and all further orders are reserved until the report is made.

GRAHAM v. RAILROAD COMPANY.

(12 Otto, 148-161. 1880.)

APPEAL from U. S. Circuit Court, Eastern District of Wisconsin.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—In September, 1855, the La Crosse & Milwaukee Railroad Company, not being at that time, so far as appears, indebted in any considerable amount, sold certain lands in the city of Milwaukee not then wanted for railroad purposes to Charles D. Nash for the sum of \$25,000. The officers of the company who took a leading part in negotiating the sale are charged to have been interested in the purchase, and to have furnished Nash

the means for effecting it. At all events, shortly after it was made, Nash conveyed the property for the original consideration to Moses Kneeland, one of the officers referred to, and Kneeland, retaining one-third part, subsequently conveyed the other two third parts to Ludington and Kilbourn, they all being directors of the company, and members of the executive committee. The company itself never questioned the fairness of this transaction; on the contrary the sale was subsequently (in March, 1858) expressly confirmed by the board of directors, and a further quitclaim deed executed by the company in confirmation thereof. In September and November, 1858, the appellants recovered two judgments against the company for indebtedness on contract, arising after the sale of the lands, and issued executions thereon under which levies were made on said lands as lands of the company. In January, 1860, the appellants having sued on these judgments in the United States court, recovered a second judgment for upwards of \$40,000, issued execution thereon, and made another levy on the lands. Being unwilling to attempt a sale under their said execution in consequence of the deeds for the lands being recorded, the appellants, in June, 1860, filed the bill in this case against Kneeland, Kilbourn, Ludington, and the railroad company, setting forth their said judgments, executions, and levies, stating the fact of the said sale to Nash and his conveyance to Kneeland, and the latter's conveyance to the other parties; alleging that the transaction was a fraud against the corporation and its creditors, and complaining that the said conveyances of the lands were a cloud upon their right to sell the lands under execution, and an impediment in the way of the execution of their writ of *fiery facias*; and prayed that the lands might be decreed subject to the lien of their judgment; that they might be decreed to be authorized to sell the same, or so much as might be necessary for the purpose of satisfying their judgment; and that Kneeland, Kilbourn and Ludington might join in the conveyance, and might be restrained from claiming the land; and that the conveyances to them might be declared null and void. The bill, amongst other things, averred that the lands were sold to Nash for much less than their real value; but it contained no allegation that the company was insolvent, or that it had not other assets available under an execution; nor was any offer made to repay the consideration which the purchaser had given for the lands.

To this bill the defendants severally filed answers, denying that the lands were worth more than \$25,000 at the time of sale; averring that the sale was made in good faith, and with the company's concurrence, and setting forth in detail many circumstances tending to show that the title was involved and embarrassed; that they required large outlays of money to render them available; that the company had offered them for sale in the market, and was unable to get from any other person the price paid for them by Nash; that although Nash was requested to purchase the lands by Kneeland, and was aided by him in paying therefor, yet Nash had the option to keep them; but after making the purchase and inquiring into the title and situation of the lands, he asked to be relieved from the purchase, and that thereupon Kneeland, Kilbourn and Ludington took them off of his hands.

The parties went into proofs, and it appears that the company had, for months prior to the sale, been endeavoring to dispose of the lands, and could get no purchaser at the price offered by Nash; and the leading statements of the answer, as to the title and situation of the lands, were verified. It also appeared that the railroad company never objected to the sale, but that it was

expressly confirmed in March, 1858, by a resolution of the board of directors, as before noticed. Various transactions subsequently took place, by which other parties became interested in the lands, and in the affairs and property of the railroad company, which are fully developed in the supplemental proceedings and proofs; but it is unnecessary to notice them further. The foregoing statement exhibits the leading features of the case as presented for our consideration.

The main question is, whether the sale to Nash, made before the railroad company became indebted to the appellants, and when for all that appears it was perfectly solvent, even though made for the use and benefit of the officers referred to, can be set aside at the instance of the complainants, for the purpose of subjecting the lands to sale under their execution. And this question, we think, must be answered in the negative.

§ 533. *The rights of subsequent creditors in cases of voluntary conveyances by the debtor.*

It is a well settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, disposes of property for an inadequate consideration, or even makes a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the *status* which he had after the voluntary conveyance was made. The authorities on this subject are fully collected in the notes to *Sexton v. Wheaton*, 1 Am. L. Cas., 1 (see §§ 865-71, *infra*), and in the opinion of Mr. Chief Justice Marshall in that case; and the general doctrine is affirmed in *Mattingly v. Nye*, 8 Wall., 370 (§§ 862-63, *infra*).

It is true that if a debtor dispose of his property with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them which they may have a right to unravel. But that is a special case, to which the present bears no resemblance. It is not pretended that the railroad company disposed of the property in question for the purpose of defrauding creditors, much less for the purpose of defrauding those who afterwards in due course of business might become its creditors. But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors.

Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred,—and cases to that effect have been cited,—the question still remains, whether the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case, going as far as this, can be found. No such case has been cited in the argument. *Dicta* of judges to that effect may undoubtedly be produced, but they are not supported by the facts of the cases under consideration.

§ 534. *Relative rights of subsequent creditors and subsequent purchasers.*

It seems clear that subsequent creditors have no better right than subsequent purchasers to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet, in such a case, subsequent purchasers have no such right. In *French v. Shotwell*, 5 Johns. Ch., 555, Chancellor Kent decided, upon full consideration, that when a party to a judgment entered upon a warrant of attorney voluntarily waives his defense or

remedy on the ground of fraud or usury, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it, or to investigate the merits of the original transaction between the original parties; and he dismissed a bill filed by the subsequent purchaser for relief in such a case. The chancellor said: "If the party himself who is the victim of fraud or usury chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it cannot consist in justice or sound policy that a subsequent voluntary purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. *Quisque potest renunciare jure pro se introducto*. . . . It is stated to have been a principle of the common law that a fraud could only be avoided by him who had a prior interest in the estate affected by the fraud, and not by him who subsequently to the fraud acquired an interest in the estate. *Upton v. Basset*, Cro. Eliz., 445, and recognized in 3 Co., 83a." This decision of Chancellor Kent was afterwards nearly unanimously affirmed by the court of errors. 20 Johns. (N. Y.), 668.

§ 535. *Rights of creditors when a conveyance is procured from the debtor by fraud.*

When the question of the right of a creditor to set aside a conveyance procured from the debtor by fraud first came before the courts in England, it was held that the debtor's own right was merely the right to file a bill in equity against the fraudulent grantee adversely; and, if he did not see fit to take such a proceeding, his creditor had no such privity with the transaction as to enable him to obtain relief, even though the debtor should assign his supposed right to the creditor; that the transaction savored of champerty, and was opposed, at least, to the spirit of the law against champerty and maintenance. This was the substance of the decision by the court of exchequer in 1835, in *Prosser v. Edmonds*, 1 Y. & C., 481. Lord Abinger treated the case as a new one, and at the close of the argument remarked that his impression was that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. He afterwards gave a deliberate opinion upon the point. In that case an executor and trustee had fraudulently procured an assignment of his brother-in-law's interest in the estate, knowing its value, which was unknown to the assignor. A subsequent creditor of the assignor, to whom he assigned his whole interest in the estate, filed a bill to set aside the assignment to the trustee. Lord Abinger distinguished the case from that of an assignment of a chose in action, as a note not negotiable, or a bond, or a mortgage, or an equity of redemption, where possession of the thing assigned is delivered to the assignee; and treated it as an assignment of a mere naked right to file a bill in equity, in which the last assignee purchased nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. "What is this," says the lord chief baron, "but the purchase of a mere right to recover? It is a rule, not of our law alone, but of that of all countries (*Voet ad Pandect*, lib. 41, tit. 1, sec. 38), that the mere right of purchase shall not give a man a right to legal remedies. The contrary doc-

trine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice." "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity." These remarks are very broad, and would apply to the case of existing as well as subsequent creditors, though the case itself was that of a subsequent creditor. It forms the subject of a section in Story's Commentaries on Equity, sec. 1040*h*, where, in a note, Lord Abinger's opinion is extensively quoted, and it has been followed by other very respectable authorities, and, as applied to subsequent creditors, at least, we think that the reasoning is sound.

§ 536. *A deed procured by fraud is (in Wisconsin) voidable at the election of the grantor, but not by a subsequent purchaser from him.*

The principle established in *Prosser v. Edmonds* has been adopted by the supreme court of Wisconsin, in which state the lands in question are situated. In *Crocker v. Belangee*, 6 Wis., 645, decided in 1858, it was held that a deed obtained from the grantor, through fraudulent representations made by the grantee, is not void, but voidable only, at the election of the grantor; and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that, in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title,—the court holding that the right of the vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or interest capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right, incapable of sale or transfer.

In *Milwaukee & Minnesota Railroad Co. v. Milwaukee & Western Railroad Co.*, 20 id., 174, the latter company had covenanted to pay a certain portion of an incumbrance on railroad property, afterwards purchased by the complainant company under a subsequent mortgage. A release of the obligation had been fraudulently, as alleged, procured from the original mortgagor company owning the road. The complainant purchased under a mortgage which conveyed "all causes of action, demands, and choses in action, of whatever nature," of the mortgagors; and claimed to have purchased the right to set aside the alleged fraudulent release, and filed a bill for that purpose; but the bill was dismissed on the ground that such a right of action could not be thus assigned. The court say: "Admitting that the facts alleged present a case which would entitle the La Crosse & Milwaukee Company [the mortgagor] to have the release set aside on account of these acts of fraudulent concealment by one of its directors of his interest in the defendant company, and assuming that the further fact appears that this right of action has been assigned by the La Crosse & Milwaukee Company to the plaintiff, the question would then arise whether the release could be avoided on the application of such plaintiff, the La Crosse & Milwaukee Company making no complaint of the

fraud whatever. In other words, is this mere right to litigate the question, and to set aside the deed of release on account of fraud practiced upon the assignor, a subject of assignment and transfer, and will a court of equity allow the assignee to stand in the shoes of the assignor in respect to the remedies?" And then referring to the previous case of *Crocker v. Bellangee et al.*, and to *Prosser v. Edmonds*, the court expresses its approbation of those decisions, and adds: "A reference to these authorities is all which probably need be said at this time in regard to the allegations above cited [referring to the contention of counsel], and upon the point whether the plaintiff company could avoid the release for the alleged fraudulent act of concealment, even if this right of action had been assigned to it by the La Crosse & Milwaukee Company."

It seems to us that those cases, which, so far as it appears, declare the settled law of Wisconsin, are conclusive of the present case.

§ 537. *Prosser v. Edmonds*, 1 Y. & C., not overruled.

It is contended on the parts of the appellants that *Prosser v. Edmonds* has been overruled by the subsequent cases of *Dickinson v. Burrell*, Law Rep., 1 Eq., 337, and *McMahon v. Allen*, 35 N. Y., 403. We have examined these cases, and others which are supposed to be in conflict with *Prosser v. Edmonds*. In *Dickinson v. Burrell*, the master of the rolls, Lord Romilly, expressly disavows any intention to overrule the former case. He says: "The demurrer is mainly supported on the case of *Prosser v. Edmonds*, which was decided, after long deliberation, by Lord Abinger; but I am of opinion that the case before me does not fall within the rule established by that decision." The case then before the court was that a conveyance of an interest in an estate had been fraudulently procured from Dickinson by his own solicitor to a third party, for the solicitor's benefit, and for a very inadequate consideration. Dickinson, ascertaining the fraud by a conveyance which recited the facts, and that he disputed the validity of the first conveyance, transferred all his share in the estate to trustees for the benefit of himself and his children. The trustees filed a bill to set aside the fraudulent conveyance upon repayment of the consideration money and interest, and to establish the trust. The master of the rolls sustained the bill, observing: "The distinction is this: if James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill; but if A. B. had bought the whole interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." "I think that the distinction between the conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, is taken by Lord Abinger in the case of *Prosser v. Edmonds*. The distinction is also taken in *Cockell v. Taylor*, 15 Beav., 103, and in *Anderson v. Radcliffe*, Ell., B. & E., 806, and has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense."

Surely there is here no overruling of *Prosser v. Edmonds*, even if such overruling could avail against the Wisconsin decisions. It leaves that case in full force as to assignments of the mere right to sue. In the case before us there is not even that. The railroad corporation acquiesced in the sale and confirmed it. The conveyance, which, perhaps, might have been set aside had the company seen fit, became absolute as between the parties, and carried the title. It is as valid between the parties as if the corporation had conveyed to

a stranger. The appellant then becomes a creditor, and afterwards obtains judgment, and simply makes a levy; and then comes into court and asks its aid to remove a cloud from its title. What title? Has he acquired any title? Was there any title for him to acquire? There had been a right to file a bill in equity, and that right had been remitted by the company's acquiescence in the sale,—probably for the reason that it obtained all that the property was worth at the time. The contrary, at least, is not established. And if it were established, it would only make out a case of voluntary conveyance as against a subsequent creditor, which has already been considered. We think that there is nothing in the case of *Dickinson v. Burrell* to overrule the effect of *Prosser v. Edmonds*, so far as the present case is concerned.

Then, as to *McMahon v. Allen*, 35 N. Y., 403, decided in 1866. One Harrison, in March, 1852, being in debt, was induced by the fraudulent contrivance of his agent and attorney, and to the prejudice of his creditors, to convey to said agent, for a very inadequate consideration, his interest in his mother's estate and in certain other property, he being ignorant of the fraud practiced upon him. In August, 1852, Harrison made a general assignment for the benefit of his creditors, of all his property and rights of action, with full power to sue for and collect the same. The assignee filed a bill to set aside the conveyance to the agent. The bill was sustained. The court, Mr. Justice Hunt delivering the opinion, relied on *Dickinson v. Burrell*, saying: "In the recent case of *Dickinson v. Burrell*, this precise question was presented;" and, after quoting largely from the opinion in that case, added: "This was a well-considered case, is of high authority, and, in my opinion, is an accurate exposition of the law. I think it should control the present case." In the New York case, it is true, there was no express repudiation of the fraudulent conveyance, as in *Dickinson v. Burrell*, but there was a conveyance of the estate to the assignee, with a power to sue for the benefit of creditors; and those creditors had been directly defrauded. Without further comment it seems to us clear that *McMahon v. Allen* cannot control the present case.

§ 538. *Subsequent creditors cannot take advantage of constructive fraud.*

The principle that subsequent creditors cannot question a voluntary or fraudulent disposition of property by their debtor, not intended as a fraud against them, is especially applicable in cases of constructive fraud, like that charged in the present bill. Suppose it be true that the purchase of the lands in question by or for the benefit of officers of the company actively concerned in the transaction could be set aside at the instance of the company as a constructive fraud, yet if there was no actual fraud, if the company received full consideration for the property sold, how can it be said that subsequent creditors of the company are injured? In the present case we are satisfied from the evidence that the property was sold for its fair value at the time, and that no actual loss accrued to the railroad company's estate. It would be unjust and a great hardship, therefore, on the mere ground of the constructive fraud, to allow creditors who had no interest at the time to seize and dispose of the property sold.

§ 539. — *a corporation in the matter of constructive fraud and with reference to subsequent creditors does not differ from a natural person.*

It is contended, however, by the appellant, that a corporation debtor does not stand on the same footing as an individual debtor; that whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that

if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken. We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each. We think that the present bill cannot be maintained.

Decree affirmed.

SOUSTEBY v. KEELEY.

(Circuit Court for Minnesota: 2 McCrary, 103-107; 11 Federal Reporter, 578. 1880.)

STATEMENT OF FACTS.—In September, 1878, Forbes sold to plaintiff his stock of goods in Waseca, Minnesota. Attachments against Forbes were afterwards levied on the goods while in plaintiff's possession, based upon the charge that the sale was fraudulent. Plaintiff had paid Forbes in cash \$3,000 and assumed the payment of debts to the amount of \$3,800 held by a bank in Waseca against Forbes. There was a verdict for the plaintiff and a motion for a new trial.

§ 540. *The rule in equity that a vendee, after notice of vendor's fraud, is only protected as to payment made before such notice, cannot be applied in a case at law.*

Opinion by McCRARY, J.

1. I have grave doubts as to the propriety of attempting to apply to a case at law the principle invoked by counsel for defendant in this case. That principle is, that where the vendee buys in good faith and without notice of fraud on the part of the vendor, and pays a part only of the consideration, agreeing to pay the remainder at a future day, if, before such remainder is paid, he receives notice of the vendor's fraud, he will be protected only to the amount actually paid before notice. No doubt this is a sound principle of equity; but can it be applied by a court of law? Can such a court rescind the contract *pro tanto*, and place the parties *in statu quo*? If so, can it be done in a case like the present, in which no issue is made except upon the validity of the sale? If the sale was held void so as to leave the title in Forbes, against whom the attachments were issued, judgment at law could be rendered for defend-

ant; but where the sale is found to be valid and *bona fide* in so far as the vendee is concerned and the title is vested in him, and where he has sold or disposed of a portion of the stock and probably expended money and given time and labor in its care and preservation, it seems probable that only a court of equity would be competent to grant any relief to the creditors of the vendor.

§ 541. *Under the decisions of Minnesota the assumption by the vendee of the vendor's debt as part of the purchase money is a payment of the amount so assumed.*

2. But it is not necessary to pass finally upon this question, as I am clearly of the opinion that the proof shows a payment by plaintiff of the whole of the purchase price. It is contended that the promise by plaintiff to assume and pay the indebtedness of Forbes at the bank, though made as a part of the consideration for the purchase, was not payment, and this for the reason that plaintiff is not legally bound to pay those debts. It is said that the holders of those claims cannot sue plaintiff and recover upon them. Upon this question there is a conflict of authority in this country. In many of the states the right of action by the payee of such debts, against the party assuming to pay them, is maintained even where such payee is not a party to the contract.

This upon the ground that such a promise is an original promise, based upon a valuable consideration, namely, the sale and delivery of the goods. 1 Pars. Con. (5th ed.), 466-8; *Fanly v. Cleveland*, 4 Cow., 432; *id.*, 639; *Canal Co. v. Bank*, 4 Duer, 97; *Lawrence v. Fox*, 20 N. Y., 268; *Arnold v. Lyman*, 17 Mass., 400; *Carnegie v. Morrison*, 2 Met., 404; *Crocker v. Stone*, 7 Cush., 338; *Hynd v. Holdship*, 2 Watts, 104; *Burs v. Robinson*, 9 Barr, 229; *Eddy v. Roberts*, 17 Ill., 508; *Todd v. Tobey*, 29 Me., 219; *Motley v. Manufacturing Ins. Co.*, *id.*, 337; *Metcalf on Contracts*, 205-11, and cases cited in notes. And such is the law in Minnesota, as repeatedly decided by the supreme court of that state. *Sanders v. Clason*, 13 Minn., 379; *Goetz v. Foos*, 14 Minn., 265; *Merriam v. Lumber Co.*, 23 Minn., 314. But the opposite doctrine is maintained by numerous cases, and among them by the supreme court of the United States, in *National Bank v. Grand Lodge*, 98 U. S., 128; 2 Chitty, Con. (11th ed.), 74, and cases cited in notes. *Mellon v. Whipple*, 1 Gray, 317.

§ 542. *Circumstances under which a circuit court of the United States will follow the decisions of a state court rather than those of the supreme court of the United States.*

Ordinarily, this court would feel bound to adopt and follow the rule laid down by the supreme court in *National Bank v. Grand Lodge*, *supra*, but under the peculiar circumstances of the present case, I am clearly of the opinion that I ought to apply the rule established by the supreme court of the state of Minnesota. It will be observed that the plaintiff assumed and agreed, in consideration of the sale to him of the stock of goods, etc., to pay certain debts held by the bank against Forbes. In so far as the debts are the property of the bank, it is certain that they can be sued upon only in the state courts; for it appears that the bank is a corporation of the state of Minnesota, and the plaintiff a citizen of that state. How many of these debts belong to the bank, and how many to other parties represented by the bank, and how many of such other parties are citizens of Minnesota, does not appear, nor is it material; it is enough to say that certainly a part and probably the whole of said debts could only be collected by suit in the state courts. It may be that some of the claims are for less than \$500, and for that reason not within the jurisdiction of this court. I must assume, therefore, that in case plaintiff refuses to pay said

claims, suits must be brought, certainly upon some of them and probably upon all of them, in the courts of Minnesota.

So far as those courts are concerned, as already seen, the law is settled by repeated decisions of the supreme court, and in accordance therewith the plaintiff would be held liable in a suit by the payee of any of said debts. The question therefore is, shall this court hold that the creditors of Forbes are entitled to recover from plaintiff the sum of those debts in this case, and thus subject him to a second payment of the same amount to the holders of the claims? A decision which would establish injustice such as this is not, I am sure, required at my hands. It is true that this case does not belong to the class in which, as a rule, the federal courts are required to follow the decisions of the highest judicial tribunal of the state. But, although the question is a new one, I am clearly of the opinion that, even on questions purely of commercial law, the federal courts should follow those decisions if it appears that, by reason of the situation of the parties and of the subject-matter, to hold otherwise would subject a party to double payment of the same debt, without the possibility of relief from the federal courts. Motion overruled.

BANK OF GEORGIA v. HIGGINBOTTOM.

(9 Peters, 48-61. 1835.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This is an appeal from the decree of the circuit court for the district of South Carolina. In their bill the complainants ask the court to set aside or postpone a judgment for \$30,000, confessed by Gillett in favor of Higginbottom and Provost, on the ground of fraud; and that certain moneys made by execution on a judgment subsequently obtained by the complainants, be directed to be paid over in satisfaction of such judgment. The judgment for \$30,000 was confessed in 1819, on which executions were regularly issued from time to time and entered in the clerk's office, so as, under the laws of South Carolina, to bind the property of the defendant. The appellant insists that this judgment, which was held to be valid by the circuit court, should be set aside, because the promissory note on which the judgment was confessed was given without consideration; and that the judgment must consequently be declared void, or postponed to the demands of *bona fide* creditors.

From the facts of the case it appears that William S. Gillett was the acting executor of the estate of his father, and that under the will he sold the property and became the purchaser of it, to a much larger amount than the sum for which judgment was confessed. He was then engaged in mercantile business, and had other property than that which he purchased at this sale; and the judgment was confessed to secure the payment of the purchase money to the brothers and sisters of the defendant, who were the devisees in the will. This sale having been made by a trustee to himself, must have been set aside and annulled on the application of the *cestui que trust*, but no such application being made, it cannot be treated as a nullity, as it regards strangers to the transaction.

§ 543. *Not necessary to the validity of a trust that the trustee know of his appointment when it is made, if he afterwards act under it.*

The appellants insist that the plaintiffs in the judgment had no knowledge of it at the time it was entered; that the amount to which the devisees were entitled had not been ascertained; that false representations were made by

Gillett, subsequent to this judgment, as to the extent of his property, through which the complainants were induced to give time on the judgment entered in their behalf; and that these facts are evidence of fraud. The evidence does not show that at the time the judgment was confessed, Higginbottom and Provost had any knowledge of it; but this is not deemed material, as they subsequently recognized the trust and acted under it. Nor is it essential to the validity of the judgment, that the distributive shares of the devisees should have been ascertained, provided they exceed in amount the sum for which judgment was entered. And this appears to be the fact, from a final adjustment of the executor's account.

§ 544. *False representations of the debtor could not affect the judgment confessed after its entry in good faith.*

The false representations by Gillett respecting the extent of his property, if true, as charged by the complainants, could not affect the previous judgment, if entered in good faith. But, connected with other facts, they may go to show in its true light the conduct of the defendant. If he represented his property as wholly unincumbered after the judgment for \$30,000 had been confessed, it would show a design on his part to practice a fraud on the complainants, and might cast a suspicion over the first judgment. But these representations are not proved, as alleged in the bill. They were not, as made by the defendant, so incompatible with the facts of the case as not to be accounted for by a somewhat partial estimate of the value of his property, free from motives of fraud. The defendant subsequently became a bankrupt, but this was produced by various occurrences stated in his answer, which were not and could not be foreseen.

Shortly after the purchase, it appears the defendant was solicitous to secure the devisees, and he consulted counsel as to the best mode of effectuating this object. A mortgage was at first suggested, but afterwards a judgment was deemed preferable. This mode, it seems, is frequently adopted in South Carolina to secure the payment of money. A judgment being entered, it is only necessary to issue an execution from term to term, which may remain in the clerk's office, to create and continue a lien on the personal property of the defendant.

§ 545. *Indebtedness to infants is a consideration to sustain a note and judgment to a third party in trust for them.*

As a matter of form, a note was executed by the defendant for \$30,000, and this was made the foundation of the judgment. Was this note given without consideration? The defendant had purchased the property of the infant devisees to a greater amount than that for which the note was executed. And was not the executor bound by every consideration arising from the agency he exercised and the relation in which he stood to the devisees, to secure for their benefit the purchase money? They were infants and consequently incapable of protecting their own interests. The defendant was enriched by the purchase of their property to a greater amount than the \$30,000. And if, by the conditions of the sale, time was to be given for the payment of the money, that circumstance does not make either the note or the judgment fraudulent. The judgment was intended to operate as a security for the payment of the money, and the defendant was bound in good faith to give this security. Had he failed in this respect, he would have been guilty of a most aggravated fraud against his infant brothers and sisters, whose property had been placed at his disposal.

§ 546. *It seems that where a judgment is entered to secure a future debt, the trust may be proved by parol.*

But, the appellants contend, if a judgment may be taken to cover a future debt, the intent should appear on the face of the proceedings, or, at all events, be evidenced by a contemporary written declaration. That in this case the judgment is assumed as a security for a debt to third persons not named in the proceedings, and whose interest in the judgment can only be proved by parol evidence.

No written declaration of the trust, made at the time judgment was entered, is in evidence; but the counsel who procured the judgment swears that at the same time he thinks he wrote or sketched off a draft of a declaration of the trust upon which the judgment was given, to be signed by Higginbottom and Provost, and his impression has always been that such a paper was executed; that in taking the judgment, he acted for the children of Doctor Gillett, and that William S. Gillett, the defendant, expressed apprehensions that the judgment, at some future period, might be used to his injury and contrary to his intention, and to obviate that difficulty it was concluded that a declaration of the trust upon which it was given should be signed by Higginbottom and Provost.

From this evidence it is extremely probable that a declaration of trust was executed at the time of the judgment or shortly afterwards; but whether this was done or not, the trust is clearly established by the evidence, and the transaction is not impeachable under the statute of frauds. If, as contended by the appellants, the judgment was confessed by the appellee with a view of covering his property from his creditors, it would have been fraudulent. And if he had expressed to no one the object of the trust, the confession of a judgment for so large a sum to persons who had no claim against him would be evidence of fraud. But there are no facts or circumstances connected with the entry of the judgment which cast a suspicion of a fraudulent intent by the defendant.

§ 547. *No unjust or illegal preference of creditors in confessing judgments in favor of some, and thus giving them a prior lien.*

It is insisted that this judgment is void, as it gave a preference to certain creditors and tended to delay others. There was no unjust or illegal preference in the case, and it is not seen how creditors were delayed by the judgment. It did not prevent any creditor from bringing suit and obtaining judgment and execution. This was done by the appellants, and a large sum of money was made on their execution by a sale of the defendant's property. This proceeding was in no respect embarrassed by the previous judgment for the benefit of the infant devisees of Doctor Gillett. But that judgment having been kept in force by the issuing of executions from term to term, the money made under the junior judgment must be applied in discharge of the prior lien. There is no injustice or hardship in this. After the first judgment shall be paid, any money collected from the defendant by execution would of course be paid on the judgment of the appellants.

§ 548. *The lien of a judgment continued in force by the continued issuance of execution is good in South Carolina for twenty years, and is no fraud.*

But the counsel of the appellants contend that the continued possession by the defendant of the property, on which the executions under the first judgment operated as a lien, is conclusive evidence of fraud. And a number of authorities are cited to show that where an absolute bill of sale of property is

made, and the possession does not accompany the deed, but remains with the vendor, the transfer is not only voidable, but is absolutely void. The authorities referred to seem to have no direct application to the case under consideration. The judgment does not purport to transfer the property of the defendant, nor was it intended to produce this effect. Connected with the executions which were issued, a lien was created; and this was not only the fair and legal effect of the proceeding, but the one which the parties to the transaction intended to secure.

The possession of the property by the defendant was perfectly consistent with the judgment, and affords no evidence of fraud. It was, like every other case of judgment and execution, which bind the real and personal property of the defendant, though in his possession. By the laws of South Carolina, this lien may be continued for any time, not exceeding twenty years. No one could have been misled by this judgment. It was entered on the public record of the district, and the executions which were issued on it were duly noted on the clerk's docket, and these constituted the lien under the usages of South Carolina. It was therefore unnecessary to express on the record, or in any other manner, what the effect of these proceedings would be.

§ 549. *That a judgment covers the entire property of the debtor is not fraud or evidence of fraud.*

But it is contended that the lien set up under these proceedings cannot be sustained, as it covered the entire property of the defendant, and that this must be considered evidence of fraud. The lien, it is true, extended to the entire property of the defendant within the state of South Carolina; but it could at any time be discharged by the payment of the judgment. This lien, therefore, neither withdraws the property of the defendant from the reach of his creditors, nor delays the legal enforcement of their claims.

The circuit court, with the consent of parties, directed the sale of the entire property of the defendant; and as the proceeds of this sale fall many thousand dollars below the judgment, and a still greater sum below the amount the executor owes the devisees, it cannot be necessary to examine some of the principles settled by the circuit court, preparatory to a final decree. We think the application made of the money arising from the sale, by the final decree of the court below, was right, and it is affirmed. The bill of the complainants must therefore be dismissed, with costs.

VENABLE v. BANK OF THE UNITED STATES.

(2 Peters, 107-120. 1829.)

Opinion by MR. JUSTICE STORY.

STATEMENT OF FACTS.—This is an appeal from a decree of the circuit court of the Kentucky district. The Bank of the United States, at Lexington, Kentucky, on the 3d of July, 1819, discounted a note of the same date for \$4,700, signed by one George Norten, payable sixty days after date, to one Daniel Halstead, or order, and by him indorsed to Abraham Venable, and subsequently and severally indorsed by William Adams and Joshua Norten, and by the latter to the bank. The note was not paid at maturity, and due diligence having been used to obtain the amount from the maker, according to the local law, a suit in equity was brought in the circuit court in November, 1821, against all the indorsers (as is the course by the local law), in which a decree for principal, interest and costs was rendered in May, 1822. An execu-

tion issued upon this decree against the parties, upon which a tract of land of two hundred acres, a tract of one hundred and thirteen acres, several negroes, and some other personal property of Venable were levied on, but the same were not sold; the former for want of proper bidders, the latter on account of a claim set up to the same by the defendant, George M'Donald. The present bill, after stating these facts, charges that on the 9th of February, 1822, Venable made two deeds to M'Donald, by which he conveyed the tracts of land and other property to M'Donald, and that the same deeds were colorable and fraudulent; and the prayer of the bill is that the deeds may be declared fraudulent, and the property may be decreed to be sold; and an injunction granted in the meantime, and for further relief.

The answers of the defendants M'Donald and Venable, deny that the deeds of the 9th of February, 1822, were colorable or fraudulent, and on the contrary, assert them to have been *bona fide*, and for a valuable consideration. The answer of M'Donald further sets up a mortgage executed by Venable on the 22d of May, 1820, to him, M'Donald, and one George Norten (who is not a party to the bill), of a tract of land of about two hundred and forty-five acres (part of the land in controversy), and of nine negroes (including those in controversy), to secure them against a bond executed by them as sureties, with Venable as principal, upon his appointment as guardian of the infant children of George Adams, deceased, whose mother Venable had since married, she having previously administered upon Adams' estate. The guardianship bond was in the penal sum of \$4,000, and upon the usual condition.

The cause being put at issue, upon the final hearing, the court decreed the deeds of the 9th of February, 1822, to be colorable and fraudulent, and ordered the same to be set aside and annulled; and that the plaintiffs might pursue their judgment and execution against the real and personal estate of Venable, as if the said deeds had never been made; subject, however, to the mortgage aforesaid, which was not in any manner whatever to be affected by this decree. It is upon an appeal taken by Venable and M'Donald to this decree that the cause is now before this court; and independently of the merits, as to the asserted fraud or good faith of the deeds of 1822, two objections have been made by the counsel for the appellants.

§ 550. *Upon creditor's bill to set aside conveyances as fraudulent, it is not error to decree the conveyances annulled as fraudulent, and that plaintiffs may pursue their judgment and execution as if the same did not exist, subject to a bona fide mortgage, which is not to be affected by the decree.*

The first is, that the court erred in directing a sale of the estate conveyed to M'Donald and Norten, until their mortgage was satisfied, or the condition thereof performed; because it had no right to change, by sale of the estate, the rights or interests of the mortgagees under a conveyance admitted to be valid, unless by their consent. This objection is founded upon a misinterpretation of the decree, which does not authorize any sale to be made by virtue of it, but merely removes out of the way the deeds which obstructed a sale at law under the judgment and levy. The decree also leaves the mortgage wholly untouched, and consequently no sale could prejudice the rights appertaining to it.

§ 551. — *and the mortgage not being affected by such a decree, the mortgagee need not be made a party to the proceedings.*

The next objection is, that George Norten, the mortgagee, is not made a party to the bill. But this objection falls for the same reason as the preced-

ing. As the mortgage is not in any measure interfered with by the decree, it is wholly unnecessary to make Norten a party to the bill. He has no interests which are controverted or injured by declaring the nullity of the other deeds. The real question then is whether the deeds of 1822 are fraudulent or not; and to that question the consideration of the court will now be addressed. The answers of the defendants having denied all fraud, those answers are entitled to stand, unless they are overcome by the testimony of two witnesses, or of one witness and circumstances.

One of the deeds purports, for the consideration of \$6,260 paid and secured to be paid, to convey to M'Donald the two tracts of land; the other, for the consideration of \$3,400, to convey certain slaves, household furniture, horses, wagons, hogs, sheep, cattle, etc., and other stock usually belonging to a farm. The bill charges that these constituted the whole estate of Venable; and this fact is not attempted to be denied in the answer. Except his liability as guardian, and as indorser of the note to the bank, it does not appear that Venable was at this time indebted to any persons whatever; the fact is charged in the bill that he was not under any embarrassment, and it is supported by the proofs.

Here, then, is the case of a person upon the eve of a decree being rendered against him for a large sum of money, which it is admitted would go far to his ruin, making conveyances of his whole property, real and personal, to his brother-in-law, for an asserted consideration equal to its full value. The brother-in-law is proved to be a thrifty, industrious man, but not at the time known to possess property sufficient to pay the purchase money, having other pursuits; and as soon as the purchase is made, suffering the estate to remain in possession of the former tenant.

How and in what manner is the consideration paid or received? M'Donald, in his answer, states that Venable, under the administration of his wife on Adams' estate, and his own guardianship of her infant children, was indebted, for assets received, to the amount of \$6,236.54; and that he, M'Donald, finding that Venable had used this money, and was wasting the estate of his wards, and was involved in difficulties by his suretyship for others, etc., with a view to his own safety and that of George Norten (who is now insolvent), first took the mortgage, and afterwards, being fearful of the waste of the estate, was induced to purchase it, that he might have the control of it, and accordingly he did purchase it. The manner in which the consideration was paid and secured, he states to have been as follows: He assumed, by a written contract given to Venable, to pay the debt due by Venable to his wards when they came of age, and, in the meantime, to pay annually a sufficient sum for their maintenance and support, to be allowed in extinguishment of the interest that might become immediately due. The contract itself is now produced, and it contains an agreement to pay to the wards, not a specific sum of money, but "as much money as they shall have a right to demand of Venable, as guardian, when they become of age." It further contains a promise to furnish Venable "as much beef, pork, hay, corn, flour, etc., to the amount of what it shall be worth to board, school and clothe" his wards.

The residue of the consideration for the purchase, namely, \$2,060.50, M'Donald asserts to have been paid by him in money to Venable, part of which he admits that he borrowed, but he does not state how much. By the contract above stated, he was to pay the money within three months after the purchase.

Such is the nature of the purchase and the consideration, as disclosed in the answer of M'Donald, and which Venable, in his own answer, adopts and supports.

The first remark that arises on this part of the case is, that the whole consideration stated in the deeds is \$9,660; and that the answers state the amount actually paid or secured as no more than \$8,347. This discrepancy is utterly unaccounted for. In the next place, the debt assumed to be due by Venable to his wards is nowhere established to have been really due by any proofs in the record. Now, this was a material fact in the case, exclusively within the knowledge and power of the defendants, which they were bound to establish by competent evidence, and which, in its own nature, was susceptible of proof beyond their answers. It was vital to the good faith of the transaction. The omission to do it would, of itself, throw some doubt upon the transaction. But the proof in the record, so far as it goes, affords a strong negative upon the assumed debt. The inventory of George Adams' personal estate is only \$2,032.07. His widow (independently of the charges of administration) was entitled to one-third part of it. One of the children (a daughter) died early, during her minority; and, without stopping to inquire whether her share in the personalty would not fall to the mother, the remaining sum, deducting only the mother's third, left the sum of \$1,355 only, as the distributable shares of Venable's wards. There is, in the record, a paper which is without any signature or proof of any sort, which puts Adams' personal estate at a much lower sum than the inventory, but which, by adding his real estate at \$2,200, and the rent for three years, and the hire of negroes and interest, swells the aggregate of his estate to \$6,286.54. This paper can be viewed in no other light than a mere speculative statement; but, if it were otherwise, it is obvious that it cannot be permitted to pass as proof of the balance then due to Adams' children.

In the first place, the real estate is not properly chargeable to the account of the administrator or guardian, merely as such.

The suggestion is, that it was afterwards sold, and the proceeds received by Venable, for which he may be justly held accountable. There was no sale made, so far at least as we have any evidence, under the general act of Kentucky on this subject, passed on the 3d of February, 1813, and, therefore, that may be laid out of the question; though it is observable that a guardian is not authorized, under that act, to sell without an order of court, and giving a bond with sufficient sureties. The only proof of any authority to sell found in the record is the following order: "Fayette county, to wit, April court, 1818. On motion of Abraham Venable, Patterson Bain, E. Yieser and Charles Humphreys are appointed commissioners under the act of assembly of the last session, for the sale of the estate mentioned in said law as belonging to the heirs of George Adams, deceased, situated in Lexington." The act here referred to is not in the record, but, so far as we can gather its contents by the order itself, the commissioners, and not the guardian, were authorized to make the sale. Their proceedings under the order do not appear. The only evidence is from a purchaser at the sale, who states that he bought the estate at about \$2,200, and, with the exception of about \$300, he paid the money to Venable, by direction of the commissioners. Whether this payment was authorized by the act is left uncertain; and, indeed, whether security was not directed to be taken from the commissioners on the sale, as in ordinary cases.

It is far from being certain that the sureties on Venable's guardianship bond were liable for the sum so received; but we may assume, for the present, that they were.

Then there is a charge of \$900, for rent received upon the real estate for three years; and, for hire of negroes for seven years, \$490, although the inventory mentions only "one negro girl and child, valued at \$300;" and, to complete the amount, a charge of interest is added on the whole, of \$1,171.98. Now, certainly, there is no pretense for the last charge, and no justification of it by any proof. The children were maintained, during this whole period, by Venable and his wife; and, in the most favorable view, if Adams' estate had been completely settled, the interest and income from the children's shares of his whole estate could not be presumed to amount to more than, if to so much as, the reasonable expenses for their support and maintenance. At least if they did, that fact should have been made out by some probable evidence. Then, again, the guardianship bond is in the penalty of \$4,000 only; and this circumstance discredits the supposition that the sureties had incurred any liability beyond that amount. The usual practice is, to take the penalty in double the amount of the supposed value of the property intended to be secured by it. The original administration bond of Mrs. Venable was in the penalty of only \$6,000; and the inventory of personal estate of George Adams, made by her on oath, which is not attempted to be impugned, covers but one-third of that amount. It has been said at the bar that, by the laws of Kentucky, sureties may be charged beyond the penalty of their bonds, and to the same extent of liability as their principals. If this were so, it would diminish the force of any argument grounded on the penalty; though it certainly would not establish that there was, in fact, a debt due to the children beyond that sum. But, among the acts of Kentucky, we cannot find any statute that leads to such a conclusion. The act of 23d January, 1810, concerning the bonds of certain officers, guardians, administrators and executors, has no provision which varies from the general law on this subject, limiting the responsibility of sureties to the penalty of the bond. It merely declares that "an action in one case, on such bond, shall in nowise abate or bar an action thereon for another cause;" which is entirely consistent with a recognition of the general rule of law. And the act of 15th January, 1811, which is supplementary to the former, and gives a remedy against sureties beyond the penalty of the bond, is expressly limited to bonds given by public officers. No adjudged case has been cited which goes to establish the position that the statute of 1810 has been differently construed by the state courts. It is not, in our view of the facts, a very material consideration; because there is no evidence offered which proves that a debt was due to Venable's wards, even to the amount of the penalty. And, in a case like the present, it was indispensable for the defendants to make out so material a fact with all due certainty. The court cannot presume it. The statement already alluded to, as a statement of the administration, or guardianship account, contains no deductions whatever, either for charges, taxes, repairs, or even for debts due from the intestate, or for expenses incurred for the children. It assumes only one side of the account, and deals not in any credits, though the presumption of their existence is almost irresistible.

In respect, then, to this part of the assumed consideration of the deeds, there is the want of certainty as to any amount of debt due to the children; and the contract given to secure to Venable does not ascertain any amount as

due. It merely provides, in general terms, that M'Donald shall pay to the children "as much money as they shall have a right to demand," etc., when they shall come of age, and in the intermediate time they are to receive an amount sufficient for their support and maintenance. Even this contract is left wholly without any mortgage or other security for its fulfillment, either to Venable or to the children; and Venable strips himself of his whole estate, and relies exclusively upon the good faith and solvency of M'Donald, to extricate himself from all future difficulties. Such a case may exist; but it must involve some suspicion, when the party who resorts to such measures has a demand hanging over him, which goes deeply to affect his solvency and his interests, and may furnish another and cogent motive for the transaction.

The provision in this contract for the support and maintenance of the children is somewhat extraordinary, and of a very indefinite nature and extent. M'Donald agrees to deliver to Venable "as much beef, pork, hay, corn, flour, etc., to the amount of what it shall be worth to board, school and clothe" them. So that even the amount is not fixed, and is to depend upon the future pleasure of the parties. In case of a real purchase, such a provision could not be expected, even though it went merely to keep down the accruing interest; and in the present case it is not, by its terms, confined even within that limit. The contract itself is not avowed upon the face of the deeds, and must be deemed a mere private and secret bargain, to be kept back by the parties.

Then, again, as to the remaining cash payment of \$2,060.50. The bill directly charges that it was a mere formal payment, and that the "money was by the said Venable returned back to M'Donald, or to the person of whom M'Donald borrowed it." The answer of M'Donald admits that a part was borrowed; but his denial of its return is couched in terms of an ambiguous purport. He says that the sum of \$2,060.50 "was paid by this defendant, in the presence of Moses S. Hall," etc. That he "borrowed a portion of the money to enable him to make the cash payment. That it was paid by him to his co-defendant, Venable, in good faith, and that no part of it was returned to him by said Venable, nor did this defendant receive any part of said money back from said Venable by any fraudulent contrivance, as the complainants have falsely alleged." Venable, in his answer, says "that the said sum of money was paid to him by his co-defendant, M'Donald, in good faith, and that no part of it was returned by him to his co-defendant." Now, it is remarkable that neither of these answers, in terms, denies that the money so borrowed was returned back to the person of whom it was borrowed, which is the gist of the charge in the bill; nor does M'Donald deny that he received it back, but only that it was not returned to him by Venable. Nor are these allegations thus loose from mere accident or carelessness. On the contrary, the proof is direct that the money borrowed was returned to M'Donald, and was by him returned to the lender. Moses S. Hall, in his testimony, says he was present when the money was paid, and it was handed to Mrs. Venable. William Achison testifies that M'Donald told him that the next morning after the money was paid, Mrs. Venable was at his house with the money, on her way to town to deposit it in bank, and he, M'Donald, borrowed it of her and returned it to Hendley, the lender, the same day. Hendley himself, in his testimony, says: "M'Donald came to me and told me that he had made a purchase; that I was a man of tolerable good sense, I could tell by a little what a good deal meant; and observed that he wished to borrow of me \$1,000, which I loaned him, and stated he would return it in a few days. He observed

that Venable was embarrassed by a debt on account of Norten, and that he had bought him out of every species of property, and that he wanted the money to pay him. He also offered me a mortgage on a negro man and a tract of land for the payment of the money, but I declined receiving any security, etc., because I expected to receive the money back in a few days. I took a memorandum of the amount, and numbers of the different notes loaned him, thinking it was possible I should receive the same notes back, etc. In about three or four days I received from said M'Donald the same notes back again. M'Donald stated to me that he was security for Venable, as guardian of Mrs. Venable's children, to the amount of \$3,000 or \$4,000, and that he made this purchase to secure himself." In point of fact, independently of the purchase, as we have already seen, he had a mortgage on the same estate as security for that very liability. But it is impossible to wink so hard as not to perceive that, if this statement be true, and it is nowhere contradicted or denied, the borrowing of the money was merely to exhibit before witnesses a formal payment, and that there was no real *bona fides* in this part of the transaction. It was an attempt, fruitless, as the event has shown, to throw a colorable gloss over the real transaction.

How the other part of the purchase money was obtained is not proved by the defendants, although there is some hearsay evidence that other money was borrowed, but the answers of the defendants furnish no statement of the amount.

§ 552. *The acts and declarations of a grantor subsequent to the conveyance are not evidence against the grantee. But in an equity proceeding where he is also a party they are admissible to disprove the grantor's answer, and may in that manner affect the grantee.*

There is also testimony in the case, from several witnesses, of the confessions of Venable, as to the object of the deeds, and of subsequent acts of control over the estate to some extent, from which unfavorable inferences have been deduced at the argument against the validity of the deeds. It has been said at the bar that these confessions and acts, being subsequent to the execution of the deeds, ought not be permitted to prejudice the title of M'Donald, and are not evidence to bind him. It is true that neither the acts nor confessions of a grantor, under such circumstances, are admissible to defeat the title of the grantee. But they are certainly admissible to disprove the answer of the grantor, when he is a party to the bill. If they discredit his answer, they withdraw from the case all the influence which his concurrence in the statement of the grantee would otherwise have; and to this extent they have a bearing upon the whole merits of the case, but not beyond it. Upon examination of these confessions, they certainly exhibit some misgivings on the part of Venable, and some proof that the sale of the estate was to defeat the debt due by him to the bank, as security of Norten. The acts of control by Venable over the estate are more equivocal, and but for his subsequent liberal participation in all the produce of the estate would, perhaps, of themselves, not be very significant. As the case is, they cannot but have some weight.

Upon the whole, without going more at large into the case, the circumstances are such that it appears to us these deeds were not *bona fide* and for a valuable consideration, and, therefore, they were properly set aside by the circuit court. Looking to the nature of the transaction, the assumed considerations, the relation and circumstances of the parties, the impending decree, the sweeping extent of the deeds, the non-disclosure, on the face of them,

of the real considerations, the objects of the collateral and secret contract, the very great doubt as to what was due to the children, and the ambiguous explanations of the parties, we think the presumptions are so strong against the validity of the deeds, that they ought not to be supported.

The decree of the circuit court is affirmed, with costs.

CLEMENTS v. MOORE.

(6 Wallace, 299-316. 1867.)

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.— These are cross-appeals, in equity, from the district court of the United States for the western district of Texas.

The appellants, Clements and Sheldon, are judgment creditors of the defendant, James Nicholson, and filed the original and amended bills, found in the record, to set aside, upon the ground of fraud, the sale by Nicholson to the defendant, Moore, of Nicholson's entire stock of merchandise, and the conveyance by Nicholson to Moore, and by Moore to Rebecca H. Nicholson, James Nicholson's wife, of certain lots in the town of Bastrop—described in the proceedings. The district court adjudged the sale of the merchandise to be fraudulent and void; and dismissed the bill as to Mrs. Nicholson and the lots.

§ 553. *Objections not made in the lower court are waived.*

We are met at the threshold of the investigation by the objections that leave was not given to file the amended bills, and that there is no replication in the case. Hence it is insisted that our examination is to be confined to the original bill and answer, and that we cannot look beyond them. We find in the record a sufficient replication, though it was not filed until after a part of the testimony had been taken. But if there were none, there are two sufficient answers to both of the objections. They were not made in the court below. They were thereby waived, and cannot be taken here. They are also within the provisions of the statute of 1789, upon the subject of jeofails. *Brightly's Digest*, 41.

The goods were sold on the 7th of July, 1851. After satisfying a debt due to House out of the stock, Nicholson determined, under the advice of Larkins, to assign the residue to Moore for the benefit of his creditors. Moore was applied to accordingly. He was told by Nicholson that his object was to secure his creditors, and that unless the assignment was made his entire means would be absorbed by a few of his creditors in New York, to whom he was most largely indebted, to the exclusion of his home and other debts. Moore promised to consider the subject. An assignment was subsequently drawn. Before it was executed Moore made the purchase. The terms were the cost in New York, less twenty per cent. The goods amounted to \$6,310.35. Moore gave his notes amounting in the aggregate to that sum. At what times they were payable respectively, and whether they bore interest, does not appear in the case. The laws of Texas permitted a failing debtor to prefer creditors according to his election. We find here none of the badges of fraud mentioned in *Twyne's case*. The sale was openly made; there was an immediate change of possession; the price agreed to be paid was fully as much as the goods were worth. Moore lost upon them. All the notes given by Moore, except three of \$500 each, were applied in payment of Nicholson's debts. On the other hand, Nicholson was insolvent, and Moore knew it. He knew also that it was Nicholson's purpose to hinder and delay the complainants. It was

easy to convert the notes and place the proceeds beyond the reach of his creditors. The same process as to the goods was more difficult. If Nicholson intended a fraud, Moore must have known he was giving him facilities in that direction. One of the three notes mentioned was sold by Nicholson at a large discount. The other two were delivered by Mrs. Nicholson to Moore in payment for the lots in controversy. It remains to consider the law applicable to this state of facts.

§ 554. *A sale may be void for bad faith, though the purchaser pays full value for the property.*

The statute of the 13th Elizabeth has been substantially enacted in Texas. The same legal principles apply there in this class of cases as in the other states where similar statutory provisions exist. As was remarked by Lord Mansfield, in *Cadogan v. Kennet*, 2 Cowp., 432, the common law, without the statute, would have worked out the same results. A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge.

§ 555. *Differences between the treatment of fraudulent sales at law and in equity.*

When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to — while it scans the transaction with the severest scrutiny — looks at all the facts, and, giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors by means of the fraud. *Sands v. Codwise*, 4 Johns., 536; *Boyd and Suydam v. Dunlap*, 1 Johns. Ch., 478; *Webb v. Brown*, 3 Ohio St., 246; *Sexton v. Wheaton*, 1 Am. Lead. Cas., 50, note; *Twyne's Case*, 1 Smith's Lead. Cas., 34, notes; *Roberts on Fraudulent Conveyances*, 520, 527. In the case before us we think that Moore should be held liable for the note sold by Nicholson and the two delivered by his wife to Moore in payment for the lots, amounting in the aggregate to \$1,500, with interest from the date of the sale. We have not adverted to the letter of Nicholson of the 18th of July, 1853, and the accompanying document, nor to his declarations made after the sale. Besides being in direct conflict with his answers under oath, they are inadmissible against Moore, and can in no wise affect the conclusions as to this branch of the case at which we have arrived.

The real estate in controversy is thus described: "A block of lots in the town of Bastrop, in said state of Texas, known in the plan of said town as

block No. 95 (ninety-five), east of Main street; fractional lot or block No. 4 (four), east of Main street, and lots No. 65 (sixty-five), No. 62 (sixty-two), and 70 (seventy), in block 11."

The property was conveyed by Nicholson and wife to Moore by deeds bearing date on the 13th of June, 1853. The considerations expressed amount in the aggregate to \$560. The bill and amended bills charge that the deeds to Moore, and the sale by Moore to Mrs. Nicholson, were without consideration and made to defraud the creditors of Nicholson. The answer of Moore alleges that he bought the lots in good faith and paid \$860 for them; afterwards he agreed they might be repurchased for what he gave, with interest at the rate of ten per cent. Except block 95 and fractional lot 4, he sold them to Mrs. Nicholson; she paid him, as he understood, out of her own separate means, and she subsequently procured a decree of the district court of Bastrop county that he should convey a good title to her, which he was ready to do. He alleges further that block 95 had been sold to pay a debt of Nicholson.

The answer of Nicholson is the same as the answer of Moore, in regard to the sale of the lots to Moore and the subsequent agreement. In regard to the sale to Mrs. Nicholson, he states that when he married her she had a considerable amount of money belonging to her and to a child by a former husband; he borrowed from her from time to time until the amount exceeded \$500; he transferred to her one of the notes of Moore for that amount; she bought the lots from Moore and paid for them with that note and other separate means belonging to her. He makes the same statement as Moore in regard to the decree of the district court of Bastrop county and the sale of block 95. He says the premises are in possession of his father under an arrangement with Mrs. Nicholson.

Mrs. Nicholson answers that when she married Nicholson she had about \$1,000 in money, which she lent to him, taking in lieu two notes of Moore of \$500 each; some time afterwards she delivered the notes to Moore in discharge of a mortgage upon the premises, which Nicholson had given to him; that Nicholson has never repaid to her any part of the money which he borrowed; she has realized nothing from the loan but the lots in question; Nicholson is utterly insolvent; she has no hope of getting any other indemnity, and that the value of the lots does not exceed the amount of the loan. She insists upon the good faith of the transaction and denies that any wrong or fraud was intended upon the complainants or any other creditor of Nicholson.

§ 556. *A defendant is entitled to verify his answer in chancery by affidavit, although complainant may waive it.*

The complainants waived an answer, under oath, by this defendant. Her answer is nevertheless verified by an affidavit. This was proper. It was her right so to answer and the complainants could not deprive her of it. Such is the settled rule of equity practice where there is no regulation to the contrary. *Armstrong v. Scott*, 3 Greene, 433. The decree of the district court of Bastrop county is found in the record. It was entered by the agreement of counsel. It required Moore to execute to Mrs. Nicholson a full and complete title to lots 62, 65 and 70. It is silent as to block 95, and ordered lot 4 to be sold to satisfy the claim of Scott, a defendant in that proceeding. Neither party took any testimony touching this part of the case. It stands upon the bills and answers.

§ 557. *Where an answer admits a fact and sets up another fact in avoidance the first fact is established but the latter fact must be proved.*

No attempt is made to explain the contradiction of the answers of Moore and Nicholson by the deeds as to the amount of the consideration alleged to have been paid by Moore for the lots. The answers of both are silent as to the mode of payment. This rendered disproof of the allegation of the amount difficult if not impossible. The facts disclosed create a strong doubt of the integrity of the transaction between Moore and Nicholson and threw on Moore the duty of making a full explanation and the burden of proof to sustain it. *Piddock v. Brown*, 3 P. Will., 289; *Wharton v. May*, 5 Ves., 49. We feel constrained to resolve the doubt against the validity of the sale. The striking discrepancies between the answers of Mr. and Mrs. Nicholson need no remark. She admits that she paid for the lots by delivering up to Moore notes which he had executed to Nicholson. This makes a *prima facie* case against her. She adds that the notes were transferred to her by Nicholson in consideration of money she had lent to him. Of this there is no proof. It is an established rule of evidence in equity that where an answer which is put in issue admits a fact and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred. *Gresley's Evidence*, 13; *Hart v. Tenyke*, 2 Johns. Ch., 60. The application here of this principle is decisive. There is nothing to neutralize the effect of the admitted fact that the property was paid for with notes which had belonged to Nicholson. There is not the slightest proof of any consideration for the transfer of those notes by him to her. The complainants have a right to follow the fund into any property in which it was invested as far as it can be traced. *Oliver v. Piatt*, 3 How., 401. The decree of the court below is silent as to lots 4 and 95. There is no competent proof in the record sufficient to exempt them from the claim of the complainants. If others have acquired paramount rights it must be shown elsewhere in another proceeding.

The decree as to both branches of the case is, in our judgment, erroneous. It is therefore reversed. The case will be remanded to the district court with instructions to enter a decree in conformity with this opinion.

SMITH v. CRAFT.

(Circuit Court for Indiana: 12 Federal Reporter, 856-864. 1893.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.—The defendant Craft, who was a merchant at Indianapolis, on the 5th of April, 1879, executed to his co-defendant, Churchman, in trust for Fletcher & Churchman, a bill of sale embracing his entire stock of watches, diamonds, jewelery and fixtures; also a lease upon the building in which he had carried on his business, one year of the term not having then expired. This was all the property that Craft owned, except his notes and accounts, which he estimated to be worth \$1,000, and some real estate which was incumbered for as much as it was worth. Fletcher & Churchman were bankers, and as such, at different times had loaned money to Craft, on his agreement that if they would make the loans, and anything occurred by which he was unable to pay all his creditors, he would first pay or secure them. It is recited in the bill of sale that Craft is indebted to the bank in about the sum of \$31,000 and that the sale is made in payment and satisfaction of this indebtedness, "and the further con-

sideration that said Churchman shall employ said Craft in said business, at the rate of \$150 per month, so long as said Churchman shall carry on or continue said business."

Immediately after the execution of this instrument, Craft's employees were notified by Churchman and Craft of the sale, and that thereafter the business would be carried on by Craft as the agent of Fletcher & Churchman. After this change, Craft conducted the business as agent, with his old force of employees, just as before the transfer, until some time in August, when, by direction of Fletcher & Churchman, he commenced selling the remainder of the goods at auction, and in this way the stock was finally disposed of some time in October. During the time that Craft managed the business he paid himself and his co-employees weekly out of the proceeds.

The complainants, the Middleton Plate Company, Keller & Untermeier, William Smith & Co., and Freund & Co., are eastern merchants and manufacturers with whom Craft had been dealing for many years, and to whom he was indebted for goods purchased prior to the sale to Fletcher & Churchman. After the sale, and before the commencement of this suit, on the 27th of June, 1881, the complainants obtained judgments against Craft for the amounts respectively due them, upon which executions issued and returns were made of no property.

The bill charges that the goods which the complainants sold to Craft on time, and for which their several judgments were taken, were part of the stock sold to Fletcher & Churchman; that they divided the proceeds with Craft, and that the transfer was intended by both Craft and Fletcher & Churchman to hinder and delay the complainants and the other creditors of Craft.

Fletcher & Churchman, in their answer, deny all fraud, and aver that on the 27th of December, 1878, Craft was indebted to them in the sum of \$25,000, for which he gave his two notes, each for \$12,500, payable in thirty and sixty days, and in the further sum of \$7,313, that being the amount paid by them for Craft, at his request, in taking up a note which he had previously given to George F. McGinnis; that the sale by Craft to them was in good faith, and in full payment of his indebtedness; that they realized not more than \$20,000 from the goods; that Craft got no part of the proceeds; that they have no knowledge that any of the goods purchased of either of complainants were in the stock at the time of the transfer; and that the sale to them was in good faith, as preferred creditors, with no intention of cheating, hindering, or delaying the complainants or other creditors.

Craft's answer denies that he received any part of the proceeds; denies all fraud; and avers that the sale was in good faith, in payment of an indebtedness which exceeded the value of the goods and fixtures and the unexpired lease.

Craft's credit seems to have been good with the complainants up to time of his failure, and yet it appears from the evidence that he was insolvent early in 1878. The judgments taken by the complainants were for goods sold after this time, and mostly within a few months before the sale to Fletcher & Churchman. The last purchase from Keller & Untermeier, amounting to \$876, was as late as the 26th of March, and only ten days before the transfer. It is probable that these goods were part of the stock sold to Fletcher & Churchman. That they got some of the goods purchased from the complainants, which had not been paid for, is clear enough. Craft swears that in the

spring of 1878, and from that time until his final failure, he had the confidence of a sanguine business man that he would be able to keep up and pay all his debts, and I am satisfied that during this period he made payments to the complainants.

Fletcher & Churchman had been accommodating Craft with loans for a number of years. Churchman testifies that Craft always promised if the loans were made, and from any cause he was unable to pay all his debts, he would protect or secure Fletcher & Churchman. The loans made from time to time (on faith of these promises, it is to be presumed) amounted, in August, 1877, to as much as \$20,000. These loans, and others made after that time, were regularly renewed every ninety days, and the interest paid in advance at the rate of ten per cent. per annum, until the notes were given, which matured on the 27th of December, 1878. At this time Craft's indebtedness from loans, both he and Churchman say, amounted to \$25,000, for which Craft gave his two notes for \$12,500, payable in thirty and sixty days instead of ninety days, as in all former renewals. About this time, and perhaps the same day, Fletcher & Churchman paid for Craft the McGinnis note, which was indorsed by Churchman. Instead of taking Craft's note for the amount thus paid for him, Fletcher & Churchman simply held the canceled note as evidence of its payment by them. Prior to December 27, 1878, Craft had always been required to renew his notes promptly at maturity. The two notes given on this day became due in thirty and sixty days, as already stated, and they were allowed to remain due without renewal until the sale, on the 5th of April. Craft is not able to explain why Fletcher & Churchman required those notes to be made in thirty and sixty days, instead of ninety days, as in all former renewals, but supposes they had their own reasons for the change. He was not asked to renew these notes when they became due, and he requested no delay. But after thus testifying he says he thinks Fletcher & Churchman were waiting for him to make his annual invoice on the 1st of April, before renewing again. Churchman testifies that when these notes were executed, on the 27th of December, he was anxious to have the indebtedness reduced; that Craft said he would cease buying goods, and he had no doubt he could fix the notes up in thirty or sixty days, or sell enough goods in that time to reduce the amount he was owing; and that when these notes became due he told Craft to let them stand, as they were in the hope that his sales would yet justify him in making some payments. Churchman gives no other reason for the change of time in the renewals or for allowing them to stand after maturity until the transfer.

Craft completed his invoice on the 1st of April, which showed that his stock and fixtures amounted to "somewhere in the neighborhood of \$33,000," exclusive of notes and accounts, which were estimated at "about \$1,000." Recognizing that he was in "deep water" he went to the office of his counsel on the 5th of April and directed him to make out papers for an assignment. Just what was done under this direction does not appear; but instead of making an assignment, Churchman was sent for, and arriving, was told that Craft had finished his inventory, could not pay all his debts and was undecided as to what he had better do. Churchman then reminded Craft of his repeated promises, when he got the money from time to time, that if he failed and became unable to pay all his debts he would secure or prefer Fletcher & Churchman. Craft admitted that he had made these promises, and there and then the bill of sale was prepared and executed. Churchman's information was, he

says, that Craft was solvent, and he knew nothing to the contrary until he was sent for when the transfer was made. Craft testifies that it was made because Fletcher & Churchman had been his friends, and he felt it to be his duty to prefer them. Both Craft and Churchman testify that the sale was in good faith, in payment of an honest debt, amounting to more than the property was worth. Neither Craft nor Churchman produced the inventory, and in speaking of it Craft says it amounted to "somewhere in the neighborhood of \$33,000," and Churchman says it amounted to "about \$30,000." It does not appear from the evidence that Churchman saw the invoice before the transfer. It is not stated at what price the goods were invoiced; and although Craft deposited the proceeds daily with Fletcher & Churchman, and they kept an account with the store, neither witness is definite in speaking of the total or net amounts realized. They both think the net amount was "about \$20,000." Craft is not able even to approximate the proportion of goods sold before the auction sales commenced in August, but thinks that probably half of the stock was thus disposed of, and he is unable to tell what the auction sales amounted to or at what reduction, if any, on the cost price the goods were sold. There is no evidence as to the value of the lease.

While I have no doubt that Craft was indebted to Fletcher & Churchman, the true amount that was owing does not clearly appear from the pleadings and the evidence. It is true, both Craft and Churchman state that the McGinnis note of \$7,313, with accrued interest from date, and the two \$12,500 notes and interest after maturity, represented the true amount owing at the time of the transfer. But one of the special interrogatories required the respondents to state the amount of the indebtedness discharged by the sale, and the date and amount of each loan, if any were made, with date and amount of each renewal. In answer to this interrogatory Craft says that at the time of the sale he owed the two \$12,500 notes and the McGinnis note, with the interest due on these notes. Although directly interrogated as to the original loans, their amounts, dates and renewals, the answer is silent on that subject. Churchman's answer to the same interrogatory, though in different language, is the same as Craft's. These answers were not prepared by the same counsel, and it is somewhat singular, to say the least, that both should be silent on the same point. While testifying before the master, in answer to substantially the same inquiry, Craft says he got \$7,000 November 17, 1876; \$6,000 in February, 1877; \$2,500, August 15, 1877, and \$6,500, October 23, 1877. These loans, amounting to \$22,000, are all that Craft is able to specify; but he says that sometimes he went into the bank and got loans which were not entered, and that he thinks he got \$3,000 at some other time, as the total loans amounted to \$25,000. Craft and Churchman are the only witnesses that testified, and they were called by the complainants.

§ 558. *The right of an insolvent debtor to prefer creditors. What is necessary to make a transfer valid.*

An insolvent debtor, in the absence of a bankrupt law, has the absolute control of his unincumbered property and he may prefer one creditor to the exclusion of all others. The favored creditor's debt may or may not be due, and the preference may be by a judgment, a mortgage, a deed, a transfer of securities or choses in action, the sale of personal property, or the payment of money. While the motive which prompts the debtor thus to favor a single creditor is not material, the transfer, to be valid, must be in good faith and solely in payment of an honest debt. There must be no design to secure an

advantage to the debtor over his other creditors, or to delay them in the collection of their debts. It does not follow that because a debtor may prefer such creditor or creditors as he pleases, that he may prefer them on such terms as he pleases. *Grover v. Wakeman*, 11 Wend., 222.

§ 559. *A preference constructively fraudulent which will not be sustained.*

Equity favors an equal distribution of a debtor's property among all his creditors, and it does not view with favor a transaction whereby a single creditor is preferred to the exclusion of all others.

Craft and Churchman are vague and indefinite, when they should be certain and definite. They should state the different loans, specifying dates and amounts, including renewals, which constitute the two \$12,500 notes, the exact amount of the invoice, the amount realized from the goods, both before and after the auction sales commenced, and the gross and net amounts realized from all sales. Craft had been insolvent for a year and a half, and perhaps longer, before the 27th of December, 1878. Churchman testifies that on the 7th of August, 1877, Craft's loans amounted to \$20,000, after which time he paid the interest, but nothing on the principal. The two \$12,500 notes were the first and only renewals that were permitted to stand after maturity. After these notes were given, on the 27th of December, 1878, and after they became due, Craft continued to buy goods from the complainants on credit, part of which were in the stock at the time of the transfer.

Without saying that it was in the minds of Fletcher & Churchman and Craft, at the time the last renewals were given, or at any other time, that the latter should get goods east on credit and turn them over to the former in payment of their debt, I think the preference was fraudulent on other grounds. Fletcher & Churchman loaned money to Craft on the faith of his agreement to secure them to the exclusion of all others if he became insolvent. The complainants, ignorant of these agreements, sold Craft goods on time, trusting to his skill, energy and integrity. They would not have done this, it is safe to assume, if they had known of the agreements to prefer Fletcher & Churchman at all hazards. These agreements were in the nature of secret liens, which the law will not allow to be enforced against Craft's other creditors. Fletcher & Churchman seem to have been on friendly and confidential relations with Craft, and I have no doubt they knew he was buying goods east on time, after the last renewals were given as well as before. They assisted him in maintaining a credit to which he was not entitled, and now claim the proceeds of the entire stock against the injured and deluded creditors. If the right of preference may be exercised as the parties exercised it in this case, the law affords ample opportunity for a failing debtor to get the property of one person and use it in paying the debt of another. *Grover v. Wakeman*, *supra*; *Boardman v. Holliday*, 10 Paige, 222; *Riggs v. Murray*, 2 Johns. Ch., 565; *Nicholson v. Leavitt*, 4 Sandf., 252.

A further objection to the sale is that the property was not taken absolutely and unconditionally in payment of Fletcher & Churchman's debt, as a preference. It was a scheme, in part at least, to secure to Craft a personal benefit against his other creditors. Fletcher & Churchman got the lease, and they were to continue the business at the old stand, and, as part of the consideration of the transfer, Craft was to be employed as their agent and superintendent, at a salary of \$150 per month for an indefinite period. During the seven months that he acted as agent he received \$1,050 out of the proceeds of the stock for wages. Why this agreement in advance to employ Craft at a fixed

salary, unless he was unwilling to make the preference on any other terms? If he exacted these terms as the condition on which he would make the sale, it was clearly not made for the honest and sole purpose of paying Fletcher & Churchman. It is evident that Craft bargained for and secured a personal benefit or advantage over the complainants while some of the goods which they had sold him on credit were yet on hand as part of the stock, or that Fletcher & Churchman tempted him to make the preference by offering to employ him as stated. If the employment of Craft had been subsequent to the sale instead of before it, and part of the consideration of it, and the preference had been otherwise free from objection, other creditors would have had no right to complain, for they would have sustained no legal injury. If it be admitted — and I do not think it can — that an insolvent debtor may make the best arrangement in his power with his creditors, preferring those who offer the best terms, then all creditors should have a chance to bid for the assets.

It is urged for Fletcher & Churchman (1) that, admitting the sale to them to have been fraudulent in fact, the proceeds have been applied as a preference in payment of an honest debt, and equity will not interfere; and (2) that the sale being at most only constructively fraudulent, they had a right to hold the property as a security for their debt, and therefore they were entitled to the proceeds. The first of these propositions is unsound, both in law and in morals. One or more creditors of an insolvent debtor are not allowed to take his property by a fraudulent arrangement, convert it into money, and, because the debtor had a right to make an honest preference, defy the other creditors. If a debtor make a voluntary assignment, which is afterwards set aside as fraudulent, the acts of the assignee performed in good faith, in the execution of the trust, will not be disturbed. He will not be held to account for the property or its proceeds which have been paid out by him in good faith to the creditors. This is the law whether the assignment be fraudulent in fact, or only constructively so. *Grover v. Wakeman*, 4 Paige, 23; *Amos v. Blunt*, 5 Paige, 13. And when a sale is not tainted with actual fraud, but is fraudulent merely by construction of law, it is sometimes allowed to stand as a security for the grantee or vendee. *Tripp v. Vincent*, 8 Paige, 176; *Weeden v. Hawes*, 10 Conn., 50; *Bump*, Fraud. Conv., 597. But when a fraudulent scheme or purchase, by which a creditor gets the property of an insolvent debtor, is set aside in a suit brought by another creditor against the fraudulent grantee or vendee, he will not be allowed to share with the plaintiff the proceeds of the property. *Wilson v. Horr*, 15 Iowa, 489; *Riggs v. Murray*, 2 Johns. Ch., 565; *Harris v. Sumner*, 2 Pick., 129.

No general rule can be laid down, applicable to all cases of fraudulent sales, assignments and preferences. The relief granted in a given case depends largely on the facts of that case. "Equity," say the court in *Clements v. Moore*, 6 Wall., 312 (§§ 553-57, *supra*), "looks at all the facts, and, giving to each its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in a court of law." The complainants, before bringing this suit, obtained judgments on their claims against Craft, and executions were issued, upon which there were returns of no property. If the property had remained in the hands of the respondent until the bill was filed, the complainants would have acquired a lien on it to the exclusion of other creditors, and they had a right to pursue the proceeds in Fletcher & Church-

man's hands with the same result. The aggregate amount of the judgments is less than \$20,000, and Fletcher & Churchman admit that they realized as much from the goods.

I hold, on the facts in the case, that the complainants are entitled to a decree against Fletcher & Churchman for the full amount of their judgments.

Since the court's finding announced for the complainants, other creditors have asked to be made parties to the suit as co-complainants. This may be done, but these creditors will be postponed in favor of complainants. *Weed v. Pierce*, 9 Cow., 722.

PHETTIPLACE *v.* SAYLES.

(Circuit Court for Rhode Island: 4 Mason, 312-325. 1826.)

Opinion by STORY, J.

STATEMENT OF FACTS.—This is a suit in equity, brought by the plaintiff, a judgment creditor of the defendant Daniel Sayles, to set aside a release and composition discharging the debt, and to obtain other relief against the judgment debtor, and also against his son the co-defendant, Hardin Sayles, as the asserted owner of certain real and personal estate of his father, under a conveyance made to defraud creditors.

The circumstances of the case are as follows: The plaintiff commenced suits for the recovery of the debts due him from the defendant, Daniel Sayles, in May, 1817, and obtained judgment thereon at December term of the court of common pleas in the same year. On the first day of the same month, and pending the suits, the defendant, Daniel Sayles, conveyed to one Cyrus Sayles (his nephew) in fee simple for the asserted consideration of \$1,000, the farm on which he (the defendant) then lived, and has ever since continued to live, with the dwelling-house, barn, mill, etc., thereon, and also a wood lot of about twenty acres. On the 13th of March, 1818, Daniel Sayles conveyed certain real and personal estate therein mentioned (not including that conveyed to Cyrus Sayles), to one John Wood, in trust to sell the same, and to distribute the proceeds among certain scheduled creditors (including the plaintiff), who should accept the assignment, with a proviso, that the conveyance should be void, unless the creditors to one-third of the amount of the debts should accept the same in writing, and discharge him from their debts. In April, 1818, Daniel Sayles being in gaol on execution by some of his creditors, filed a petition to the general assembly of Rhode Island, praying for the benefit of the insolvent law of that state. In this petition he sets forth that he has nothing to offer as an inventory of property but his wearing apparel, his "property being all assigned for the benefit of all the creditors who may choose to accept the same." The petition was granted by the general assembly at its June session, 1818, and the petitioner having in the meantime, on the 8th of May, been committed on executions, which issued on the plaintiff's judgments against him, was in the usual manner discharged therefrom under the insolvent law. An instrument of release bearing date the same day with the assignment to Wood, and reciting the purport of it, was executed by the scheduled creditors, and among others by the plaintiff, accepting of the assignment, and upon payment of their distributive shares (which have been received), discharging their debts. The plaintiff did not sign this instrument until after the debtor was discharged under the insolvent act. There is an allegation in the bill that the debtor also conveyed real estate and personal

estate to the amount of \$1,500 to his son Hardin, to defraud his creditors. But neither the answers nor the evidence take any, even the slightest notice of this matter, and it was abandoned at the argument.

The bill, after stating the substance of these facts, proceeds to charge that the plaintiff signed the release, believing that the assignment was an honest assignment of all the debtor's property, "and at the time the creditors signed said release and took said assignment, the said Daniel represented said assignment to contain all his property of every kind, and fraudulently concealed said real estate and personal property from them, and that the creditors, and especially the *plaintiff*, was ignorant of the said Daniel's owning this property, confided in his said representation and thereupon, and so confiding in the same, signed said release." This is the charge laid to invalidate the release; and although the charge is not made with technical precision and accuracy (and indeed in many respects the bill is inartificially drawn); yet I think that it is sufficient, if proved, to require from the court a decree which shall declare the release a nullity. A deed procured by a fraudulent misrepresentation cannot be permitted to have the slightest validity to bar rights in a court of equity.

The bill then proceeds to state that Enoch Steere, another of the releasing creditors, has assigned his debt to the plaintiff. But no facts are stated as to the time when the assignment was made, nor whether it be such as can, with the limited jurisdiction of this court, under the eleventh section of the judiciary act of 1789, ch. 20, be maintained in this court; nor even any allegation that there has been any fraud in respect to this debt, either on the creditor or the assignee. We may, therefore, dismiss all consideration of this part of the bill as utterly inadmissible for any purpose of relief.

The bill then proceeds to state that Cyrus Sayles, in December, 1819, by his deed (which is in fact a mere release), conveyed the same farm and lot of land to Hardin Sayles for the pretended consideration of \$1,100, but in fact for the same purpose of defrauding the creditors of Daniel Sayles, and that he is now in possession thereof. It charges that Hardin was a party and privy to the original fraud upon the creditors, and took an active agency in the transactions, and that the defendants are now in possession of property of Daniel Sayles more than sufficient to pay all his debts.

The prayer of the bill is for general relief. The defendants, by their answers, expressly deny any fraud, and assert that the conveyances to Cyrus Sayles, and from him to Hardin, were made for a valuable consideration and *bona fide*; and that there was not any fraudulent misrepresentation by the debtor to obtain the release, as suggested in the bill. The general replication having been filed, the cause has been argued upon the whole evidence in the case, and is indeed principally a question of fact.

§ 560. *If there be a fraudulent conveyance or concealment of his property by a debtor, or any artifice used to mislead, or to make the property assigned appear to be the whole property of the debtor, equity will set aside a release given by a creditor; but otherwise, if, at the time of executing the release, the creditor knew of such fraudulent conveyance.*

The first question for consideration is whether there has been, on the part of the debtor, any fraudulent misrepresentation to procure the release. I agree to the doctrine, that the mere fact that the debtor had previously made a fraudulent conveyance, is not of itself sufficient to set aside the release. If the creditor knew of such conveyance, there is no pretense to say that he

would not be bound by his release, for he would act with his eyes open. And if he is wholly ignorant of it, and gives a release without any artifice to mislead him, or any attempt to make the property assigned appear to be the whole property of the debtor, it would be going a great way to affirm that he would be entitled to relief, if upon more reflection and better advice he should find that he had concluded an unfavorable bargain. But if there be a concealment of property or a fraudulent conveyance by the debtor, with intent to mislead the creditor, and under such circumstances the creditor, trusting to the good faith and honesty of his debtor, signs a release, I should be sorry, that at least in a court of equity, there might not be found sufficient morals in the law to defeat such overreaching baseness. *A fortiori* an actual or direct misrepresentation ought to have this effect.

It has been further argued that the assignment to Wood was fraudulent, because it stipulated for benefits on the part of the debtor, which he had no right to demand. I agree that it would be so in relation to creditors, who should not choose to come in and confirm it. But except as to such creditors, it would certainly be valid; for it is competent for other creditors to waive their rights; and it is impossible that there can be any fraud upon those who deliberately, voluntarily, and with knowledge of all the facts, assent to the terms of the debtor. The whole question, therefore, turns upon the point of misrepresentation to the creditors who have signed the release.

§ 561. *When a person takes the benefit of the insolvent act, his petition to the legislature is a representation to it and to his creditors of what his actual condition is, and the latter will be presumed to know of such representations and acts.*

Now what are the circumstances of the present case? It is said, that there is no proof that the debtor ever did represent that the property assigned to Wood was his whole property, as an inducement to the release. That is true, if by proof is intended a personal, direct, and unequivocal declaration. But are not the facts in evidence tantamount to such a declaration? The assignment was made to Wood in March, and the petition to the legislature in the succeeding April. That petition contains an express affirmation, on oath, that the party had no property except his wearing apparel, which had not been assigned for the benefit of all his creditors. This was in no sense a private document; but a public representation as well to all his creditors, as to the legislature, of the actual posture of his affairs. Upon the faith of this document, the legislature granted him the benefit of the insolvent act, and thereby discharged him from imprisonment under the executions of his creditors, and particularly of the plaintiff. The act went farther, and presuming a rightful legislative authority, it undertook to discharge the party from all the debts of all his creditors. Every creditor might be presumed to be conversant of public representations and acts so vitally affecting his own rights and interests. And what is most material to the case, the plaintiff did not sign the release or accept of the assignment to Wood, until after these transactions were passed and notorious. The plaintiff must therefore be presumed to have known the facts stated in the petition, and to have acted under the most entire reliance upon the good faith of the party. The defense of the debtor himself does not attempt to impeach this conclusion. On the contrary, his answer asserts that the assignment to Wood "was a fair and honest assignment of all the real and personal estate of every kind and nature belonging to" *him*, and that *he* "delivered to the said Wood, under said assignment, all and every part and

kind of property belonging to *him*, or to which he had any claim or title, and received from his said creditors the release and discharge stated in said bill, and which he now relies upon as a defense against the unjust claim of the complainant;" and he proceeds to deny "that at the time of making said assignment, and obtaining said discharge, he made any false representations as to his insolvency, the amount of his debts, or property, or that he in any way deceived any of his creditors in regard to his ability to pay his debts, but that said discharge was voluntarily executed by said creditors." The plain import of all this is, that he had made no fraudulent conveyance of his property; that his representation was therefore true, and that his creditors under the assignment to Wood, were entitled to have, and in fact had, the full benefit of all his property. If this be so, then the release ought to stand; if otherwise, then upon principles of common justice it ought to be set aside.

The material question, therefore is, whether the debtor had at this time made a fraudulent conveyance of real or personal estate for the purpose of cheating his creditors. I say of real or personal estate, for it is sufficient if either existed, since to the extent of the property so concealed or subducted, there was a fraud upon the creditors, and a misrepresentation of the debtor vitally affecting the release.

Two conveyances are relied upon by the plaintiff as fraudulent; *first*, the conveyance of the farm to Cyrus Sayles; *secondly*, the conveyance of personal property to Polly Smith.

And *first*, as to the conveyance of the farm to Cyrus Sayles. This was made on the first day of December, 1817, a short time before the judgments obtained by the plaintiff and for the asserted consideration of \$1,000. The debtor was, at this time, beyond all question, insolvent, and in a few months afterwards, applied for the benefit of the insolvent act. He notwithstanding possessed a right to sell the farm, or any other property for a full and valuable consideration, and *bona fide* to any person whatsoever. He might sell to his nephew as well as to any other person, although such a sale by an insolvent debtor to a relation would naturally excite more suspicion than a sale to a mere stranger. Still if *bona fide* made, for a fair consideration, and without any design to defraud creditors, the sale would be entirely valid in point of law. So the debtor had a perfect right to prefer one creditor to another; to pay one and omit to pay another; to give security to one and refuse it to another; and a previous debt would be just as good a consideration to uphold a sale, as money paid at the moment. All that the law requires in such cases is good faith and honest intentions between the parties. If there be bad faith, or an intention to defraud creditors, no consideration, however valuable, will give effect to the deed against third persons, who are injured by it. As to them, it is utterly void and unsupportable.

The manner in which the consideration was paid by Cyrus Sayles is stated in the answers to be as follows: *first*, about \$400 due on an antecedent mortgage of the estate to one John Arnold, and paid by Cyrus Sayles; *secondly*, a debt due upon notes of the grantor to Cyrus Sayles himself, for work and labor, of about \$375; *thirdly*, a debt due to one Ziba Whipple by the grantor, and paid by Cyrus Sayles; and *lastly* the balance in money paid to the grantor. These statements being responsive to the matter of the bill, in its charges and interrogatories, is evidence in favor of the defendants; and if they are not overturned by counterproofs or circumstances, they are decisive on this point.

The burthen of proof of fraud, indeed, rests on the plaintiff; and the fraud being explicitly disavowed by the answers, the plaintiff must maintain the suit by his own strength.

§ 562. *To prove fraud it is not sufficient to show circumstances of suspicion or doubt; the fraud must be established beyond a reasonable doubt.*

This then being the posture of the case, it is necessary to consider whether the circumstances relied on as presumptive of fraud are of such a nature as ought to outweigh the positive denials of the answers. It is not sufficient for the plaintiff to show circumstances of suspicion or doubt, or even of inflamed suspicion or doubt. Nor is it sufficient to establish contradictions in the testimony of either party, which might induce the court to pause or hesitate as to the side on which the truth lies. He must go farther, and establish beyond a reasonable doubt, that the weight of evidence and circumstances is so decisively in his favor as to destroy the ordinary credit of the answers.

There are some facts in the case which are not disputed, and indeed are incontrovertibly proved. One is, that at the time of the conveyance, Daniel Sayles was *bona fide* indebted to Cyrus in a sum exceeding \$300, and probably from \$375 to \$400. Another is, that there was due to John Arnold, on his mortgage, upwards of \$400, which was secured and finally paid to him by Cyrus. The weight of evidence also is, and it is positively sworn by Ziba Whipple, that a debt of Daniel of about \$100 was transferred by him (Ziba) to Cyrus, and formed a part consideration of the conveyance. A small sum of money, not probably exceeding \$100, appears to have been paid by Cyrus to Daniel at the time of the execution of the deed. It may be taken also as a fact, that the farm was not at the time worth more than \$1,000. There is some testimony in the cause to establish a higher value; but it is encountered by stronger testimony on the other side; and the argument itself does not affect to place much reliance on a supposed undervaluation to discredit the sale. Indeed, considering that there was no release of the wife's dower, and that the time of the sale was a period of great depression, it would be very difficult upon the proofs to doubt, that if *bona fide*, the sale was for the full value of the estate.

What then are the circumstances, on which the plaintiff relies, to establish a fraud in the face of these facts? At most, the excess of value, beyond debts actually extinguished or provided for, did not reach \$200; and the whole machinery of fraud must have been deliberately got up to cover an insignificant sum, such as would not commonly tempt a party to very extraordinary subterfuges and evasion.

§ 563. *In equity the court will not allow re-examination of a witness whose testimony has been closed, without good cause shown, and a deposition taken without an order of court for cause will be suppressed.*

One circumstance, on which the plaintiff relies, is, that Cyrus Sayles, in one of the three depositions given by him as a witness, has asserted that three fictitious notes were made by Daniel to him, antecedently to the conveyance, for the purpose of swelling the balance due to him, so as to cover all the purchase money. If this statement were confirmed by the proofs it would be entitled to very great weight in the cause. But there is some difficulty in admitting it. The deposition, here alluded to, was taken in another and prior cause, pending in another court, and not in the present cause. It forms no direct and positive proof of itself, and can be used in no other manner than to affect the credibility of the other testimony of the witness. The plaintiff himself, in

February, 1825, took the deposition of the witness under a commission, as evidence in this cause, and the defendants, on that occasion, cross-examined him. It is certainly not for the plaintiff, under such circumstances, to impeach the credibility of his own witness. The most that he is entitled to do is to substantiate, by other witnesses, any material facts which that witness has misstated. Afterwards, in June, 1825, the defendants, without any order or leave of the court, took the deposition of the same witness, under the same commission, and the plaintiff, on that occasion, on his cross-examination, brought out the fact of the first deposition, and procured a verified copy of the same to be annexed to the cross-examination. The magistrate, before whom it was taken, has also proved the original. It is in this manner that the first deposition has found its way into the cause. An objection has been taken by the plaintiff to the use of the third deposition, upon the ground, that, after the first examination of the witness was completely closed on each side, it was irregular to re-examine him without an order of the court. It is certainly the practice of the court of chancery not to allow a witness, whose examination has been once taken and closed, to be re-examined without an order of the court, and then only upon good cause shown. Wyatt's Prac. Reg., 420; Harris, Ch. Pr., ch. 42, p. 273; 2 Ch. Ca., 217; Sawyer v. Bowyer, 1 Br. Ch., 387; Sandford v. —, 1 Ves. Jr., 399; Kirk v. Kirk, 13 Ves., 280, 285. The reason assigned for the rule is, to prevent perjuries, and tampering with witnesses, after the pressure of the evidence is known. I think the practice a salutary one; and shall adhere to it on this occasion, and direct a suppression of the third deposition. The first deposition would still be in the cause, as it is regularly before the court, by the testimony of the officiating magistrate; but the difficulty is, that it is not evidence in chief, and can be used only to discredit the witness by a party entitled to use it for that purpose. The plaintiff, having taken and used his testimony, is certainly not in this predicament. The only deposition of the witness, then, which can be examined by the court, is the second, and that is so far from supporting the plaintiff's allegations, that, if it be entitled to credit, it comports mainly with the defense. It is, too, corroborated by the testimony of the magistrate, before whom the deed of Daniel Sayles to Cyrus Sayles was executed and acknowledged.

§ 564. *Possession of real estate by the grantor after a sale does not raise per se a presumption of fraud, as it does in the case of personal estate.*

Another circumstance, relied on to invalidate the good faith of this conveyance, is, that no change of possession took place, but the grantor continued in possession notwithstanding the sale, and occupied the farm as he had been accustomed to do. This circumstance is not without weight, and in a doubtful case would incline the court not to yield any just suspicions arising from other causes. But possession, after a sale of real estate, does not *per se* raise a presumption of fraud, as it does in the case of personal estate. In the latter case, possession is *prima facie* evidence of ownership, and where a party, who is owner, sells personal property absolutely, and yet continues to retain the visible and exclusive possession, the law deems such conduct a constructive fraud upon the public, and the sale, as to creditors, wholly inoperative, whether it be for a valuable consideration or not. This doctrine has its foundation in a great public policy, to protect creditors against secret, collusive transfers. The same rule does not apply to real estates. Possession is not here deemed evidence of ownership. The laws of most civilized nations require solemn instruments to pass the title to real property; and in Rhode Island, as in most of the states

in the Union, a deed executed with due formalities, and acknowledged before a magistrate, and recorded in the public registry, is indispensable to make a perfect transfer of real estate. The public look not so much to possession as to the public records, as proofs of the title to such property. The possession, therefore, must be inconsistent with the sale, and repugnant to it in terms or operation, before it raises a just presumption of fraud. Now, in the present case, there is nothing of this nature. Admitting that there was an understanding, that if Daniel Sayles should be able he might re-purchase the estate, at a future time, by paying a sum equal to the original price, there is nothing fraudulent in such an agreement. If *bona fide* made, by parol or in writing, there is nothing in law or morals, that repudiates it. Then as to the possession of Daniel, during the succeeding winter, that would not be an unusual indulgence granted upon any sale. There is no pretense to say, that the conveyance was, for a moment, kept secret. It was put on record as soon as it was executed, and became notorious. The subsequent lease to Hardin Sayles, under which he and his father remained in possession until the sale to him in May, 1819, at a stipulated rent, is certainly compatible with a real and *bona fide* change of the ownership.

But it is argued that the sale itself to Hardin Sayles is evidence that the sale originally made to Cyrus Sayles was merely nominal. First, it is said, that this second sale was originally contemplated by the parties. But in what manner? It was solely upon the ground that Hardin should be able to pay to Cyrus a full consideration for it. There is certainly nothing unnatural, immoral or illegal, in a son's wishing to repurchase for his father the family estate, which the latter is compelled to sell. And if the purchaser is willing to accede to such an agreement, I am not prepared to admit that a transaction, otherwise *bona fide*, would be tainted by it. The most that can be said is, that it may justly be deemed a circumstance corroborative of marked badges of fraud, but of itself it cannot create a fraud.

Then again it is urged that Hardin Sayles was a young man, without family and without property, and therefore not likely to make such a purchase, or to be credited for it on his own account. It appears, however, that though just of age he was enabled from his industrious habits to obtain credit, and that he has since been pursuing a profitable business by which he has discharged the whole purchase money for the estate. It is not unnatural that he should, from filial affection, have been willing to incur considerable personal responsibility to save his parent, with whom he lived, from absolute ruin and suffering. I agree that his conduct should, under such circumstances, be closely watched, but taking the whole evidence together I cannot say that there is anything, after his purchase, to lead to any just question of his being a fair purchaser on his own account, and not a mere trustee, acting *in fandum legis* for the benefit of his father. The acts and language of his father in respect to the farm, after the purchase, are quite consistent with the absence of any farther interest than age, experience, and the ascendancy of the parental character would ordinarily imply. If, however, his acts and language should be thought to raise some doubts, still it is to be remembered that, in a case like the present, doubts are not sufficient to justify a decree for the plaintiff.

I pass over all particular notice of the sale of the cotton goods supposed, but not proved, to have been the property of Cyrus Sayles, and of the application of the proceeds towards the payment of the mortgage of John Arnold, because I am not satisfied by the evidence that this payment originally con-

stituted a part of the agreement on the sale to Cyrus Sayles, nor that, when applied, it was not a debt incurred by Cyrus to Hardin Sayles. I do not say that the transaction is free of doubt, but it is susceptible of different explanations, and my mind does not repose with confidence on it. It certainly ought not to outweigh the positive denials of the answers of both of the defendants as to the integrity and good faith of both conveyances.

There are other circumstances upon which I might comment, but they are far more slight than those which have been mentioned. The court cannot feel itself at liberty to set aside deeds of real estate upon the ground of fraud unless that fraud is manifest beyond a reasonable doubt. It is not to substitute conjecture for proof, nor suspicion for plain, direct, positive presumption.

§ 565. *An omission by an assignor in his inventory, of property which he had actually sold bona fide, although the sale was invalid as to creditors, is not sufficient to raise a presumption of fraudulent misrepresentation.*

2. It remains to examine the conveyance of personal property by Daniel Sayles to Polly Smith. That the grantor was truly indebted to the grantee, in the full amount of the consideration stated in the bill of sale, is not denied, and indeed, upon the evidence, admits of no dispute. That the personal property so conveyed, consisting partly of stock of the farm, and partly of household furniture, was left in the absolute possession of the grantor, is not disputed. Under such circumstances, even if *bona fide* made between the parties, it was, in contemplation of law, as I have already stated, void as to creditors; but between the parties themselves it was undoubtedly valid. It is clear that there was no intention to cheat the creditors by a pretended sale, or by any secret contrivance whatsoever. The parties evidently acted upon a misconception of the law, from sheer ignorance and not from guile. How else shall we account for the fact that the notes for the debt were given up, and a perfect confidence placed in this bill of sale, not as a sufficient, but as a legal and the only indemnity which the party could give. There is no evidence which establishes that the property was equal in value to the amount of the debt; and as far as it goes, the evidence strongly inclines the other way. If, then, between the parties this was a good bill of sale, however ineffectual it might be against creditors, if they chose to enforce their rights, what ground is there for the court to say that the omission, by Daniel Sayles, to include this property in his inventory, was a fraudulent misrepresentation? The bill of sale was not void, but only voidable; not voidable by himself, but by his creditors only. It seems to me that it would be going very far for a court to hold that a bill of sale merely constructively fraudulent, and which the party himself in honor and honesty could not contest, was yet property which he was bound to include in his inventory as his own property. My judgment is that a transaction innocently intended, but failing, from the ignorance of the parties, to effectuate their object, ought not to receive such an interpretation.

Upon the whole, my judgment is that the present bill is not, upon the evidence, sustained in its material allegations, and therefore it ought to be dismissed; but I do not think it a case for costs. The district judge concurs in this opinion, and therefore there is to be a decree of dismissal.

§ 566. *In general.*—The word “good” in the sixth section of the statute of 13 Elizabeth is held both in courts of law and equity to mean a valuable consideration. The law as thus expounded embraces three kinds of conveyances. (1) Those with a fraudulent intent in both parties, which are declared void as well by the enacting part of the law as by the exemption from the saving in the sixth section, without regard to the consideration. (2) Voluntary con-

veyances made for a good consideration, without fraud in fact, but as they tend to defraud creditors if they vest the property, the policy of the law makes them void for legal fraud, which it imputes to them on account of their tendency, which is deemed equivalent to actual fraud. (8) Conveyances for valuable consideration, *bona fide*, without notice of any fraud or covin by the person receiving the conveyance, which are excepted out of the statute, are valid at common law to pass the property conveyed, and entitle the purchaser to protection in all courts. *Magniac v. Thompson*, 1 Bald., 344.

§ 567. The act of 18 Elizabeth, chapter 5, relating to fraudulent conveyances, is in affirmance of the common law, and is in force in New Jersey. *Ibid.*

§ 568. The statute of 13th of Elizabeth, chapter 5, concerning fraudulent conveyances, was declaratory of the common law, and in the absence of such legislation the common law would have accomplished the same results. *Sumner v. Hicks*, 2 Black., 532 (§ 982).

§ 569. Without deciding whether a verdict may present a case to the court which, though it does not contain a specific finding that a deed is covinous and fraudulent, or made to deceive or delay creditors, may contain such equivalent matter as will in point of law show the deed to be void, it is held that mere evidence of fraud, circumstances which may or may not accompany covin, do not constitute such a case. *Wright v. Stanard*, 2 Marsh., 311 (§ 864).

§ 570. It is held, in Michigan, that a deed fraudulent as to creditors is not void but voidable only. *Wilkinson v. Yale*, 6 McL., 16.

§ 571. The federal courts will follow the construction of the local courts on local statutes against fraudulent conveyances. *Allen v. Massey*,* 17 Wall., 351; *Sumner v. Hicks*, 2 Black., 532 (§ 982); *Lloyd v. Fulton*, 1 Otto, 479 (§§ 850-51); *Heydock v. Stanhope*, 1 Curt., 471.

§ 572. Intent to defraud.—The statute of the 18th Elizabeth concerning fraudulent conveyances has been adopted in Texas. And the supreme court in that state holds that when a deed is a mere pretense, collusively devised, and the parties do not intend other than an ostensible change of property, as to creditors the property does not pass; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with intent to defraud creditors, that the conveyance is void. *Chandler v. Von Roeder*, 24 How., 224.

§ 573. Upon the question whether a conveyance made by a debtor is void as made to defraud creditors, the intentions of the debtor alone will not control; the intentions of both parties to the conveyance must be ascertained. *Jenkins v. Einstein*,* 3 Biss., 128.

§ 574. Fraud in fact, or actual fraud, as to creditors, is defined in this case to be an intention to injure, defraud or delay or prevent them from recovering their just debts, by any contract, gift, deed, settlement or agreement, withdrawing or attempting to withdraw the property of the debtor from the reach of his creditors. *Magniac v. Thompson*, 1 Bald., 344.

§ 575. Under the law of Maine, a conveyance made with all the formalities of the law, and for a consideration, but made with intent to hinder, delay, or defraud creditors, is good and passes the estate as between the parties, and is voidable only at the election of the creditors. And as against a creditor whose interest it is that the conveyance shall be sustained in order that he may abandon his levy upon the land so conveyed and procure a levy upon other lands of the debtor, as he is allowed to do in such case under the laws of Maine, where the lands first levied on do not pass by the levy, the debtor can not be permitted to set up his own fraud to defeat the conveyance and sustain the levy. *United States v. Poole*,* 5 Fed. R., 412.

§ 576. Subsequent creditors.—A deed set aside as void as to existing creditors is also void as to subsequent creditors, and they all share *pro rata*. *Smith v. Kehr*, 2 Dill, 50; S. C., 20 Wall., 31.

§ 577. A subsequent creditor cannot be heard to impeach a conveyance on account of the fraudulent intent of the grantor, unless it appears that it was made with intent to hinder, delay, or defraud subsequent creditors. *United States v. Griswold*,* 3 Saw., 311.

§ 578. Where a conveyance is intentionally made to defraud creditors, it is void as to all subsequent as well as prior creditors. And if the conveyance is made with a view to defraud subsequent creditors, it is as to them void, although all prior creditors are fully paid. *Burdick v. Gill*,* 2 McC., 486.

§ 579. If a conveyance is avoided as fraudulent by existing creditors, the land or its proceeds goes to the creditors generally, including subsequent creditors; a conveyance fraudulent as to existing creditors being considered fraudulent as to subsequent ones also. *Pratt v. Curtis*,* 2 Low., 87.

§ 580. Assignment for creditors.—An assignment of all a man's property is not *per se* a fraudulent conveyance, and especially when done for the benefit of creditors. *Brashear v. West*, 7 Pet., 608.

§ 581. In Pennsylvania, an assignment by a debtor of all his property for the benefit of his creditors, but excluding all creditors who do not within a certain time execute a release of all their claims against him, is not constructively fraudulent. *Ibid.*

§ 582. An assignment for the benefit of creditors was held in this case to be fraudulent, an investigation of the circumstances of the debtor not showing any necessity for the failure, and the debtor, who attributed his failure to his acceptances, and who had received a large amount of property for his indemnity, having made other appropriation of the means thus received than the payment of the debts for which he was security, and having purchased valuable real estate in the name of a near connection. *Fuller v. Ives*,* 6 McL., 478.

§ 583. An assignment in trust for creditors to pay them a certain per cent. of their debts, in which participation in the assets is made dependent upon entering a release of the remainder of the debt, and there is no provision made for the distribution of the surplus among non-assenting creditors, is *per se* fraudulent and void. It is likewise void as to non-assenting creditors, where such provision is made in the deed, but where it is shown upon the face of the assignment and schedule annexed to it, to a moral certainty, that nothing will be left for such non-assenting creditors. *Seale v. Vaiden*,* 10 Fed. R., 381.

§ 584. To warrant the court in setting aside an assignment for the equal benefit of all creditors, at the suit of one creditor seeking to appropriate the whole assets to his own claim, the proofs of fraudulent intent must be clear and convincing. The fact that the debtor, by means of an answer without merits and through dilatory proceedings, delayed the recovery of the creditor's judgment as long as it was in his power, and made the assignment only at the last moment prior to the recovery, which could no longer be postponed, is not evidence of fraudulent intent. *Olney v. Tanner*,* 10 Fed. R. 101.

§ 585. An assignment for the equal benefit of all creditors, if legally complete and perfect, and is intended to devote and does devote all the debtor's property to the payment of his debts, cannot be rendered fraudulent by the subsequent remissness of the assignee. *Ibid*.

§ 586. An assignment, fraudulent and void as against creditors on account of its terms, may be made good by a second assignment, omitting the objectionable terms, and expressed to be made in correction of the first, where no creditor has acquired a lien in the meantime. *Sumner v. Hicks*, 2 Black, 532 (§ 982).

§ 587. It is held, in Massachusetts, that assignees of property, though the assignment be constructively fraudulent as to creditors, cannot be charged with its proceeds as trustees or garnishees, if their own claims against the debtor exceed the amount of such proceeds in their hands. *Beach v. Viles*, 2 Pet., 675.

§ 588. An assignment of all his property by a person hopelessly insolvent, not for the equal benefit or all his creditors, but those of them who will consent to accept sixty per centum of their demands in full satisfaction, which attempts to place the property beyond the reach of creditors for two years at the discretion of the trustees, and which contains a reservation in favor of the grantor of whatever may remain after the sixty per centum is paid to those creditors who agree to discharge him, is fraudulent as to creditors, and void both at common law and under the statute of Elizabeth. *In re Beadle*, 5 Saw., 351.

§ 589. A clause requiring a release and reserving the surplus to the debtor does not, under the law of Rhode Island, *per se* render void and fraudulent an assignment of all the property of a debtor for the benefit of his creditors. *Heydock v. Stanhope*, 1 Curt., 471.

§ 590. Preferring creditors.—A debtor in failing circumstances cannot prefer one creditor to another if fraudulently done. *Drury v. Cross*, 7 Wall., 299.

§ 591. Under the law of Rhode Island, an assignment with preferences is not *per se* fraudulent as to creditors not preferred. *Parker v. Phettiplace*,* 2 Cliff., 70.

§ 592. Though an insolvent debtor may prefer one creditor to another, yet if he conveys to a creditor in payment property worth a great deal more than the amount of the debt, the conveyance, as to the excess, will be fraudulent and void as to the other creditors. *Mitchell v. McKibbin*,* 8 N. B. R., 548.

§ 593. A preference by a debtor to one or more of his creditors affords no evidence of a fraudulent intention. *Thompkins v. Wheeler*, 16 Pet., 106.

§ 594. Whatever be the actual intention of the parties, no conveyance can be impeached as fraudulent as against creditors unless it is capable in point of law of executing or aiding in the execution of some illegal purpose. Thus a debtor may convey his property in payment of one creditor and thus defeat the execution of another creditor about to be levied, and his intent in doing this is immaterial. *Heydock v. Stanhope*, 1 Curt., 471.

§ 595. Section 1420 of the Mississippi code of 1871, declaring that an attachment may issue where a debtor has disposed of his property "with intent to defraud his creditors or give an unfair preference to some of them," does not render fraudulent a preference which tested by the rules of law is legal. And to be illegal the preference must be actually fraudulent. *Fitzpatrick v. Flannagan*, 16 Otto, 648.

§ 596. If an assignment of property by way of security is concealed for the purpose of defrauding creditors, it is void as to all creditors injured by the fraud. *DeWolf v. Harris*, 4 Mason, 515.

§ 597. If an insolvent debtor appropriate the whole of his property in payment of the debt of a preferred creditor, it is not constructively fraudulent. *Pomeroy v. Manin*, 2 Paine, 476.

§ 598. In Ohio a failing debtor may prefer creditors, if the preference is in good faith, and under circumstances repelling a fraudulent purpose. *Coolige v. Curtis*, 1 Bond, 222; *Parrish v. Danford*, 1 Bond, 345.

§ 599. Partnership.—A firm, with knowledge that its members are individually insolvent, has no right to dispose of firm property under circumstances which will render such disposition a fraud upon the creditors of the individual members. *Parrish v. Danford*, 1 Bond., 345.

§ 600. A partnership composed of two members having expired by its own limitation, one of the partners and his brothers purchased the interest of the other, giving their note with one H. as indorser. This firm continued the business, and, subsequently becoming embarrassed, offered to their creditors payment in goods at eastern cost, or notes held by them. Many of the creditors accepted this offer and were paid in this way. Afterwards, the firm being indebted to H. for advances, sold to him their entire stock at seventy-five cents on the dollar at eastern cost, to secure the debt and to indemnify him for his liability as indorser. H. surrendered the note given for his debt, assumed the payment of the note upon which he was indorser, and, for the balance of the purchase money, gave his note, which the firm applied in payment of their debts. It was held that there was no fraud in this sale, nor in a subsequent assignment by the debtors of all their other property to H. for the benefit of all their creditors. *Walker v. Adair*,* 1 Bond, 158.

§ 601. If one of the motives of a transfer by one partner of his interest in the firm to his co-partner is to hinder and defeat creditors, the transfer is fraudulent at common law, although other considerations may have induced the conveyance. *Burrill v. Lawry*,* 18 N. B. R., 367.

§ 602. A transfer by an insolvent firm of all its property to one of the members, thus defeating the right of preference which the firm creditors have to be paid out of the firm property, can not be sustained in a court of equity. *Collins v. Hood*, 4 McL., 186.

§ 603. A distribution of partnership stock among the partners is not fraudulent as to creditors, when assented to by them. *Wilkinson v. Yale*, 6 McL., 16.

§ 604. Consideration.—If the parties to a sale intend by it to defraud creditors, the fact that it is made upon a full consideration will not make it valid. *Parrish v. Danford*, 1 Bond, 345.

§ 605. If a purchaser pays no consideration, his title is affected by the fraudulent intent of the grantor in making the conveyance. *Wilcoxon v. Morgan*,* 2 Colo. T'y, 473.

§ 606. Where one person, at the time insolvent, seeking a loan from another of \$10,000, prepared a note and mortgage for the amount, and only \$350 was loaned, and the same note and mortgage were used by crediting the difference on the note, the transaction was held not to be of itself fraudulent as to creditors, and the mortgage was held to be good as to the amount it actually secured, even though the circumstances cast suspicion upon the transaction. *United States v. Griswold*, 7 Saw., 296.

§ 607. A deed made upon a valuable consideration, where the change of property is *bona fide*, or such as it professes to be, is not fraudulent. It cannot be said of such a deed that it was made with intent to defeat or defraud creditors. *Wheaton v. Sexton*,* 4 Wheat., 508.

§ 608. Where a deed is attempted to be impeached by creditors or subsequent purchasers, on the ground of fraud, to be presumed from inadequacy of price, it is necessary for the jury to find, or for the case to state, the facts from which the fraud may be inferred. *Ridgeway v. Ogden*,* 4 Wash., 139.

§ 609. A mortgage, which is a mere security, is not rendered fraudulent because it conveys more property than is sufficient to secure the debt; nor is such fact a badge of fraud. *Downs v. Kissam*,* 10 How., 102.

§ 610. A release of her dower interest by a wife is a valuable consideration moving from her sufficient to support a conveyance, by the owner of the land, a stranger, of other land to her, as against the creditors of the husband. *Dick v. Hamilton*,* Deady, 322.

§ 611. A deed with a consideration merely nominal will, as respects creditors, be treated as voluntary. But to render a deed void, under the statute of Elizabeth, as respects creditors, it must be made with intent to hinder and defraud creditors. *Ridgeway v. Underwood*,* 4 Wash., 129.

§ 612. Where a debtor in failing circumstances, or actually insolvent, conveys his property to a creditor, even by a legal preference, for a grossly inadequate price, such conveyance is fraudulent as against other creditors. He has no right to cover up and conceal, or spirit away, any more property than is necessary to pay the creditor whom he legally prefers; the preference must be fair and just. *Jenkins v. Einstein*,* 3 Biss., 128.

§ 613. Inadequacy of consideration is not of itself sufficient to set aside a conveyance. It must be so inadequate as to clearly indicate the existence of some unfair dealing, some fraud, imposition, or oppression by the purchaser. *Ibid.*

§ 614. A conveyance of property by a debtor to his creditor is not vitiated by the depreciated value of paper of the debtor's firm, turned out as part payment for the property. *Ibid.*

§ 615. A conveyance of property for the purpose of defrauding or defeating creditors is void, however valuable or adequate the consideration paid may be. *Alexander v. Todd*, 1 Bond, 175 (§§ 838-42).

§ 616. The insertion in a deed of a consideration less than the real one paid is not of itself a fraud, if a fair and valuable consideration is in good faith paid or contracted to be paid. *Ex parte Knowles*, 2 Cr. C. C., 576.

§ 617. A mortgage, made by one in embarrassed circumstances, purporting to secure a debt of \$90,000 when only \$4,000 is owed to the mortgagee, is fraudulent as against creditors. *Hubbard v. Turner*, 2 McL., 519.

§ 618. A fee of \$10,000 secured by mortgage to a firm of three lawyers for defending a suit was held not to be so extravagant as to be fraudulent on that account, where the case involved \$143,000, of which \$85,000 for damages and as much more for forfeitures was well founded in fact and law; in which there were three jury trials each lasting several weeks, a motion for new trial and a hearing on error in the circuit court; and the preparation and trial of the case covered a wide field of inquiry and controversy, extending over nearly a quarter of a century, and from the Atlantic to the Pacific; and the time and labor given to it by the attorneys were unusual. *United States v. Griswoll*, 7 Saw. 296.

§ 619. Under recording acts.—By the code of Indiana of 1838, a mortgage, not recorded within ninety days after its execution, was fraudulent and void as against any subsequent purchaser or mortgagee for valuable consideration unless such mortgage should be recorded before the proving and recording of the deed or mortgage under which such subsequent purchaser or mortgagee might claim. *Wyman v. Russell*, 4 Biss., 307.

§ 620. The United States is a creditor of a surety on an official bond against whom it has recovered a judgment; and this, within the meaning of the statutes of Illinois making all conveyances operative, as to creditors, only from the time they are accorded. *Ross v. Prentiss*,* 4 McL., 106.

§ 621. Under the statute of Illinois of January 18, 1833, providing that as to creditors and subsequent purchasers without notice, deeds shall take effect from the time they are recorded, the notice does not apply to creditors, but to purchasers only. *Ibid.*

§ 622. The Code of Louisiana gives no effect to acts of alienation as against creditors or *bona fide* purchasers, unless they have been regularly registered. *Barker v. Barker*, 2 Woods, 87 (§§ 854-58).

§ 623. Under the statute of enrollment of conveyances, 1766, ch. 14, a contract to sell land, or an equitable interest in land, is not void for want of acknowledgment and enrollment. *Arden v. Brown*, 4 Cr. C. C., 121.

§ 624. The statute of Virginia, making an unrecorded conveyance void as to creditors and subsequent purchasers, does not make an unrecorded marriage settlement of the wife's goods upon her and her husband void as against the creditors of the husband. *Pierce v. Turner*, 1 Cr. C. C., 462.

§ 625. By the statute of New Jersey, of 1820, omission to record a conveyance of real estate avoids it only as to purchasers and creditors. *Magniac v. Thompson*, 7 Pet., 348.

§ 626. A contingent debt, likely to become absolute, and which afterwards does become absolute, is, both on principal and authority, enough to furnish a motive to make a fraudulent conveyance to hinder and avoid its eventual payment. But where the liability is contingent, like that of a warrantor or indorser, the conveyance cannot be considered as *per se* fraudulent. Circumstances indicative of fraud must exist. *McLaughlin v. Bank of Potomac*,* 7 How., 230.

§ 627. A defendant in ejectment, claiming under a judgment and execution in favor of a creditor of the grantor under whom the plaintiff claims, may show that the deed of the grantor is fraudulent and void as to the creditor. *Middleton v. Sinclair*,* 5 Cr. C. C., 409.

§ 628. Bailment.—If the owner of a slave permits her to remain in the possession of another for four years, and then the latter, without the consent of the owner, delivers her to a third person who keeps her for four years more, the possession of the two cannot be so connected as to make it a fraud within the statute of Virginia. *Auld v. Norwood*,* 5 Cr., 361.

§ 629. Mortgage of stock to be acquired.—The law of Massachusetts in equity is that a mortgage by a trader of stock to be acquired is valid. *Brett v. Carter*,* 2 Low., 458.

§ 630. Jurisdiction — Non-residents.—A state law making second liens, separated from the possession of the property, fraudulent and void as to the creditors of the person in possession, governs all property held in possession within its jurisdiction, although the agreement is made and the holder of the lien resides elsewhere. *Hervey v. Rhode Island Locomotive Works*,* 3 Otto, 664.

§ 631. **Innocent purchaser.**—Property conveyed in fraud of creditors can not be charged in the hands of a subsequent purchaser, unless he took with knowledge of the fraud. *Pratt v. Curtis*, * 2 Low., 87.

§ 632. **An executor whose duty it is to defend his title to the trust property is not permitted to make a contract with one assailing his title, that, in case the assault prevails, the property of the estate is to be divided between them.** *Wilson v. Jordan*, * 3 Woods, 642.

§ 633. **A purchase by an attorney from his client is not to be considered fraudulent on account of the relation between the parties, where the transaction is totally disconnected with that relation, where the attorney is not consulted as the attorney of the seller in the transaction, and where his advice does not suggest or consummate the bargain, or control the independent judgment of the seller in regard to it.** *Jenkins v. Einstein*, * 3 Biss., 128.

§ 634. **Burden of proof.**—Where defendants are apprised by a bill in equity that a conveyance between them is to be impeached as fraudulent, it is incumbent on them to contradict or explain every fact tending to cast suspicion upon it. *Alexander v. Todd*, 1 Bond, 175 (§§ 838-42).

§ 635. **If a wife, knowing that her husband is obtaining credit on the faith of her property, remains silent, this is not a fraud upon which the husband's creditors can charge her in equity.** *Bank of United States v. Lee*, 13 Pet., 107 (§§ 708-13).

§ 636. **Secret sale.**—A sale of goods is not fraudulent in law because kept secret. The secrecy is but a circumstance from which, connected with other facts, fraud may be inferred. *Warner v. Norton*, 20 How., 448 (§§ 716-19).

§ 637. **A deed not at first fraudulent may become so by being concealed, because by its concealment persons may be induced to give credit to the grantor.** *Barker v. Barker*, 2 Woods, 87 (§§ 854-58).

§ 638. **The declaration of a mortgagor, made after the execution of the mortgage, that the mortgage was only nominal and made to shield his property, cannot be received for the purpose of proving it to be fraudulent.** *Merrill v. Dawson*, Hemp., 568.

§ 639. **Subsequent transactions.**—Where a bill charges a fraud in the inception of the conveyance only, subsequent transactions cannot be inquired into except as evidence of the fraud charged. *Bank of United States v. Lee*, 13 Pet., 107 (§§ 708-18).

§ 640. **Equity will not permit an appropriation of a payment by creditors merely for the purpose of leaving an apparent indebtedness at the time of the execution of a trust deed by the debtor, in order to raise a presumption that the trust deed was fraudulent.** *Offutt v. King*, * 1 MacArth., 312.

§ 641. **A trust deed for the benefit of wife and children is not void as against creditors because the grantor reserves to himself the absolute power to sell and dispose of the trust property in any manner that he shall deem most advantageous to the beneficiaries, and the deed provides that the trustee shall execute deeds to the purchaser and invest the purchase money again as he shall be directed by the grantor; but that the property, however varied, shall be in the name of the trustee, for the benefit and use of the beneficiaries during the natural life of the grantor, and that at his death the trust funds are to be equally divided between his wife and children.** *Ibid.*

§ 642. **Pretended sale.**—A sale which is merely a pretended one, and made for the purpose of making the assignor a competent witness, is valid between the parties thereto and their privies. *Randall v. Phillips*, 3 Mason, 378.

§ 643. **Homestead and dower.**—If a husband and wife make a conveyance, which if *bona fide* would release her dower interests, and it is set aside at the instance of the assignee in bankruptcy of the husband as having been made to defraud creditors, the wife's claim for dower and the husband's right of homestead are extinguished. *Cox v. Wilder*, * 5 N. B. R., 448. *Reversed*, *Cox v. Wilder*, 2 Dill., 45.

§ 644. **In a libel for damages for collision, the respondents cannot raise the question whether the sale by which the libellant acquired the vessel was fraudulent and void as to creditors of the former owner, the respondents not being such creditors.** *The Schooner Lyon*, 1 Spr., 40.

§ 645. **Maryland act of 1729.**—It is not the intention of the act of Maryland of 1729, chapter 8, section 5, to give validity to any bill of sale or deed which would otherwise be, in law, fraudulent and void. *Smith v. Ringgold*, 5 Cr. C. C., 124.

§ 646. **Action on the case.**—In the absence of special legislation, a general creditor cannot maintain an action on the case against his debtor, or against those colluding and combining with him to make dispositions of his property, though the object is to hinder, delay and defraud creditors. *Adler v. Fenton*, 24 How., 407.

§ 647. **The relinquishment by a husband of his marital right in a legacy bequeathed to his wife, made prior to reducing it to his possession, is valid as against his creditors.** Till reduced to possession the creditors have no claim to it. *Gallego v. Gallego*, 2 Marsh., 285.

§ 648. **Indemnifying surety.**—While a fraudulent combination between an officer and the surety on his bond, for the purpose of shielding the property of both or either from just responsibility, and in contemplation of the delinquency of the former, would vitiate any agreement or instrument made with such design, the principal may convey property for the indemnity of the surety if done in good faith. *Leggett v. Humphreys*, 21 How., 66.

§ 649. **An heir at law of a married woman can not defeat a conveyance by her to an innocent purchaser for value on the ground that the conveyance of the land to her in trust for her son-in-law was made to defraud his creditors.** *Gridley v. Wynant*, 23 How., 500.

§ 650. **Power of revocation.**—It is only a general power of revocation, reserved to the grantor in a deed, which is a badge of fraud; whenever the consent of other independent persons is required, or an equivalent is to be substituted, there can be no objection to the power of revocation; it affords no evidence of fraud. *Bank of United States v. Lee*, 5 Cr. C. C., 319.

§ 651. **Where a bankrupt, having a claim for a large amount upon a foreign government for an unlawful seizure of a vessel and cargo, gave no information concerning it to the assignee, and made no further mention of it in his schedules except alluding to it as a claim upon the "Mexican republic subject to a mortgage," and he purchased all the effects for a nominal sum from the assignee in the name of his sister, the transaction was declared fraudulent and void upon the subsequent allowance of his claim.** *Clark v. Clark*, 17 How., 315.

§ 652. **May be seized on execution.**—In an action against a sheriff for seizing plaintiff's property on an execution against another, it is a good defense to show that the property has been conveyed to the plaintiff by the execution debtor in fraud of his creditors. *Hozey v. Buchanan*, 16 Pet., 215.

§ 653. **Assignees in insolvency may avoid the transactions of the insolvent for fraud or collusion where he could not, since they do not represent him merely but the creditors.** *Whetmore v. Murdock*, 3 Woodb. & M., 380.

§ 654. **An assignee in bankruptcy, being the representative of creditors, may maintain a suit to recover property fraudulently conveyed, where the bankrupt could not.** *Carr v. Gale*, 3 Woodb. & M., 38.

§ 655. **A transfer of property which is fraudulent and void as to creditors is so as to an assignee in bankruptcy.** *In re Morrill*, 2 Saw., 356.

§ 656. **Insolvency.**—All sales and transfers made with intent to delay, hinder or defraud creditors are absolutely void. And no man, knowing himself to be insolvent, can make a valid disposition of his property except for the benefit of creditors. *Parrish v. Danford*, 1 Bond, 845.

§ 657. **A mortgage to secure future advances is, as to the advances actually made upon the faith of it, good as against the assignee in bankruptcy of the mortgagor.** *Schulze v. Bolting*, 8 Biss., 175.

§ 658. **If a sale under execution is not made for the purpose of satisfying the judgment, but fraudulently to defeat subsequent incumbrancers, and the purchaser is not a bona fide one for value, his title is bad.** *Blanchard v. Brown*, 3 Wall., 245.

§ 659. **Badges of fraud.**—The subsequent conduct of a grantor in a deed of trust in disposing of property embraced in the deed, without the consent of the trustees or the *cestui que trust*, and without substituting an equivalent, is not, as between the grantor, or those claiming under him, and the *cestui que trust*, evidence that the deed was fraudulent. *Bank of United States v. Lee*, 5 Cr. C. C., 319.

§ 660. **A man in business made a conveyance of valuable property to a relative of his wife, for much less than its actual value, with a promise on the part of the vendee to allow the vendor to repurchase at the same price within a year. This promise was substantially fulfilled within the time by another relative of the wife taking a conveyance to hold for her, until he was paid his advance. At the date of the sale the vendor was financially embarrassed, and in a year thereafter went into bankruptcy. And within about a year after his discharge, a conveyance of the property was made to his wife in pursuance of an arrangement with the grantee in the second conveyance, upon payment by her of less than one-half of the nominal consideration of the original conveyance by the husband. During all this time the husband remained in possession and control of the property and took the rents and profits as his own. On a suit by a judgment creditor of the husband to subject this property to the payment of the judgment, the explanations offered by the defendants being indefinite, improbable and contradictory, it was held that the transaction from beginning to end was a contrivance to hinder delay and defraud existing creditors; and that the conveyance procured to be made to the wife was made to put the property beyond the reach of both existing and subsequent creditors.** *United States v. Griswold*, * 3 Saw., 311.

§ 661. **A person, while insolvent, and a short time before he took the benefit of the bankrupt law, made a deed to a relative. On his subsequent bankruptcy, he placed the property on his schedule and verified the truth of the schedule by his oath. Neither the grantee nor his heirs**

set up any claim of title to the land for fifty years thereafter, nor did it appear that they paid the taxes. The court instructed the jury that these circumstances were strong evidence that the deed was made to defraud creditors. *Bulkley v. Buffington*,* 5 McL., 457.

§ 662. It is no impeachment of a deed made upon a valuable consideration, and accompanied by a *bona fide* change of possession, that it is made to the use of the family of the maker. *Wheaton v. Sexton*,* 4 Wheat., 503.

§ 663. The holder is a creditor of the indorser of a note within the statutes against fraudulent conveyances. That, after the conveyance, the note is renewed with the same indorser, and without any new consideration, will not change the rule. It is the same pre-existing debt. *McLaughlin v. Bank of Potomac*,* 7 How., 220.

§ 664. Hymer conveyed a piece of land to his children by a warranty deed which was fraudulent as to creditors. Subsequently his creditors attached this land, upon the ground of the fraud, and it was sold under these attachments to Rogers for the sum of \$451. Shortly after this, Hymer again conveyed the land by warranty deed to Arnold for \$1,000. Later still he obtained a deed from Rogers for the amount the latter had paid at the sheriff's sale, Arnold having procured this to be done and paid the \$451. Under the local law a deed made to defraud creditors was void, the conveyance creating a resulting trust in favor of the grantor, and the property being liable to be sold under execution. There was evidence from which it might be presumed that part of the \$1,000 received from Arnold had been invested by Hymer for the benefit of his wife and children. It was decided under these circumstances that the deed from Rogers inured to the benefit of Arnold instead of the children of Hymer. *Arnold v. Hymer*,* 2 McC., 331.

§ 665. The complainants who had done work for the debtor who was a contractor, and had attached his land for the debt, brought a bill to remove the clouds upon the title so that they could sell the land to make their debt. The incumbrances sought to be removed were a judgment lien on the land, and a deed of trust made by the debtor to secure a debt which he owed to his wife, which incumbrances it was claimed were made and sought to be maintained for the purpose of hindering and delaying the complainants. It was further alleged that after bringing the bill the debtor and his wife sold the land to certain creditors for the amount of their debts, who had to remove the liens of two judgments, but had such judgments assigned to themselves to be held for contingencies; and that the deed of trust to the wife was assigned to one of these creditors, who became the purchaser under it. The contingency mentioned was the prevailing of the complainants' attachment over their purchase, in which case they could hold the two judgments and the deed of trust as prior to the attachment. It was held that this deed to these creditors should be set aside, and also the deed to the creditor under the deed of trust. *Bean v. Patterson*,* 12 Fed. R., 739.

§ 666. A person heavily in debt made a conveyance of lands for a consideration of about half their value, the grantor remaining in possession, cultivating the land and selling the timber, and the grantee exercising no acts of ownership or control over the property. It was charged and not denied that the deed was not executed until about four months after its date; and also that it was not delivered in any other way than by the recording of it. After the execution of the deed the grantee was present and participated in a negotiation for a loan of money to the grantor, to be secured by the same lands. Subsequent to the conveyance, and before the payment of the purchase money, as alleged, the grantor in his schedule, annexed to his petition in bankruptcy, verified under oath, made no mention of this indebtedness. It was held, under all the circumstances of the case, that this conveyance was made in fraud of creditors, and that the grantee was not an innocent purchaser. *Hudgins v. Kemp*,* 20 How., 45.

§ 667. A security taken for the repayment of money advanced for a son-in-law, to repair the frauds he has committed, even for the purpose of concealing the perpetration of them, cannot be deemed fraudulent. *Marbury v. Brooks*,* 7 Wheat., 556.

§ 668. A forger of certain notes conveyed all of his property to his father-in-law to be paid to the holders of the notes, hoping by this means to prevent a prosecution of the forgeries, and then absconded. The trustee participated in this hope and advised the forger to abscond. But the holders of the notes made no agreement to forbear to prosecute, nor had they any knowledge of the transaction at the time it was done. It was held that the conveyance was not fraudulent as to the other creditors of the forger. *Ibid.*

§ 669. A conveyance of land by a debtor, pending a suit against him and in anticipation of a judgment, where no purchase money is paid and no note or obligation taken therefor, and no change of possession takes place, is presumptively fraudulent. *United States v. Lotridge*,* 1 McL., 246.

§ 670. A mortgage made to save the mortgagee harmless on account of his having become security for the mortgagor, and on account of notes to be indorsed by the mortgagee for the

accommodation of the mortgagor, is not *per se* fraudulent as to creditors. *United States v. Hooe*,* 3 Cr., 73.

§ 671. In this case, the court concludes on the evidence that the complainant not only has not proved the fraud charged, but that it is disproved by the defense. *Collins v. Cleveland*,* 22 How., 246.

§ 672. Where the respondents had bought up the outstanding negotiable paper of a debtor at a discount of from seventy-five to eighty per cent., and received from him conveyances of his property in exchange for the paper, and also a mortgage of certain real estate as a further security for the same, estimating the paper so purchased at its full face value in the exchange, and had also been preferred in an assignment by the debtor for creditors, it was held (the local law allowing assignments with preferences), that these facts did not of themselves show fraud, or cast upon the respondents the burden of showing the fairness of the transaction. *Parker v. Phetteplace*,* 2 Cliff., 70.

§ 673. M. and his sister owned a farm jointly, which they sold in 1864, she permitting him to receive the entire price, \$4,000, and to invest it in his own name, partly in bonds and mortgages and partly in a farm. From that time she made no claim to any interest in this property, M. having collected the interest on the bonds and mortgages and treated it as his own, and worked the farm and sold its produce, and claiming title to it when inquired of as to his property. No accounts between them were kept and she held no evidence of indebtedness against him. In 1870, when suits were brought against him for debts growing out of his mercantile business, M. hurriedly made up an account between him and his sister, treating her as entitled to one-half of the \$4,000 and to one-half of \$1,500 of personal property which he had in 1864, and to \$1,250 interest, and to \$600 for labor and services, for which sum due her he conveyed to her the farm and the bonds and mortgages. His assets in the mercantile business nominally exceeded his debts by a very small margin, and besides the property transferred to his sister he had only \$1,300 of property, which he proceeded, a few days after, to convey to another relative. There was no evidence that the sister had any interest in the \$1,500 of personal property, or that she had not always considered her brother as the absolute owner of the property, or that there was any contract to pay her for her services. It was held that the transfers must be set aside as fraudulent as to creditors and the case referred to a master to take an account as against the sister of the property received by her, giving her proper credits. *Bartlett v. Mercer*,* 8 Ben., 440.

§ 674. The paper of an insolvent merchant was purchased in the market at a great discount, and the debtor made an assignment of property to the purchaser in payment thereof. A judgment creditor filed a bill to set aside this conveyance, alleging that this purchase was made under an agreement with the debtor that he was to share in the benefits of the discount, and that the property assigned in payment was held to this extent in trust for the debtor. The bill also attacked a general assignment for the benefit of creditors, as being a part of the same scheme. The answer denied the allegations positively, and the debtor testified in the same positive manner that there was no such arrangement. The court held that this evidence overcame the circumstantial and argumentative evidence on the other side, though agreeing that there was ground for suspicion. That this paper which the debtor had taken up, upon making the conveyance to the purchaser, was embraced in the general assignment, was held not to be improper, as there were other parties on the paper who had bound themselves to indemnify the debtor against it. *Parker v. Phetteplace*,* 1 Wall., 684.

§ 675. Where property was purchased with the money of the wife, and conveyed directly to her by the vendor, pursuant to an agreement entered into before marriage, *held*, no fraud. *The Bank v. Taylor*,* 2 Cr. C. C., 507.

§ 676. Where a railroad and rolling stock were leased for an indefinite time, the lessee to run, equip and extend the road out of the earnings, *held*, a fraud as against creditors. *Cleveland v. Railroad Co.*,* 7 Am. L. Reg. (O. S.), 536.

§ 677. A purchase without an examination of the title, and without being furnished with an abstract, is not a badge of fraud, where the purchaser has been the attorney of the seller, and knows or thinks he knows the title; and he loses on the transaction by having to pay off prior judgment liens. *Jenkins v. Einstein*,* 3 Biss., 128.

§ 678. Directors of an insolvent corporation will not be permitted to purchase the property as against creditors of the company. *Cleveland v. Railroad Co.*,* 7 Am. L. Reg. (O. S.), 536.

§ 679. And it seems that the consideration paid, and the disbursements for taxes and improvements, will not be a first lien as against a creditor. *Ibid*.

§ 680. Where A., while in prison for a small debt, conveyed to B. a large farm for the consideration of only \$250, and then swore out of jail, taking the poor debtor's oath, and immediately returned to the farm and continued to occupy it for many years, it was held to be evidence of a trust between A. and B. But being one to defraud creditors, it was held that a court of equity would not enforce it. *Hunter v. Town of Marlboro*, 2 Woodb. & M., 168.

II. CONTINUED POSSESSION BY VENDOR OR MORTGAGOR.

[See CONVEYANCES.]

SUMMARY—Federal courts follow state laws, § 681.—Rule of the common law; present rule in England; statute of Virginia, § 682.—Possession consistent with deed; property incapable of delivery, § 683.—Notice to creditor; sheriff not liable for levying on goods, § 684.—Ancient and modern doctrines, § 685.—Statute of 13 Eliz. in affirmance of common law, §§ 686, 691; the statute to be liberally construed, § 687.—Effect of the laws of a state to which vendor removes after conveyance, § 688.—Conveyance by husband in trust for wife, § 689.—Under recording acts, § 690.—Sale void under statute of Elizabeth, § 692.—Sale not per se fraudulent, §§ 693, 694.—Agent of seller continuing business as agent of purchaser; delivery of key, § 694.—Mortgages, §§ 695-700.

§ 681. On the question whether a sale is fraudulent on account of the continued possession of the property by the vendor, the courts of the United States will follow the state statutes and construe them by the precedents established by the decisions of the state courts. *Howard v. Prince*, §§ 701, 702.

§ 682. It was an ancient rule of the common law that the continued possession by the vendor of the goods sold was, *per se*, fraudulent, and rendered the sale void. But by the rule which now obtains in England, such possession is only presumptive evidence of fraud, the fact of fraud in suits at law being a question for the jury; and this is also the rule in Virginia. Under the statute of that state, section 1 of chapter 114, relating to fraudulent acts, it was held in this case that the presumption of fraud was negatived by the nature of the property, which consisted of fixtures in a tobacco factory, and by the fact that the purchase money was applied by the vendor in payment of creditors. *Ibid*.

§ 683. There is an exception to the rule declaring a sale or assignment fraudulent as to creditors where the possession remains in the grantor, where such possession is consistent with the deed, or where the property is at the time of conveyance abroad and incapable of delivery. In the latter case the title is complete, provided the grantee takes possession within a reasonable time after the property comes within reach. If he does not, the same inference of legal fraud arises as if the property had been originally capable of immediate delivery. *Meeker v. Wilson*, §§ 703-707.

§ 684. Notice of a conveyance of personal chattels unaccompanied with possession, which the law has pronounced a fraud, can not estop a creditor of his right to defeat the fraud. And if the law were otherwise, such notice could not render a sheriff, in levying an execution issued on a judgment of such creditor, responsible in damages, when otherwise he would not be. *Ibid*.

§ 685. By the common law, a grant or assignment of goods and chattels is valid between the parties, without actual delivery thereof, and the property passes immediately upon the execution of the deed. But as to creditors, the title is not perfect unless possession accompanies and follows the deed. The want of possession is considered by the modern authorities as constituting an actual fraud which renders the transaction void as to creditors. *Ibid*.

§ 686. The statute of 13 Elizabeth, ch. 5, is held to be only an affirmance of the common law. *Ibid*.

§ 687. A liberal construction should be given to the statute of Elizabeth against fraudulent conveyances. *Bank of United States v. Lee*, §§ 708-13.

§ 688. The act of the state of Maryland of 1729, chapter 8, section 5, providing that sales of chattels where the grantor remains in possession shall be void as to creditors unless recorded, has no reference to a case where the title has been vested in the purchaser by the law of another state, and the vendor has subsequently to the sale removed to the state of Maryland. *Ibid*.

§ 689. Under the statute of Virginia of 1785, declaring that where any reservation or limitation shall be made of a use or property by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall remain in another, the same shall be taken, as to creditors and purchasers of the persons remaining in possession, to be fraudulent; and that the absolute property is with the possession, unless such reservation or limitation is declared by will or deed proved by witnesses and recorded, it is held that a conveyance of personalty by a husband in trust for his wife is not fraudulent because the wife holds possession, where the conveyance is acknowledged and recorded pursuant to the act. *Ibid*.

§ 690. The law of Virginia against fraudulent conveyances, being the same as the acts of 13th and 27th Elizabeth, does not comprehend absolute bills of sale among those where the title may be separated from the possession, and yet the conveyance be a valid one, if recorded within eight months. *Hamilton v. Russel*, §§ 714-15.

§ 691. The act of the assembly of Virginia on fraudulent conveyances is intended to be coextensive with the acts of 13th and 27th Elizabeth, and those acts are merely declaratory of the principles of the common law. *Ibid.*

§ 692. An absolute and unconditional sale, where the possession does not accompany and follow the deed, is, upon a sound construction of the statute of Elizabeth, *per se* fraudulent as to creditors. *Ibid.*

§ 693. Where possession does not accompany and follow a deed of personalty, it is only *prima facie* and not *per se* fraudulent; and is open to proof of an innocent purpose. *Warner v. Norton*, §§ 716-19.

§ 694. It was held in this case that a sale was not *per se* fraudulent, where the agent who had been transacting the business of the seller in his absence, agreed to continue the business as the agent of the purchasers of the stock, and a change of possession was made by a delivery of the key to the storehouse to the purchasers. It was further held that the lower court had not erred in leaving the question of good faith to the jury. *Ibid.*

§ 695. A mortgage of all the tools and machinery in a factory, and all which may be purchased for the factory by the mortgagor within four years, together with all the stock manufactured or purchased by the mortgagor during that time, which mortgage is recorded as required by law, is valid, and is not constructively fraudulent as to creditors, though it provides that the mortgagor shall remain in possession during the whole four years and take the rents and profits for his own benefit, and may sell the property and purchase more, the latter being substituted for that sold and subject to the mortgage lien. The possession of the property by the mortgagor, and the power to use it and dispose of it, being not only consistent with the deed, but positively avowed and provided for by it, the creditors, being charged with notice by the records, are not allured by any false colors. *Mitchell v. Winslow*, §§ 720-25.

§ 696. A provision in a mortgage making the mortgagors the agents of the mortgagees to retain possession of the property, sell it, and account for the proceeds until the indebtedness is paid, does not render it fraudulent and void, if carried out in good faith. It does not hinder, delay and defraud creditors. Such possession is explained by the terms of the instrument; and is not inconsistent with good faith, within the meaning of the statute of Minnesota on fraudulent conveyances. *Hawkins v. Hastings Bank*, § 726.

§ 697. In Indiana the statute of Elizabeth is in force, and there is also a statute declaring that "no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee or assignee, and retained by him, unless such assignment or mortgage" shall be duly recorded; and "that the question of fraudulent intent in all cases shall be deemed a question of fact." Prior to the adoption of these provisions, an actual and continued change of possession was necessary. Under these provisions, a mortgage which simply allows the mortgagor to retain the possession and use of the property until breach of the condition is, when duly recorded, *prima facie* valid. But it is their intention only to make registration a substitute for delivery of possession, and not a protection for all other stipulations contained in a mortgage. They do not make a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, *prima facie* valid, nor prevent the court from declaring it fraudulent as a matter of law. Such a mortgage was held to be constructively fraudulent, in the case, where it provided that the mortgagor might, until default made in the payment of the notes secured or their renewals, sell the goods as before and purchase others which should be subject to the mortgage lien; and contained no covenant to account to the mortgagees, or any recognition that the sales were to be for their benefit. *Robinson v. Elliott*, §§ 727-32.

§ 698. A statute of Iowa provides that "no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice," unless acknowledged and recorded. Under this statute it is held in that state that an unrecorded mortgage of chattels, where the mortgagor retains possession, is valid as against creditors who receive notice at any time before obtaining a lien by levy or otherwise. The court in this case considered itself bound to follow this construction by the state courts, although of opinion that such a mortgage was not valid as against a subsequent creditor who became such without notice of the mortgage. *Crooks v. Stuart*, §§ 733-35.

§ 699. That a mortgage of a stock of goods, where the mortgagor is permitted to remain in possession and dispose of them in the ordinary course of business, is fraudulent and void as against a creditor of the mortgagor who becomes such without notice of the mortgage, whether this power is expressly given in the mortgage or otherwise, is a doctrine of general jurisprudence, and is applied by the federal courts without regard to the decisions of state courts upon state statutes. *Ibid.*

§ 700. An insolvent debtor made a mortgage of his entire estate to a creditor who knew of his insolvency. The mortgagee, for the purpose of giving the mortgagor a fictitious credit,

actively concealed the mortgage and withheld it from record, and while so doing represented the mortgagor as having a large estate and unlimited credit. By these means others were induced to give the mortgagor credit. The latter having failed and become unable to pay the debts so contracted, it was held that the mortgage was fraudulent and void at common law, whether the motive of the mortgagee had been a gain to himself or an advantage to his mortgagor. *Blennerhassett v. Sherman*, §§ 736-37.

[NOTES.— See §§ 738-795.]

HOWARD AND WENDLINGER v. PRINCE.

(District Court for Virginia: 1 Hughes, 239-245.)

STATEMENT OF FACTS.— In this case there was a sale of personal property by G. S. Prince to his father, J. D. Prince, the bill of sale being forwarded to the father in New York, and the property remaining in the possession of the son in Richmond. The bill of sale was not recorded in Virginia. The bill of sale was executed on the 19th July, 1873, and in December G. S. Prince was adjudged bankrupt. This bill is filed by his assignees in bankruptcy to set aside the bill of sale as fraudulent.

Opinion by HUGHES, J.

The case presents itself as one of a sale of personalty, where the vendor remains in possession of the goods sold. The old common law rule was, that in such a case the continued possession of the goods by the vendor was, *per se*, fraudulent, and rendered the sale void. It was decided in *Twyne's case*, which was rendered upon the statute of 13th Elizabeth, chapter 5, declaratory of the common law, that though the sale in that case were upon valid consideration, yet the continued possession of the vendor invalidated the sale; the secrecy and non-delivery which was proved raising a presumption that the whole transaction was collusive, creating a trust for the benefit of the vendor. In *Edwards v. Harben*, 2 Term, 587, it was held that such possession was not merely *evidence* of fraud, but was itself, in point of law, fraudulent. These cases controlled the decisions of the English courts for a long period of time, and produced for many years like decisions by the courts of many of the states in this country, Virginia included, and by the courts of the United States.

But in England, the doctrine of fraud, *per se*, has been discarded, and the milder rule has for some time obtained, that continued possession after sale of personalty by the vendor creates only a presumption of fraud, and that the fact of fraud is not, in suits at law, to be determined by the court, but must be left to the jury; and it is further held in England, that if the personal chattels savor of the realty, as, for instance, engines, utensils and machinery belonging to a manufacturing establishment, no presumption of fraud will arise from the want of delivery. 2 Kent, 516, and cases there cited.

§ 701. *The possession by vendor of personal property after a bill of sale is not per se fraudulent under Virginia law.*

If the transaction under consideration between George S. Prince and John D. Prince is fraudulent, it is so under the law of Virginia, as construed by the courts of Virginia; that law being now section first of chapter 114 of the Code of 1873. Counsel for complainants contend that this court must decide this case by the precedents which they cite from the supreme court, and other courts of the United States. In one sense, that should and must be done. But in no case in which a court of the United States has had to pass upon the doctrine to which I have alluded (other than cases in which the personalty

concerned was a ship at sea, or other thing exclusively within the admiralty jurisdiction), has it decided against the law and ruling of the courts of the state in which the property was assigned. The leading federal decisions (especially the noted case of *Hamilton v. Russell*, 1 Cranch, 309) were rendered upon cases arising in the district court of Columbia, where the federal courts were at liberty to lay down the law irrespective of the laws of the states.

§ 702. *A case in which the law of the state controls the decision of a federal court.*

In the case now before me, I should go counter to the uniform practice of the courts of the United States if I should be governed by any other law in my decision than the statute of Virginia, just referred to, and should construe it by any other precedents than those of our own court of appeals. I have said that the rule of *Edwards v. Harben*, 2 Term, 587, did substantially obtain for a long time in Virginia; see 2 Hen. & M., 289, 302; 2 Mun., 341; 3 Mun., 1, 7; 5 Mun., 28; *Gilmer*, 15; 5 Ran., 211, 599 and 2 Rob., 280. But at last our court of appeals found it necessary to recede from a rule which common experience had taught to be unjust and untenable. The cases of honest assignments where the vendor retained possession were too numerous and too frequent to allow of a further adherence to the old arbitrary rule of fraud *per se*. Accordingly in the case of *Davis v. Turner*, 4 Grat., 423, cited with distinguished consideration throughout the United States and in England, most of the judges who had held to the rule, themselves receded from it, and the court adopted the conclusion, expressed as follows by President Cabell: "It seems now conceded on all hands that the continued possession of the vendor, after an absolute sale, is open to explanation in some form or shape, and we are not so restrained from authority as to prevent our allowing an explanation that shows such possession and the whole transaction to have been fair and honest, and especially where such possession has been held under a bailment for a valuable consideration in good faith made from the vendee to the vendor. . . . It would be carrying a distrust of juries too far to suppose them incapable, with the aid of a wholesome *prima facie* presumption, to administer justice on this subject, in the true spirit of the statute, and it is better to confine the interposition of the court to guiding, instead of driving, them by instructions, and to the power of granting new trials in case of plain deviation." I need not repeat that this case of *Davis v. Turner* has become a leading case on the subject on this continent. As declaring the law of Virginia, it is binding upon this court.

The question before us now is, whether the transaction that has been described, which took place between George and John D. Prince, in June and July, 1873, was fraudulent under section first, chapter 114, relating to fraudulent acts, of the code of Virginia. A full and free power to dispose of chattels is an essential and inherent incident of ownership; and the vendee has the same right to leave them in the possession of the vendor that he would have to take them into his own custody, or place them in the possession of a third person; unless such act necessarily and inevitably tends to deceive and defraud creditors. 4 Hill, 271. The frequent necessity of intrusting personal estate to others than the actual owner, forbids an arbitrary enforcement of the rule that possession shall always be deemed conclusive evidence of title. 2. N. H., 13.

It being a case in chancery, I am to exercise the functions of a jury; and in doing so, I am required to *presume* that the transaction was fraudulent, because

of the fact that George S. Prince retained possession of the fixtures assigned by the bill of sale; but I am also allowed to take the other facts presented in the evidence into consideration, as explaining away or not this legal presumption.

If the bill of sale under consideration had been made for the purpose of securing to John D. Prince the payment of a debt which George S. Prince owed him before the time of the assignment, the case would have been the invidious one of preferring one creditor over others; and the *presumption* arising from continued possession would have been exceedingly strong, if not insurmountable; for it would have been a case of preference and partiality. But the fact here was, that the father advanced money to the son for the purpose of being used, and which was used, for the benefit of other creditors. The money paid by the father was faithfully appropriated to the claims of other creditors; and the assignment was made, not to the *prejudice* of other creditors, but to their advantage. This is a circumstance in the case which I find myself unable to consent to disregard.

Again if the property assigned had been public or corporate bonds, or bills payable, or tobacco, or any movable thing which could have been physically delivered with convenience, then if it had not been delivered, but the use and possession of it retained by George S. Prince, the presumption of fraud would have been very strong. But the property assigned was not of this movable and transferable sort. It was fixtures, a personalty which savored of realty; a sort of property which John D. Prince would have had no use for in Brooklyn, N. Y., a sort of property which as often as not, in Richmond, does *not* belong to the manufacturer of tobacco, but belongs to his landlord or other owners; a sort of property the mere possession and use of which in the business of tobacco manufacturing, are not in fact presumptive of the manufacturer's ownership. It is a sort of property the real ownership of which is not, in fact, and as of course, presumed from the mere use of it by the manufacturer, nor made the basis of credit, any more than is the ownership of the building. It is a sort of property the ownership of which would be especially inquired of by a prudent creditor before giving credit. The Virginia court of appeals having adopted the present English rule on the legal question under discussion, I will presume that it has adopted also the English precedents. See *Ry. & M.*, 312; 8 *Taunt.*, 338; 5 *Esp.*, 22; 3 *B. & C.*, 368; and 3 *B. & Ad.*, 498.

The case under consideration is emphatically one in which the rule *caveat creditor* applies. The creditor of a tobacco manufacturer in Richmond does not in fact presume that either a factory building or the fixtures in it is the property of the manufacturer. He does look and he should look to the ownership of each before giving credit upon either. In the case of fixtures, if there is no actual fraud by misrepresentation and false pretense, fraud ought not even to be *presumed* from the mere fact that a vendor has use and possession of such ponderous personalty as tobacco fixtures, which he has sold.

The evidence of Mr. Burton in this case is that in nine-tenths of the tobacco factories of Richmond, the fixtures are in other ownership than that of the manufacturers, or are under mortgage. The presumption of fraud created by law in this case is, therefore, I conceive, negated by the nature of this property as well as by the proved facts of the transaction. The fixtures were bought by contract; they were paid for in money; the purchase-money was used *bona fide* by the vendor in payment of his creditors; the continued possession was of property that would have been useless if removed merely to effect a change of possession; it was used after the sale, for the benefit of the

business and of the creditors; and the property was of such a character as not by the custom of Richmond to create the impression of ownership in the person using it, or to give a credit to that person.

I am, therefore, of the opinion that the bill of sale in this case ought not to be set aside; and that the bill of the complainants ought to be dismissed. I will make an order to that effect, and give leave to the complainants within ten days of its date to appeal from the order upon filing a bond for costs, and a copy of this record and this decision with the clerk of the circuit court.

MEEKER v. WILSON.

(Circuit Court for Massachusetts: 1 Gallison, 419-429. 1813.)

STATEMENT OF FACTS.—Trove against a deputy sheriff for converting a lot of sugar claimed by the plaintiff. Shoemaker and Travers being in failing circumstances, made an assignment to plaintiffs for the benefit of their creditors of all their estate, including the property in question, which was to arrive from Guadaloupe on the brig Deborah. The sugars upon their arrival were taken into possession by the collector for the payment of duties. While in his possession an attachment was levied on them at the suit of Port and Russell, creditors of Shoemaker and Travers. Other creditors, Howland and Allen and Thomas Allen, also attached the goods. The duties were paid by a sale of part of the goods, and defendant sold the remainder to satisfy the execution of Port and Russell, and in his return did not state that he had kept the property four days in accordance with the Massachusetts law. This suit was brought on the 18th of October, 1808, more than a year after the sale by defendant, and there was no proof that up to that time he had any notice of the assignment or claim of plaintiff, or that they had made any effort to obtain possession of the property. There was judgement for defendant and a motion for a new trial on the ground of misdirection of the jury, and also of newly discovered evidence.

§ 703. *Sale of chattels; failure to deliver possession.*

Opinion by STORR, J.

By the common law a grant or assignment of goods and chattels is valid between the parties without actual delivery thereof, and the property passes immediately upon the execution of the deed. But as to creditors the title is not considered as perfect unless possession accompanies and follows the deed. The want of possession is considered in some of the authorities as an evidence or badge of fraud to be submitted to the jury, but the more modern authorities hold it as constituting in itself, in point of law, an actual fraud, which renders the transaction, as to creditors, void. 3 Co., 80; 2 T. R., 587; 1 Cranch, 309. It is true that the cases in which these decisions have been made turned upon the construction of the statute of frauds of 13 Eliz., ch. 5, but that statute is now fully settled to be only an affirmance of the common law. Cowp., 434; 1 Cranch, 309 (§§ 714-15, *infra*).

§ 704. — *rule when chattels granted are abroad when the conveyance is made.*

An exception to the rule is, where the possession of the grantor is consistent with the deed or where the property conveyed is, at the time of the conveyance, abroad and incapable of delivery. In the latter case the title is complete, provided the grantee takes possession within a reasonable time after the property comes within his reach. If he does not, the same inference of legal

fraud arises as if the property had been originally capable of immediate delivery, and the possession had remained unchanged.

These principles of the common law are undoubtedly founded upon the consideration that possession of personal chattels constitutes the ordinary *indiciu*m of ownership, and that the greatest public mischiefs would arise if secret and unavowed transfers might overreach the attachments of creditors. It would enable debtors to hold out false colors and protect covinous contracts from the animadversion of the law. The mischief would be still greater as to sheriffs and other public officers who are bound to take the property of debtors in execution. They must act at their peril (Dalton, 146; Gilb. on Executions, 21), and where the debtor is in the open and visible possession of property, exercising acts of ownership, they are compellable to seize it on the proper judicial process; and great indeed would be the hardship if their proceedings could be overhauled in an action of tort, where the utmost diligence and care could not protect them from deception. Upon principle, independent of all authority, it would seem that substantial justice would require that a party who has a secret transfer of property left in the possession of the original owner, should be held to waive his rights in favor of creditors and public officers, even if the case were not held infected with fraud. "*Vigilantibus non dormientibus leges subserviunt.*"

§ 705. *Property in the hands of a party having a lien on it is not attachable, but if the lien be waived the objection cannot be made by the general owner.*

Upon these principles, independent of the special objections which I shall notice hereafter, how stands the present case? The assignment was made on the 6th of December; the cargo arrived soon after at New Bedford; and an almost irresistible presumption arises of early notice thereof to the assignees. The property was documented as belonging to Shoemaker and Travers, was taken into the custody of the United States as such, was attached in the same character by Howland and Allen, and also for Messrs. Port and Russell, by the the defendant, on the 17th of January following, and again by the United States in the July following; and although it remained unsold until September, the assignees never made any claim thereto nor asserted their possession; nay, further, no notice ever appears of their claim until October, 1808. Under such circumstances, it seems impossible to maintain the present suit, unless the grossest laches entitle a party to the favor of the law. The case of *Bamford v. Baren*, 2 T. R., 594, note (a), would alone be decisive. But it is argued that the property, being in the custody of the United States, was not legally attachable by the defendant and that, therefore, he stands in the character of a mere trespasser *ab initio*; and I have no doubt that in point of law, property in the hands of a person having a lien thereon cannot be taken from him under an attachment against the general owner (*vide* Whitaker on Liens, 142; Vin. Abr., tit. Pawn. A., 3). He has a right to retain it, until discharged of the *onus*; and if it be wrongfully taken away, he may maintain an action against the seizing officer for the tort. But he may waive his right, and if he does, it is no objection in the mouth of the debtor himself. As to his assignees, if their title be consummate before the seizure, the officer is not the less liable on account of the lien; and if their title be defective, it cannot be made better by an independent title in a third person, with whom they have no relation. The objection rests on the supposition that the plaintiffs had a legal title to the property; for if they have not, it is immaterial to them what has been done with it; but on the general principle, which I have stated, we are of

opinion that the title of the plaintiffs, under the assignment, was void as against creditors.

§ 706. *The regularity of a sale cannot be contested by a stranger.*—

A similar answer may be given to the argument, that the officer has not, on the face of his return, disclosed matter sufficient to show that the property was sold under the levy in a legal manner. If the assignees had no title to the property, they cannot be injured by this irregularity; and the wrong, if any, was done to Shoemaker and Travers; and as to the objection founded on the suit of the United States, it is sufficient that no right under that suit is now in controversy.

On the whole, we are satisfied that the direction of the court at the trial was correct. The assignees, having omitted to take possession of the property within a reasonable time after it came within their reach, must be considered as voluntarily leaving it in the possession of the assignors, and as, therefore, possession did not accompany or follow the deed, the conveyance, as to this property, was in point of law void against creditors. The laches of the assignees amounted to a legal abandonment of all right to the property under the conveyance.

But an application has been made to our discretion to grant a new trial, because the party has not had the benefit of the whole evidence of his case, through the inadvertence of counsel. I do not know that the inadvertence of counsel in the management of a cause has ever been considered as a substantive ground for granting a new trial, and it would certainly be a dangerous practice to introduce at this time. There are, however, peculiar circumstances connected with this case, which, if the new evidence proposed could be available in point of law, might induce the court to accede to the application.

§ 707. *Notice of an assignment to a judgment creditor cannot be held as notice to the sheriff or affect his right to seize the property assigned.*

The new evidence proposed, as it was admitted in the argument, would go no further than to show that Messrs. Port and Russell, before their attachment was made, had notice of the assignment. But it is not now pretended that the defendant ever had any such notice. I am at a loss to perceive how notice to Messrs. Port and Russell can vary the legal rights of the sheriff. No authority has been produced to show, that where a sheriff seizes goods in execution, which are in the possession of the judgment debtor, and used by him as his own, the acts of the sheriff become tortious by mere knowledge in the judgment creditor, that the same goods had been previously transferred to a third person. No such authority can be presumed to exist. The sheriff is bound to act in conformity with the commands of his writ, and to seize the property of the judgment debtor. If he seizes it, he is bound to proceed in the execution. If the property turn out to be the debtor's, the sheriff is at all events protected, whatever notice he or the judgment creditor may have, as to the rights of third persons. If the property turn out not to be the debtor's the seizure is unlawful, and the sheriff is liable to an action, whether he has or has not any notice of the claim of the real owner. He acts, as I have before stated, at his peril. Notice of the claim of the assignees could not, as such, vary the legal rights of the sheriff. It could only be material, as one ingredient in the case, to unite with others in showing that possession or its equivalent was sought and obtained within a reasonable time after the property came within their grasp.

In the present case, the original attachment by the defendant is conceded on

all sides to have been in subjection to the rights of the United States; and as no actual custody was taken, it was merely nominal as to third persons. The first effective seizure was upon the execution; and at that time, all other prior claims of the United States by lien being extinguished, the property was in effect in the possession of the judgment debtors; no adverse claim having been made or possession taken. The general property draws after it the possession, unless in special cases. If at this time the officer had had actual notice of the plaintiff's claim, as their laches, would in favor of a creditor, have avoided their title, I have no doubt that he would have been bound to have seized the property in execution; and if so, certainly notice to Messrs. Port and Russell could not make the case stronger.

It is not necessary, however, to assume this strong ground. It is very clear, that the sheriff cannot be prejudiced by any knowledge of the judgment creditor. The legality of his acts depends exclusively upon the ownership of the property and the requisitions of his precept. Suppose there had been an agreement between the creditor and debtor not to take any property on the execution, would it be contended that a sheriff, to whom such agreement was unknown, would be a trespasser for obeying the injunctions of his precept?

I am yet to learn, however, in what manner the knowledge of Messrs. Port and Russell could affect the legality of the levy under the execution. Notwithstanding that knowledge, they had a right to contest, if they chose, the validity of the assignment. It has not as yet been established, to my knowledge, that the mere notice of a defective conveyance of property precludes the party having notice from availing himself at law of any right to attach that property; much less can it be admitted, that notice of a conveyance of personal chattels unaccompanied with possession, which the law has pronounced a fraud, can estop the party from his right, as a creditor, to defeat that fraud. And if the law were otherwise, it is clear that such notice cannot render a sheriff responsible in damages for conduct which otherwise would stand completely justified. And for myself, I am prepared to go further, and to hold, that if Messrs. Port and Russell not only had notice of the assignment, but had actually approved the same, and come in under it (as was at first intimated to be the real fact, but is now abandoned), the present action could not be maintained. A remedy at law or in equity might perhaps lie against Messrs. Port and Russell, to recover the proceeds of the execution after they had passed into their hands; but the sheriff himself would be protected, if the property, in point of law, was still to be considered as the property of the judgment debtors. No question has been made as to the effect of such an assignment, to convey the property of the debtor, lying in this state, so that it may not be subject to the attachment of creditors here. It will be time enough to consider that question when it shall arise.

Vide, on this point, *Le Chevalier v. Lynch*, Doug., 170; *Hatch v. Smith*, 5 Mass. R., 42; *Widgery et al. v. Haskell*, 5 Mass. R., 144; *Harrison v. Sterry*, 5 Cranch, 289; *Hunter v. Potts*, 4 T. R., 182; *Rex v. Braddock*, 3 Price, 6; *West on Extents*, 334; *Pickstork v. Lyster*, 3 M. & S., 371.

On the whole, I am satisfied that substantial justice, as between these parties, has been done; and I am against granting a new trial. As the district judge concurs in this opinion, the motion for a new trial is overruled. *Vide* *Ladbroke v. Crickett*, 2 T. R., 649.

BANK OF THE UNITED STATES v. LEE.

(13 Peters, 107-122. 1839.)

APPEAL from the Circuit Court for the County of Washington, District of Columbia.

Opinion by MR. JUSTICE CATRON.

STATEMENT OF FACTS.—The bill alleges, as a principal ground of relief, fraud in fact, in the inception of the conveyance sought to be set aside; this being denied by the answers, it is incumbent that fraud in fact should be proved by the complainants, and which, they insist, is established by the proofs. As the pleadings and exhibits furnish almost the entire evidence, it becomes material to set them out to a considerable extent. And in extracting the facts, from which it is supposed we are authorized to infer fraud, it must be done with reference to the bearing of the local and peculiar laws of Virginia on the transaction.

It appears that, in 1817, Richard Bland Lee, the husband of Elizabeth Lee, the respondent, borrowed from the Bank of the United States, at their office of discount at Washington, \$6,000, on his note at sixty days (renewable at the pleasure of the bank), and indorsed by Ed. J. Lee and Walter Jones; and further to secure the repayment of the money, executed a deed of trust for eleven slaves, and sundry household goods, valued at \$7,200, to Richard Smith, the cashier of office of discount, with power to the trustee to sell in default of payment, after giving thirty days' notice. The deed also pledged some outstanding claims, not necessary to be noticed, as they proved to be of no material value. The debt not having been paid, after long indulgence, suit was brought, and a recovery had, against Richard Bland Lee, and Walter Jones, one of the indorsers; but no part of the judgment has been satisfied.

In 1834, the president, directors, and company of the bank filed their bill against Edmund J. Lee, Elizabeth Lee, and Richard Smith, the trustee; alleging that Richard Bland Lee died in 1827, intestate; that no one had administered on his estate, and that Elizabeth Lee had converted the slaves and household goods to her own use after the death of her husband; that she was executrix in her own wrong, and bound to pay the debt; but refused to do so, asserting the property pledged to pay the bank debt by her late husband, had been conveyed by him as early as 1809, to Ed. J. Lee, William Maffit, and Richard Coleman, in trust for the sole and separate use of the said Elizabeth; that she had exhibited the deed to the complainants, but which they aver was voluntary, fraudulent and void, as against them, because they were purchasers for a valuable consideration, without notice of such deed, as also creditors of Richard Bland Lee, the grantor. That the considerations set forth in the deed are not truly stated; but, if truly stated, they are wholly insufficient to give validity to the same. That Richard Bland Lee, at the date of the deed in 1809, was largely indebted, and incompetent in law to make such deed for the benefit of his wife and family.

That if the deed was duly executed, and upon legal and adequate considerations when made, yet the same was executed in the commonwealth of Virginia; that the trustees had never acted under it, or taken possession of the property embraced in it; but had suffered Richard Bland Lee, the grantor, at all times, and without interruption from the date of the deed to the time of his death, to retain possession of the property, and to use, enjoy and dispose of the same, and hold himself out to the world as the true and absolute owner;

and especially, that the trustees had permitted the grantor to bring the slaves and furniture from Virginia to the District of Columbia and county of Washington, about the year 1814, and there to continue his use and enjoyment of the same, as if he were the absolute, entire and unqualified owner thereof.

That the deed was never recorded in the county of Washington, nor notice given to the public, or the complainants, of its existence during the lifetime of Richard Bland Lee, nor for some years after his death; but he was permitted to obtain credit and contract debts upon the faith of his being the sole and absolute owner of the slaves and goods described in the deed; and permitted to sell and dispose of parts of the same, without any assertion of right or title on the part of the trustees of said Elizabeth; and that Ed. J. Lee, the only surviving trustee, and the said Elizabeth, knew that the complainants had made the loan of the \$6,000 to Richard Bland Lee, in the full faith that he was the real and unqualified owner of the property; and knew he had made and executed the deed of trust to Richard Smith, to secure the repayment of the money, yet they did not communicate to the complainants the existence of the deed made for the benefit of the said Elizabeth, during the lifetime of Richard Bland Lee, nor until several years after his death; nor did said Ed. J. Lee, or Elizabeth, intimate in any manner, or give the complainants, or their trustee, reason to suspect that there was any defect in the title derived under the deed to Richard Smith; nor that Ed. J. Lee, or Elizabeth, had any title or claim, or pretended to have, to the slaves and furniture.

The foregoing allegations present two aspects: 1. That the deed of 1809 was fraudulent and void in its inception, and, 2. That if valid in Virginia, it not having been recorded in the county of Washington (formerly a part of Maryland), and the continued possession of the property covered by it having remained with the grantor, both in Virginia and here, up to the time of his death, was such a fraud upon creditors of, and purchasers from, Richard Bland Lee, as to destroy the effect of the conveyance. The deed of 1809, amongst other things, sets forth that Richard Bland Lee owed Judge Washington \$10,034.28; and, as a part of the consideration, Mrs. Lee had joined her husband in a mortgage to trustees for Judge Washington's use, pledging her separate estate to secure the debt. These specific facts the bill does not set forth; but, by way of interrogatory, asks the defendants to answer whether the debt mentioned in said deed, as being due to Judge Washington, had ever been paid; by whom, and from what funds; and the respondents are required to produce the deed. It also appears that the complainants commenced an action of replevin against Mrs. Lee for the slaves and household goods, and which was, by an agreement of the parties, suspended until the termination of this suit.

Ed. J. Lee answers, that the deed of 1809 was executed by Richard Bland Lee, to himself and others, as trustees for Elizabeth Lee, the wife of said Richard Bland Lee; that it sets forth the true consideration for the same; that the respondent is the only surviving trustee; that he never did give notice to the complainants of the existence of the deed; but that he did not know, until shortly before Richard Bland Lee's death, that he had made the deed of trust to Richard Smith, and which never received respondent's assent. That he cannot state, from general recollection, how the debt due to Judge Washington was paid, but it is his impression it was paid either by stock in the Bank of Alexandria, which belonged to Elizabeth Lee, and was held in trust for her by her brother Zachæus Collins, deceased, or by a sale of part of the farm called Langley.

Elizabeth Lee answers that the loan of \$6,000 was made by the bank as charged, but that she was ignorant of the execution of the deed of trust to Richard Smith, to secure the repayment of the money, until long after the deed had been delivered, and the loan made; denies she ever assented thereto, or waived her rights to the slaves, or any part of the property purporting to have been conveyed by the deed. Admits the recovery of the judgment as alleged, and that Richard Bland Lee died in 1827, intestate and insolvent, and that no one has administered on his estate.

And, further answering, says that on the 9th day of January, in the year 1809, the said Richard B. Lee and this respondent, then dwelling, and having for a long time before dwelt, in the county of Fairfax, in the state of Virginia, and the slaves and other personal property hereinafter mentioned, then being in the said county, she agreed with the said Richard to relinquish her right of dower in a certain tract of land in the county of Spotsylvania, in the commonwealth of Virginia, on the Rappahannock river, containing eight thousand acres, more or less, of five undivided eighth parts, of which the said Richard Bland Lee was seized in fee simple, and to join the said Richard in a conveyance thereof to Ludwell Lee.

She also, on the same day, agreed to join her said husband in the execution of a deed of trust to Henry Smith Turner, Thomas Blackburn, and Bushrod Washington, Jr., conveying to them two tracts of land in the said county of Fairfax, one situated on the river Potomac, near the Little Falls thereof, containing one thousand six hundred acres, more or less; the other being the estate on which the said Richard and this respondent then resided, containing five hundred and thirty acres, more or less; which tracts of land were then held in trust for this respondent; which last mentioned conveyance was to be made to the said Turner, and others, in trust to secure the payment of the sum of \$10,034.28, due from the said Richard to the Honorable Bushrod Washington. And in consideration of the execution of the said conveyance by this respondent, and of her thereby relinquishing her dower in the said Spotsylvania lands, and her right to the said lands in Fairfax, the said Richard, on his part, agreed to convey to Edmund J. Lee, William Maffit, and Richard Coleman, all the household and kitchen furniture, carpeting, beds, bedsteads, bed furniture, plate, chinaware, glass, tables, chairs, table linen, carpets, sideboards, bureaus, wardrobes; and all kinds of furniture then in their said dwelling-house and kitchen; estimated to be worth \$1,600; and the following slaves, that is to say: John, and his wife Alice, and their children, Patty, Betty, Henry, Charles, Johnny, Margaret, Milly, and Frank; Ludwell, and his wife Nancy, and their children Caroline, Harriet, Frederick, Ludwell, and Barbara; Henny and her child Eleanor; Rachel and her child Rachel; two sisters, Kitty and Letty, and their brothers, Alexander and Alfred; George (a blacksmith), Harry (a carpenter), Harry (a wagoner), Tom (a carter), Thornton (a cook), Samuel (a smith), and John (a ploughboy), to be held by the said E. J. Lee, William Maffit, and Richard Coleman, and the survivors and survivor of them, and the executors and administrators of such survivor, in trust, for the use of this respondent during her life; and after her death, to pass to her heirs at law, provided she died intestate, or to such persons as she might bequeath the same to by her last will and testament, so as she should make the same pass fully and completely, and without limitation or condition, to her heirs or legatees: It was further agreed by the said Richard and this respondent, that the said Richard should be authorized, at any time during his life, to sell or

otherwise dispose of any part of the said slaves and furniture, with the consent of a majority of the said trustees, or of the survivors or survivor of them, or of the executors or administrators of the last survivor, provided the said Richard should convey to the said trustees, or to the survivors or survivor, or the executors or administrators of the last survivor, other property, real or personal, to the full value of the said furniture or slaves so sold or disposed of. And it was further agreed that if the said Richard should fully pay the said debt to the Honorable Bushrod Washington, without selling any part of the lands to be conveyed to the said Henry S. Turner and others, in trust, as aforesaid, and then held in trust for the said Elizabeth, then that the conveyance to be made as aforesaid, to the said E. J. Lee, William Maffit, and Richard Coleman, should become null and void, as to the slaves, Ludwell, Thornton, Henry, Butler, Tom, Samuel, Jack, and Eleanor.

And the said Elizabeth avers, that in execution of the said agreement, and in consideration of the conveyance by the terms thereof to be made to the said E. J. Lee, William Maffit, and Richard Coleman, for her use, in manner and on the terms aforesaid, she did, on the 16th day of July, 1809, in due form of law, with the said R. B. Lee, execute and deliver to the said Ludwell, a conveyance in fee of the said lands in Spotsylvania, thereby relinquishing her claim of dower therein. And did, with the said Richard, in due form of law, on the 9th day of January, 1809, execute and deliver to the said Henry S. Turner, Thomas Blackburn, and Bushrod Washington, Jr., a deed for the said lands, in Fairfax county, whereby she conveyed her right to the said lands last mentioned, to the said Turner and others, in trust, to secure the payment of the said debt, due from the said Richard B. Lee to the Honorable Bushrod Washington, in the manner provided by the said agreement. And that the said Richard did, on the same day, in execution of the said agreement, on his part, execute and deliver to the said E. J. Lee, William Maffit, and Richard Coleman, a conveyance, whereby he transferred and conveyed to them the said slaves and furniture before mentioned, to be held in trust for this respondent, in the manner and on the terms before stated, which said deed was duly proved and recorded, within eight months from the date thereof, in the county court of the county of Fairfax, in which the said Richard and this respondent continued still to reside, and in which the said slaves and furniture still remained. And this defendant herewith exhibits the said three deeds severally marked Exhibits, No. 1, No. 2, and No. 3. This respondent avers that the said agreement, before mentioned, was made between the said Richard and her; and the said deeds executed in pursuance thereof, fairly and *bona fide*, without any intention to defeat, defraud, hinder or delay any creditor of the said Richard. She is advised and insists that they were duly proved and recorded, according to the laws of the state of Virginia, and that, under the same, she is a *bona fide* purchaser of the said slaves and furniture, according to the terms of the said deed to E. J. Lee and others; and that the said deed fully protects her in the right to the said property conveyed, according to the terms thereof, against all creditors of the said Richard, and all purchasers subsequently to the date thereof. And this respondent has before herewith exhibited, as part of her answer to said deed, with the certificate of proof and record thereof, by the clerk of the county court of Fairfax county, marked Exhibit No. 3.

This respondent admits that no sale of the Fairfax lands was made under the said deed to Henry S. Turner and others; she, therefore, makes no claim to the slaves, Ludwell, Thornton, Henry, Butler, Tom, Samuel, Jack and

Eleanor; that none of the said last-mentioned slaves are in her possession or subject to her control, nor were they so when the complainants issued out their writ of replevin in their bill mentioned, or at the time they instituted this suit.

In this case it is agreed* that the following facts be, and they are hereby, admitted as true, reserving all objections to the admissibility of the facts as competent testimony in the case, namely, that Richard Bland Lee and his wife Elizabeth, one of the defendants, resided at Fairfax county, in the state of Virginia, on the 9th of January, in the year 1809, and said Richard B. Lee then held the negroes and other personal property mentioned in the deed of that date, from said Richard B. Lee, to Lee, Maffit and Coleman, filed with defendant Elizabeth's answer, and marked Exhibit No. 3.

That the said R. B. Lee and his wife Elizabeth were housekeepers, and resided together, in Fairfax county, at the date aforesaid, that the said negroes and other personal property continued in their possession after the deed of the 9th of January, 1809, had been made, in like manner as such possession had been held before said deed was made, and so continued until they removed to Washington City, in the year 1814 or 1815, when they brought said negroes and other property from Fairfax county with them to the city of Washington. That from the period of said removal to Washington, said personal property, as distinguished from the negroes, was assessed by the officers of the corporation as the property of the said Richard B. Lee.

That four of the said negroes were, for the first time in the year 1818, assessed to said Richard B. Lee. That prior to the 9th day of January, in the year 1809, the said Richard B. Lee was seized in fee of five undivided eighth parts of eight thousand acres of land in Spotsylvania county, in the state of Virginia, which was conveyed by said Richard B. Lee and said Elizabeth his wife, to Ludwell Lee in fee simple.

The execution, due acknowledgment and recording of the deed and bills of sale, exhibited with the defendant Elizabeth Lee's answer, is admitted. The execution and service of the notices exhibited with the answer of the defendant, Edmund J. Lee, is admitted. It is admitted that the deed of the 9th of January, 1809, was delivered to the trustees therein named, and that they agreed to act, but never took possession of the property therein mentioned, or of any part of it.

§ 708. *The recital in a deed thirty years old, from a husband to his wife, of the consideration being a deed executed by the wife, when the deed of the wife was not in fact executed for months after, is not evidence of fraud.*

It is also agreed that the deeds referred to in E. J. Lee's, Elizabeth Lee's, and Richard Smith's answers, severally were duly executed, acknowledged and recorded, and are to be received and treated as parts of the record in this case. On these pleadings, exhibits and admissions, various possessions are assumed as grounds of relief. The deed of January 9, 1809, recites that Mrs. Lee had executed a deed to Ludwell Lee, relinquishing her right of dower to the five thousand acres of land in Spotsylvania; whereas, the deed to Ludwell Lee, relinquishing the dower interest, bears date subsequently, in July, 1809.

It is insisted for complainants, that the recital was false, and that this part of the consideration had must be rejected. We do not think so. The transaction is of nearly thirty years' standing, and not so open to explanation as a more recent one; it may be, that a deed had been executed by Mrs. Lee, as recited, to Ludwell Lee, and that it was afterwards superseded by another; be

this as it may, Richard Bland Lee was estopped by the recital in his own deed; and Mrs. Lee's trustees bound to performance on her part, supposing the recital to have been untrue. The substance of the contract was, that she should relinquish her dower interest to Ludwell Lee; and she did relinquish it obviously in compliance with the agreement; and that it was done in July, instead of the preceding January, is an immaterial circumstance. The husband's alienee acquired the disincumbered estate in consideration of the deed sought to be impeached, and in a court of equity, cannot deprive the wife of the slaves, without doing equity to her, by restoring the lands now beyond our reach; provided the transaction was *bona fide*.

The other part of the consideration was the deed of trust (of January 9, 1809) by which the Fairfax estates of Sully and Langley were pledged for the payment of the debt due to Judge Washington. These estates were the separate and sole property of Mrs. Lee; and not being subject to execution by the laws of Virginia, the creditor had not the slightest claim upon them, and it would have been most unwise for Mrs. Lee to have onerated them without ample indemnity.

Judging of the probabilities in 1809, from future results, between that time and the death of Richard Bland Lee, in 1827, and we are inclined to conclude that Mrs. Lee, with the ardor common to her sex, mistook her true interest in making the exchange of her lands for the slaves and household goods; that she has been greatly the sufferer is free from doubt. The Virginia estates have passed into other hands, to satisfy her husband's creditors; most of the slaves have been sold to supply his improvidence and necessities; and the little that is left of the property secured to Mrs. Lee (down to the humblest utensil) is now sought to be appropriated to the satisfaction of the judgment on which the bill is founded.

That the deed of trust to Henry S. Turner, and others, to secure Judge Washington's debt, was executed in good faith, is not controverted; the objection is, that the debt was paid by means independent of the lands mortgaged; and the mortgage discharged. The consideration, therefore, given by Mrs. Lee for the slaves and other property secured to her separate use, is fully proved; and was ample when the contract was made; and this is all that rested upon the respondents to establish, to resist the claim of the complainants on the first aspect of the bill; that which alleges the deed to have been fraudulent in its inception.

But an after circumstance is invoked as furnishing evidence favorable to the complainants. In the interrogating part of the bill, the respondents are required to answer, whether the debt mentioned in the deed of 1809, as due to Judge Washington, had ever been paid; by whom, and from what funds? Edmund J. Lee responds, that he had no distinct recollection on the subject; Mrs. Lee admits that no sale of the Fairfax lands was made under the deed to Henry S. Turner, and others, but that the eight slaves, who, in such event, were to be returned to her husband, had been disposed of by him, etc. If Mrs. Lee meant to say that the trustees had not sold by virtue of the deed of trust for Judge Washington's benefit then she answered truly. If, however, she is to be understood as answering that the estates pledged were not applied, in part, to the extinguishment of the debt, then she was mistaken. Sully, the homestead, was sold to Francis Lightfoot Lee, in February, 1811, for \$18,000; embracing the five hundred acres which was Mrs. Lee's individual property, and including two hundred and seventeen acres in addition; out of which sum

Judge Washington was paid \$7,450. The estate was not conveyed by the trustees, but by Richard Bland Lee, the respondent Elizabeth, and Bushrod Washington, with covenants of title and warranty. The conveyance upon its face recites, in the fullest manner, that \$7,450 of the purchase-money had been paid by Francis Lightfoot Lee to Judge Washington, in discharge of the balance of debt due to him. There can be little doubt, Mrs. Lee, in her answer, was mistaken, in admitting to her prejudice that the Fairfax lands had not been appropriated to the payment of Judge Washington's debt. Her principal object seems to have been to disavow all claim of title to the eight slaves.

§ 709. *Where a wife conveys lands for the payment of her husband's debts, in consideration of a conveyance of other property to her, and the debts are paid by still other property, this does not invalidate the deed to her.*

Suppose, however, that Judge Washington's debt had been paid by other means, and the Fairfax lands disincumbered of it; could the fact influence this cause? That it could not is manifest. The complainants, by their bill, do not seek to come in under the deed to Turner, and others; nor under that to Edmund J. Lee, and others. If they had, and if the fact had been established, that Mrs. Lee, by the payment of the debts from independent means, retained her lands, and the slaves also, then a court of equity would treat her as a trustee for Richard Bland Lee, and let in the complainants as his assignees, to subject the slaves, etc., to the payment of the bank debt.

§ 710. *Where the bill charges fraud in the inception of the contract only, subsequent transactions cannot be inquired into other than as relating to the fraud as charged.*

But the bill charges that the deed to Edmund J. Lee and others was fraudulent and void in its inception; presenting no case, founded on the subsequent transaction alluded to; and the court cannot notice it other than as evidence to fix fraud on the respondents in executing the deed sought to be set aside; which, if valid then, must be deemed so now. The capacity of the husband to contract, through the intervention of trustees, with the wife, and to make a valid conveyance founded on a *bona fide* consideration paid out of the wife's separate estate, has not been questioned; nor is the doctrine open to controversy.

That a liberal construction should be given to the clause in the Virginia statute, for the suppression of fraud, we admit; this is the well-established rule in construing the statutes of Elizabeth, which the first section of the Virginia statutes substantially adopts. Heydon's case, 3 Rep.; 1 Black. Com., 88; Fitzhugh v. Anderson, 2 Hen. & Munford, 304.

On the second ground on which relief is sought, it is insisted that the complainants are entitled to have satisfaction out of the property claimed by Mrs. Lee. "1. Because the continued possession, use, and enjoyment by said Richard Bland Lee, of the said property, purporting to be conveyed by the deed of 9th of January, 1809, was evidence of a continued ownership, and avoids said deed as against subsequent *bona fide* purchasers and creditors, without notice. 2. That said deed so executed in Virginia will not validate the possession, use, and enjoyment of said property in the city of Washington."

The investigation of this assumed ground of relief involves considerations affecting the nuptial relation. We are asked to deal with the conduct of a wife, living in harmony with her husband, as if she was a third person, and to decree against her because she did not expose her husband to the community in which they lived, and especially to the complainants, when within the wife's knowledge he was holding out her property as his own and using of

it as his own, and obtaining credit upon the faith that he was the true and absolute owner.

That Richard Bland Lee did deal with and use the property in controversy, as if it had been his own, whilst he resided in this city, and that the community did believe him the true owner and give him credit on the faith of the property, is no doubt true; and it is very probable that Mrs. Lee knew the fact, but continued passive and silent on the subject. She denies, however, that she had any knowledge of the execution of the deed of trust to Richard Smith, until long after it had been made; and the answer, being responsive to the allegations in the bill, is conclusive of the fact denied, there being no proof to the contrary.

§ 711. *A wife's knowledge that her husband uses and holds out her property as his is not fraud, and does not bind her as to his creditors.*

Was it a duty incumbent on Mrs. Lee, to advertise the community in which she lived, that her husband had no title to the property on the faith of which he was obtaining credit; but that it was hers? This would have been charging the husband with fraudulent conduct; for it cannot be denied, that if A sells and conveys his slaves or lands, and then produces to another his previous paper title, and obtains credit upon the goods, or lands by pledging them for money loaned, he is guilty of a fraud; and if the true owner stands by and does not make his title known, he will be bound to make good the contract, on the principle that he who holds his peace when he ought to have spoken shall not be heard now that he should be silent. He is deemed in equity a party to the fraud. How far the principle applies in a case of the wife of a fraudulent vendor standing by, we are not called on to decide, and wish to be understood as not deciding. Mrs. Lee's is not that case; to say the most, she was only passive and silent in regard to her rights generally, although she may have had knowledge that Mr. Lee was obtaining credit on the faith of her property, and the question is, was it her duty to have acted otherwise? All we need say is, that a court of chancery cannot hold Mrs. Lee responsible because of her silence.

§ 712. *Continued possession of grantor; relation of husband and wife.*

Then, as to the question of possession continuing with the grantor. Leave the relation of man and wife between Richard Bland Lee and Elizabeth Lee out of view, and it would be impossible that any one could have been misled by Mrs. Lee having the possession, she having the sole and exclusive beneficial interest and right of possession. The difficulty arises from a circumstance, the existence of which the statutes of Virginia contemplated and provided for. By the act of 1785, it is declared that where any reservation or limitation shall be made of a use, or property, by way of condition, reversion, remainder, or otherwise, in goods and chattels, the possession whereof shall remain in another, the same shall be taken, as to creditors and purchasers of the persons remaining in possession, to be fraudulent, within the first section of the act; and that the absolute property is with the possession, unless such reservation or limitation of a use, or property, is declared by will or by deed, proved by two witnesses in the general court, or the court of the county wherein one of the parties lives, and recorded within eight months after the execution thereof.

The statute of Virginia has been adopted in Tennessee, where it has been holden that a deed like the present, founded on a good consideration, and separating the title from the possession, was within the statute and must be recorded; but when recorded, creditors and purchasers of him who retains the

possession must take notice of it, and that the recording exempts the property from liability to execution. *Crenshaw v. Anthony, Martin & Yerger's R.*, 110. The great object of the act was to secure the settlement of slaves by the intervention of executors and trustees so as to retain them in the family, and this could be done by a *bona fide* gift of a husband (not materially indebted at the time) to a wife or children, if the deed was duly recorded, to the exclusion not only of subsequent creditors but subsequent purchasers also, contrary to the 27th of Elizabeth, whereby (in the language of the supreme court of Tennessee, in *Marshall v. Booker*, 1 Yerger's R., 15), "an extravagant, spendthrift husband may provide for his wife and children before they are overtaken by ruin." But we can say with Lord Hardwicke, in *Russell and Hayward v. Hammond*, 1 Atk., 15, "that we have hardly known one case, where a person conveying was deeply indebted at the time of such gift, that it has not been deemed fraudulent." In Virginia, therefore, the possession of Mrs. Lee was in accordance with the established practice, and is in no degree subject to imputation.

§ 713. — *effect of the statute of Maryland, where the parties remove from Virginia to the District of Columbia.*

It is insisted, however, that when Richard Bland Lee removed into Washington City, the statute of Maryland operated on the Virginia title of Mrs. Lee, and defeated it for the benefit of purchasers from her husband. The statute declares that no goods or chattels, whereof the vendor shall remain in possession, shall pass, alter or change, or any property thereof be transferred to any purchaser, etc., unless the same be by writing, and acknowledged before one provincial justice, or one justice of the county where such seller shall reside, and be within twenty days recorded in the records of the same county. 1729, c. 8, § 5.

The statute has no reference to a case where the title has been vested by the laws of another state, but operates only on sales, mortgages and gifts made in Maryland. The writing is to be recorded in the same county where the seller shall reside when it is executed. The seller, Richard Bland Lee, residing in Virginia, it was impossible for Mrs. Lee to comply with the act. That the Virginia deed secured to Mrs. Lee the same rights here that it did in Virginia, we apprehend to be, to some extent, an adjudged question. It has frequently arisen in the state courts. The case of *Bruce v. Smith*, 3 Harris & Johnson, 499, was this: In 1804 Brodhag owed Jones, and gave a deed of trust on slaves to secure the debt (\$3,000), executed to Smith as trustee. The parties resided in Georgetown, where the act of Maryland of 1729 continued in force after this district was separated from Maryland. The deed of trust was duly proved and recorded in the District of Columbia, Brodhag retaining the possession of the slaves. In 1805 Brodhag removed to Alleghany county, Maryland, and continued in possession of the slaves, as apparent owner, until August, 1809, when the sheriff of Alleghany seized on them by virtue of an execution against Brodhag in favor of Deakin's executors, and Smith, the trustee, sued Bruce, the sheriff, in trespass. In that case (as in this) Brodhag had given in the slaves to the assessor of taxes, and had sold part of them between 1804 and 1809.

The court of appeals of Maryland, in substance, held that the act of 1729 did not affect the case, and the only proof required to sustain the plaintiff's title was the bill of sale (as it is denominated), and that it lay on the defendant to prove fraud in fact in order to avoid it.

In 1804 the jurisdictions exercised in the District of Columbia and the state of Maryland were as distinct as those of Virginia and the District, so that the case of *Bruce v. Smith*, 3 Har. & Johns., 499, was similar in respect to conflict of jurisdiction with the one before the court.

The same point came up in Tennessee, and met the decision of the supreme court of that state. The following are the material facts in the Tennessee case: In 1812, in Lunenburg county, Virginia, Daniel Crenshaw sold and conveyed certain slaves to Richard Herring, who soon after contracted for the purchase of a tract of land from Daniel Crenshaw, lying in the same county; but Nancy Crenshaw, the wife of Daniel, refused to relinquish her right of dower; and to induce her to do so, Herring agreed with her and her son, Cornelius Crenshaw, to convey to the latter, in trust for his mother and for her separate use, two of the slaves previously purchased from Daniel Crenshaw. The deed was duly executed and recorded in Lunenburg. In 1814 Daniel Crenshaw and his wife removed to Tennessee, carrying the slaves with them, Cornelius, the trustee, continuing to reside in Virginia.

In Tennessee, to all appearance, Daniel Crenshaw was the true owner of the slaves, and acquired credit on the faith of the property. He was improvident, for which reason, manifestly, the wife caused the slaves to be secured to herself; and it may be remarked that similar motives have led to many, not to say most, of this description of conveyances in the states where the provisions of the act of 1785 of Virginia prevail. In 1821 Stacy recovered a judgment against Daniel Crenshaw in the county of his residence in Tennessee, by virtue of an execution founded on which judgment, Anthony, the sheriff, seized upon the slaves; and Cornelius Crenshaw, as his mother's trustee, sued the sheriff in detinue. The circuit court held the deed of trust void, by force of the statute of Tennessee (which is very nearly a transcript of that of Virginia), because the deed had not been recorded in Tennessee; a verdict was rendered for the defendant; and the plaintiff prosecuted his writ of error to the supreme court, where the judgment was reversed.

The court held that the deed made in Virginia, separating the title and possession, was of a character to be operated upon by the act of 1785 of Virginia; and had the deed not been recorded there, as to creditors and purchasers, the title would have been deemed to be with the possession; but having been recorded there, a title fair and unimpeachable vested in the trustee and *cestui que trust*, Nancy; that being valid in Virginia, the statute of Tennessee could not affect it. Furthermore:

The court refused to hold the wife responsible, because she had continued passive and silent in regard to her separate right to the slaves, by which individuals might have been, and in all probability were, induced to believe her husband the true owner, and to give him credit on the faith of the property. In that case, as in this, the wife had done no affirmative act, designedly to draw in the creditor to trust her husband; and the court believed, by remaining silent, she had violated no duty, nor been guilty of any deceit on which a forfeiture of her right could be pronounced.

The deed in controversy is also embraced by the fourth section of the statute of Virginia, which, amongst other things, provides for the recording of all deeds of trust and mortgages, upon acknowledgment or proof according to the directions of the act; it having been holden by the courts of Virginia, and this court (3 Hen. & Mun., 232; 3 Cranch, 150), that deeds conveying chattels are included within the section referred to. And the deed vesting the

property in Mrs. Lee's trustees having been duly recorded in the manner required by the statute, it was effectual according to the laws of Virginia, to protect the title against subsequent creditors of, or purchasers from, Richard Bland Lee.

Upon the whole, we are of opinion the decree below dismissing the bill should be affirmed.

BALDWIN, J., dissented. THOMPSON, J., did not sit.

HAMILTON v. RUSSEL.

(1 Cranch, 309-318. 1803.)

ERROR to the Circuit Court for the County of Washington, District of Columbia.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—On the 4th January, 1800, Robert Hamilton made to Thomas Hamilton an absolute bill of sale for a slave in the bill mentioned, which on the 14th of April, 1801, was acknowledged and recorded in the court of the county in which he resided. The slave continued in possession of the vendor; and some short time after the bill of sale was recorded, an execution on a judgment obtained against the vendor was levied on the slave, and on some other personal property also in possession of the vendor. In July, 1801, Thomas Hamilton, the vendee, brought trespass against the defendant Russel, by whose execution, and by whose direction, the property had been seized; and at the trial, the counsel for the defendant moved the court to instruct the jury that if the slave, George, remained in the possession of the vendor, by the consent and permission of the vendee; and if by such consent and permission the vendor continued to exercise acts of ownership over him, the vendee, under such circumstances, could not protect such slave from the execution of the defendant.

The court gave the instruction required, to which a bill of exceptions was taken. The counsel for the plaintiff then moved the court to instruct the jury that a plaintiff in trespass, whose property is loaned to a friend, and is in that friend's possession at the time it is seized by a sheriff in virtue of an execution against the person so in possession, can sustain an action of trespass for a seizure upon such possession. The court, being divided, refused to give the instruction required, and the jury found a verdict for the defendant. Judgment was accordingly rendered for the defendant, to which a writ of error has been sued out, and the question is, whether the court below has erred in the instructions given or refused.

In the opinion to which the first bill of exceptions was taken, it is contended, on two grounds, that the circuit court has erred. 1st. Because this sale is, under the act of the Virginia assembly against fraudulent sales, protected by being recorded. 2dly. That if it be not protected by that act, still it is only evidence of fraud, and not in itself a fraud.

§ 714. *The Virginia law against fraudulent conveyances does not validate a bill of sale unaccompanied by possession, if recorded.*

On examining the act of assembly alluded to, the court is of opinion that it does not comprehend absolute bills of sale among those where the title may be separated from the possession, and yet the conveyance be a valid one, if recorded within eight months. On this point one judge doubted, but he is of

opinion that this bill of sale was not recorded within the time required by the act, and that the decision in the case of *Eppes v. Randolph*, 2 Call, which was made by the court of appeals of Virginia, on a different act of assembly, would not apply to this act.

§ 715. *A bill of sale unaccompanied by possession is per se fraudulent.*

On the second point there was more difficulty. The act of assembly, which governs the case, appears, as far as respects fraudulent conveyances, to be intended to be co-extensive with the acts of the 13th and 27th Elizabeth, and those acts are considered as only declaratory of the principles of the common law. The decisions of the English judges, therefore, apply to this case.

In some cases a sale of a chattel, unaccompanied by the delivery of possession, appears to have been considered as an evidence, or a badge, of fraud, to be submitted to the jury, under the direction of the court, and not as constituting in itself, in point of law, an actual fraud which rendered the transaction as to creditors entirely void. Modern decisions have taken this question up upon principle, and have determined that an unconditional sale, where the possession does not "accompany and follow the deed," is, with respect to creditors, on the sound construction of the statute of Elizabeth, a fraud, and should be so determined by the court. The distinction they have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is incompatible with the deed itself; and a deed made upon condition which does not entitle the vendor to the immediate possession. The case of *Edwards v. Harbin*, Ex'r of *Tempest Mercer*, 2 Term Rep. 587, turns on this distinction and is a very strong case.

William *Tempest Mercer*, on the 27th of March, 1786, offered to the defendant, *Harbin*, a bill of sale of sundry chattels as a security for a debt due by *Mercer* to *Harbin*. This *Harbin* refused to take, unless he should be permitted, at the expiration of fourteen days, if the debt should remain unpaid, to take possession of the goods and sell them in satisfaction of the debt, the surplus money to be returned to *Mercer*. To this *Mercer* agreed, and a bill of sale, purporting on the face of it to be absolute, was executed, and a corkscrew delivered in the name of the whole. *Mercer* died within the fourteen days, and immediately after their expiration *Harbin* took possession of the goods specified in the bill of sale and sold them. A suit was then brought against him by *Edwards*, who was also a creditor of *Mercer*, charging *Harbin* as executor in his own wrong, and the question was, whether this bill of sale was fraudulent and void, as being on its face absolute and being unaccompanied by the delivery of possession. It was determined to be fraudulent; and in that case it is said that all the judges of England had been consulted on a motion for a new trial in the case of *Bamford v. Baron*, and were unanimously of opinion that "unless possession accompanies and follows the deed it is fraudulent and void;" that is, that unless the possession remain with the person shown by the deed to be entitled to it, such deed is void as to creditors within the statutes. This principle is said, by Judge Buller, to have been long settled, and never to have been seriously questioned. He states it to have been established by Lord Coke, in 2 *Bulstrode*, so far as to declare that an absolute conveyance or gift of a lease for years, unattended with possession was fraudulent. "But if the deed or conveyance be conditional, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition." "And that case," continues Judge Buller, "makes

the distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For in the latter case, the possession continuing with the vendor till such future time, or till that condition be performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed by all the cases since." "This," continues the judge, "has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent."

This court is of the same opinion. We think that the intent of the statute is best promoted by that construction, and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud, unless possession "accompanies and follows the deed." This construction, too, comports with the words of the act. Such a deed must be considered as made with an intent "to delay, hinder or defraud creditors."

On the second bill of exceptions the court did right in refusing to give the instruction required. The question propounded seems to have been an abstract question not belonging to the cause.

Judgment affirmed, with costs.

WARNER v. NORTON.

(20 Howard, 448-461. 1857.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.—This case is brought before us by a writ of error from the northern district of Illinois.

An action of trespass was commenced by Norton *et al.* against Warner, charging him with having seized and carried away personal property of the value of \$10,000. The defendant pleaded not guilty, and by several special pleas set up that certain creditors of Augustus A. Haskins, who had left his residence at Lasalle, procured a writ of attachment under the statutes of Illinois, which was directed to the defendant, as sheriff, in virtue of which he attached the personal property of Haskins, which is the trespass charged, etc.

The bill of exceptions taken on the trial will show the points of law which were made on the facts. The proof of the plaintiffs tended to show that Beman, one of the plaintiffs, had a claim as creditor against Haskins for the sum of \$1,200, and that the firm of Norton, Jewett & Busby had also a claim of about \$3,000; that each of these claims had been put into the hands of one Anderson for collection, with authority to settle them; that on the 10th of January, 1855, the goods were chiefly in a hardware storeroom, and in the tin shop attached thereto in the village of Lasalle; that up to that time Haskins had been carrying on the business of a hardware retailer and manufacturer of tinware; that while he was absent the business was conducted by one Atherton, his head clerk, who employed the operatives and superintended their work; that on the 10th of January, 1855, Haskins sold his stock to Beman, and the firm of Norton, Jewett & Busby, through Anderson as their

agent, Anderson canceling the aforesaid debts, and giving his notes on time to Haskins for the balance of the price agreed upon; and thereupon, by way of putting the purchaser into possession, Haskins, Anderson and Atherton being in the storeroom, Haskins got the key of the outer door and gave it to Anderson, and Anderson gave the key and charge of the store and tin shop to Atherton, who up to that time had been carrying on the business for Haskins, but then undertook to act for Anderson.

Anderson and Haskins left Lasalle and did not return until after the attachment was laid on the goods. Haskins never returned to reside there, and exercised no ownership over the goods after the sale. Norton, Jewett & Busby were the ostensible partners of their firm, but they informed Anderson that John C. Phelps and his brother were special partners. There was no further evidence to show the interest of the Phelps, except the belief of the witness that they were parties, though he could not so state from his own personal knowledge. An objection to this defect of proof was made, but not insisted on.

The plaintiffs' proof further tended to show that the sheriff, on the 9th of February, 1855, did take property attached, and removed it; and evidence was offered to show that before and at the time of said sale Haskins was in failing circumstances, and that certain creditors had sued out writs of attachment, as set forth in defendants' special pleas, against the goods of said Haskins, and that the taking of the property complained of was by legal process.

Defendant offered further evidence tending to prove that said sale was made secretly, but several of the plaintiffs' witnesses stated the sale was not made secretly, and that, while the invoice was being made out, people were coming in and going out of the store as usual; that no steps were taken by any one to make the sale known until after the attachment was laid; that from the time of the sale Atherton continued to control the goods and the business as before, and to all appearance was doing so for Haskins; that sales were made to customers as formerly without notice to any one of the change of proprietors, and, in some instances, the bills and receipts of sales to customers were made out in the name of Haskins. No change was made in keeping the books; that the servants and operatives about the store and tin shop continued to work under the direction of Atherton, with no knowledge of any sale, and supposing the business was being carried on as formerly, and for the use of Haskins; but it did not appear that any of these things were authorized by the plaintiffs or known to them; and that this condition and course of things continued until the goods were seized by the sheriff.

§ 716. *In a joint suit for trespass plaintiffs must have a joint interest.*

After the testimony was closed the court charged the jury: First, they must be satisfied from the evidence that the plaintiffs named in the declaration had a joint interest in the property sued for, or they must find for the defendant. The jury found for the plaintiffs, which shows they were satisfied with the evidence on the point made, or considered the objection abandoned. If it were not insisted on in the court below it cannot be raised here. There is no error in this charge of the court.

The second, third and fourth charges were, "that if the jury believe from the evidence the sale was made for the purpose of hindering, delaying or defrauding creditors, it was invalid as against the defendant; and that whether the sale was or was not fraudulent was a question of fact to be determined by the jury under all the circumstances of the case. That if the sale was secret, and no means taken to apprise the public of it, these were facts which threw

suspicion upon the transaction, but did not make the sale fraudulent in law as against the defendant."

§ 717. *A sale of personal property, possession of which is kept by vendor, is not void as matter of law, but the question of fraud is for the jury.*

It is insisted that the sale was void as matter of law against creditors, and should have been so held by the court, and the case of *Hamilton v. Russell*, 1 Cranch, 310; 1 Curtis, 415, is cited as sustaining this position. In that case Hamilton made an absolute bill of sale for a slave on the 4th of January, 1800, which was acknowledged and recorded on the 14th of April, 1801. The slave continued in the possession of the vendor until an execution was levied on him as the property of the vendor. Trespass was brought against the plaintiff in the execution, who directed the levy to be made. The court held, under the statute of Virginia against frauds, that an absolute bill of sale, unless possession "accompanies and follows" the deed is fraudulent; and the case of *Edwards v. Harben*, 2 Term Rep., 587, was cited. It is admitted that the statute is in affirmance of the common law. (See §§ 714-15, *supra*.)

In his third volume of Commentaries, Chancellor Kent has an interesting chapter on this subject, in which the case of *Edwards v. Harben* and many other authorities are cited; and he favors the doctrine that unless the possession of goods follows the deed, it is fraudulent *per se*. But he states many exceptions to this rule, as where the possession of the vendor is consistent with the deed or the circumstances of the case. And he says in *Steward v. Lambe*, 1 Brod. and Bing., 506, the court of C. B. questioned very strongly the general doctrine in *Edwards v. Harben*, that actual possession was necessary to transfer the property in a chattel, and the authority itself was shaken. And he observes the conclusion from the more recent English cases would seem to be that though a continuance in possession by the vendor be *prima facie* a badge of fraud, yet the presumption of fraud may be rebutted by explanations.

In the case of *Wood v. Dixie*, 7 Q. B., 894, the counsel who was interested in maintaining the doctrine of *Edwards v. Harben*, admitted that "some doubt has existed whether upon certain facts, as for instance, want of possession, fraud is a question of law to be decided by the court, or of fact for the jury; but it seems to be now established that the question is for the jury. In *Martindale v. Booth*, 3 B. and Ad., 498, Parke, justice, says the dictum of Buller, justice, in *Edwards v. Harben*, has not been considered in subsequent cases to have that import; the want of delivery is only evidence that the transfer was colorable. In *Benton v. Thornbell*, 2 Marsh., 427; *Lattimer v. Batson*, 4 Barn. and Cress., 652, the same doctrine is laid down. In the more modern English cases the stringent doctrine of *Edwards v. Harben* has been departed from, and the want of possession of chattels purchased is considered evidence of fraud before the jury. In *Kidd v. Rawlinson*, 2 Bos. and Pull., 59, Lord Eldon admitted that a bill of sale of goods might be taken as a security on a loan of money, and the goods fairly and safely left with the debtor. And this decision conformed to Lord Holt's view in *Cole v. Davis*, 1 Lord Raymond, 724, and Lord Eldon, many years afterwards, declared in *Lady Arundell v. Phipps*, 10 Ver., 145, that possession of goods by the vendor was only *prima facie* evidence of fraud. In *Eastwood v. Brown*, 1 Ryan and Moody, Lord Tenterden held want of possession was only *prima facie* evidence of fraud.

It would seem to be difficult on principle, to maintain that the possession of goods sold is *per se* fraud, to be so pronounced by the court as that cuts off all explanation of the transaction, which may have been entirely unexceptionable.

If circumstances at law may be proved to rebut the presumption of fraud, the case must be submitted to the jury.

But the case before us is not similar to that of *Hamilton v. Russell*. There was a change of possession in the goods purchased by Anderson by the delivery to him of the key of the outer door of the storehouse, which he delivered to Atherton, who had agreed to continue in the business as the agent of the purchasers. From the time of the purchase, Haskins had no possession of the property, nor did he exercise any acts of ownership over it. He was absent from Lasalle from the time of the sale until after the attachment was laid. Now, whether this was a colorable delivery or not, was a matter of fact for the jury and not a matter of law for the court. It is clearly not within the case of *Hamilton v. Russell*.

Few questions in the law have given rise to a greater conflict of authority than the one under consideration. But for many years past the tendency has been in England and in the United States, to consider the question of fraud as a fact for the jury under the instruction of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of goods does not accompany the deed, it is *prima facie* fraudulent, but open to the circumstances of the transaction, which may prove an innocent purpose. But if such explanation may be given, it is a departure from the stringent rule in the case of *Edwards v. Harben*.

§ 718. *Secrecy in sale of property is a badge of fraud, but not conclusive of it.*

It is urged that the fourth instruction is erroneous, as the jury were told, though the sale was secret, and no means taken to make it public, it was not fraudulent in law against the defendant. Whilst in the old cases it was held that the possession of the vendor of goods sold was fraudulent against creditors, no case, it is believed, has been so held by the court on the alone ground of secrecy in making the contract. It is a circumstance connected with other facts from which fraud may be inferred. But if the secrecy supposed amounted to absolute fraud, yet the court could not have so pronounced in this case, as there was evidence controverting the supposition of secrecy, which the court could not properly take from the consideration of the jury.

The fifth and sixth charges were that the jury were to determine the facts as to the possession after the sale, and that if a sale is made by a party and the vendor remains in possession, it is ordinarily a badge of fraud, and requires explanation, and under the sixth they left the case to the jury to determine whether the sale was in good faith and for an honest purpose; which instructions were, as we think, correct, and in accordance with the general doctrine on the subject.

§ 719. *Decision on motion for new trial not a ground of error.*

A decision on a motion for a new trial, being addressed to the discretion of the court, is no ground for a writ of error.

The judgment of the circuit court is affirmed.

MITCHELL v. WINSLOW.

(Circuit Court for Maine: 2 Story, 630-648. 1843.)

STATEMENT OF FACTS.—The mortgage in this case was executed by the Messrs. Ropes to Jeremiah Winslow, to secure a loan of \$15,000, conveying "all and singular all the machinery of every kind, which is in and belonging

to our cutlery manufactory at Saccarappa, in Westbrook, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of said manufactory, which we may at any time purchase for four years from this date, and also all the stock which we may manufacture or purchase during said four years. To have and to hold," etc. "Provided, nevertheless, that if the Ropeses paid to Winslow, within four years, the principal sum borrowed, with interest semi-annually, then the deed, with certain notes of hand given to secure the same, to be void. Provided, also, until default of or in the payment of said sums of money, or of some part thereof, or of the interest therefor, contrary to the true intent and meaning of the preceding proviso, it shall and may be lawful to and for the said George and David N. Ropes, their heirs and assigns, quietly and peaceably, to hold and enjoy, all and singular the premises hereby granted, and to secure and take the rents and profits therefor, to and for their own use and benefit, without denial or interruption of or by the said Jeremiah, his heirs or assigns, or any other person or persons claiming by or under him." The instrument was recorded, and in July, 1842, the interest being in arrear, N. Winslow took possession of the property as agent of Jeremiah, and sold it to Neal Dow. Subsequently the Ropeses were adjudged bankrupts, and their assignee filed a petition praying for an order authorizing him to take possession of the property.

Opinion by STORR, J.

Two questions are presented for the consideration of the court. (1) Whether the present mortgage created a valid lien, in favor of the mortgagee, upon the machinery, tools, and stock in trade, acquired by the mortgagors, and put into the factory after the execution of the mortgage, within the true intent and meaning of the proviso in the second section of the bankrupt act of 1841, chapter 9. (2) Whether admitting the stipulations of the mortgage might, as against the mortgagor, be a good and sufficient authority to the mortgagee to take possession of, and apply the subsequently acquired machinery, tools, and stock, to the payment of the debt to him, the mortgage is good, so as to protect the property against the claims of the other creditors of the bankrupts.

The proviso of the bankrupt act above alluded to is in the following words: "And provided, also, that nothing in this act contained shall be construed to annul, destroy or impair any lawful rights of married women, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." I am not aware that the present mortgage has been contended to be inconsistent with anything contained in any section of the act. It was executed long before the bankrupt act was in existence; and there is no pretense to say that it is designedly fraudulent, or that the mortgagee has waived any of his rights under the mortgage.

The present is a mortgage of personal property, and has been duly recorded according to the act of 1839, chapter 390, of the state of Maine (which is substantially in the same language as the act of Massachusetts on the same subject), and no objection arises on this head. The question, therefore, in effect, resolves itself into this, whether the mortgage, *quoad* future machinery, tools, and stock in trade, is a valid mortgage or lien, by the laws of the state of Maine, as between the parties themselves, and also, as between the mortgagee

and the creditors of the mortgagors. If it be valid, either at law or in equity (it is wholly immaterial which), then the decision must be in favor of the respondent; otherwise, it must be in favor of the assignee.

It is material here to state that the present is not a controversy between a first and second mortgagee, as to property acquired and *in esse* after the execution of the first mortgage, and before the time of the execution of the second mortgage, both the mortgagees being *bona fide* purchasers for a valuable consideration, and the second mortgagee having no notice of the prior incumbrance. That might, at law, present a very different question, and is precisely that which is understood to have been decided in the case of *Winslow v. The Merchants' Insurance Company*, in Massachusetts. Neither is this a controversy between a mortgagee of a thing in building (as, for example, a ship in building) before it is completed, and a subsequent attaching creditor, or a subsequent purchaser, after it is completed, which seems to have been the important point in *Goodenow, administrator, v. Dunn, administratrix*, and *Burney v. Amee*, 8 Pick., 236, and which might, also, at law, admit of very different considerations. The present is a question between the assignee of a bankrupt, acting for the benefit of all the creditors and the mortgagee, claiming title under his mortgage; and it arises upon a petition, partaking of the character of a summary proceeding in equity, and not in a suit at the common law, or governed by its principles. Now, it is most material to bear in mind, under this aspect of the case, that it is a well established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and, consequently, they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. This was expressly laid down by Lord Hardwicke in *Brown v. Heathcote*, 1 Atk., 160, 162, where he said: "The ground that the court go upon is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could. Therefore, assignments of choses in action for a valuable consideration, have been held good against such assignees." The same doctrine was recognized by his Lordship in *Jewson v. Moulson*, 2 Atk., 417, 420. Sir William Grant [Master of the Rolls], in *Mitford v. Mitford*, 9 Ves., 87, 100, said: "I have always understood the assignments from the commissioners, like any other assignment by operation of law, passed his (the bankrupt's) rights precisely in the same plight and condition as he possessed them. Even where a complete title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shows that they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed, a distinction has been constantly taken between them and a particular assignee for a valuable consideration; and the former are placed in the same class as voluntary assignees and personal representatives." The same doctrine was held by Lord Thurlow in *Worrall v. Marlar*, reported in Mr. Coxe's Note to 1 P. Will., 459. It has ever since been firmly adhered to, (see *Parker & Blanchard v. Muggidge*, 5 Law Rep., 358; 1 Cooke, Bank. Law, ch. 7, § 2, pp. 267-270, 4th edit., 1799; 1 Deacon on Bank. Laws, ch. 10, § 3, pp. 320, 321, edit., 1827; 2 Story on Eq. Jurisp., §§ 1229, 1411); and has been fully recognized at law, in cases of bankruptcy. Lord Chief Justice Willes, in *Scott v. Surman*, Willes, 402, and the reporter's note; *Gladstone v. Hadwen*, 1 M. & Selw., 517, 526; Com.

Dig., Bankrupt, D., 19; *Leslie v. Guthrie*, 1 Bing., New Cas., 697; *Carvalho v. Burn*, 4 Barn. & Adolp., 382, 393; *Meyer v. Sharpe*, 5 Taunt., 74; *Simond v. Hibbert*, 1 Russ. & Mylne, 729.

§ 720. *What necessary to a valid assignment at law.*

It may be admitted to be true, what, indeed, seems to be the result of the authorities cited at the bar, as well as of others equally entitled to respect, that to make a grant or assignment valid at law, the thing which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment; and that a mere possibility is not assignable (*Wood & Foster's Case*, 1 Leon. R., 42; *Grantham v. Hawley*, Hob. R., 132; *Robinson v. Macdonnell*, 5 Maule & Selw., 228; Com. Dig., Assignment, ch. 3, Grant, D); although, perhaps, the doctrine may require some qualifications under special circumstances, as for example, in cases of the assignment of freight in the course of earning at the time of the assignment, as is shown in the case of *Leslie v. Guthrie*, 1 Bing., New Cas., 697, 708, 709. But this admission will carry us but a very little way in the present case. For here the true question is, not whether the assignment of the property to be acquired *in futuro* is good at law, but whether it is good in equity; for if it be, then, independently of any fraud (which is not pretended), as the assignee can take only what the bankrupt had a title to, subject to all equities, it follows, as a matter of course, that the petitioner (the assignee) has no claim on which he can found himself for relief under his petition. So that the question is in reality narrowed down to the mere consideration of this, whether the present mortgage as to the future machinery, tools, and stock in trade to be put into the factory (for there is no controversy as to those *in esse* at the time of the assignment), is valid or not against the mortgagor.

§ 721. *Courts of equity support assignments of contingent interests and expectancies.*

Upon the best consideration which I am able to give the subject, I think it is good and valid. Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments of rights and interests which are absolutely fixed and *in esse*. On the contrary, they support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true that the assignment can have no positive operation to transfer *in presenti* property in things not *in esse*; but it operates by way of present contract, to take effect and attach to the things assigned when and as soon as they come *in esse*; and it may be enforced as such a contract *in rem* in equity. Lord Hardwicke, in *Wright v. Wright*, 1 Ves., 409, 411, expressly recognized this doctrine; and said that an assignment of a contingent interest or possibility of an inheritance was equally allowable with an assignment of a possibility of a personal thing or chattel real. And he added: "An assignment always operates by way of agreement or contract, amounting, in the consideration of this court, to this, that one agrees with another to transfer and make good that right or interest which is made good here by way of agreement." In the very case then before him he admitted that the assignor had no immediate claim or demand, but a mere possibility in the property assigned, and that it was well assigned by the word "claim," which well described it, *in presenti* and *in futuro*. He also relied on the case of *Beckley v. Newland*. 2 P. Will., 182, which (he said) was an agreement on marriage to settle all such lands as came to the party by descent or

otherwise from his father; and it was carried into effect by the court, notwithstanding an expectancy of an heir at law is less than a possibility; and *Hobson v. Trevor*, 2 P. Will., 191, was fully to the same effect. In *Carleton v. Leighton*, 3 Meriv., 667, Lord Eldon is said to have held that the expectancy of an heir, presumptive or apparent, was not an interest or possibility, nor was capable of being made the subject of assignment or contract. But there is some reason to doubt the accuracy of the language as to assignment or contract; for he is reported immediately to have added that the cases cited (referring to the cases of *Beckley v. Newland*, and *Hobson v. Trevor*) were cases of covenant to settle or assign property which should fall to the covenantor, where the interest, which passed by the covenant, was not an interest in the land, but a right under the contract. This is strictly true, but still the contract was obligatory and sufficient to enforce a specific performance thereof.

In the case of *Carleton v. Leighton*, the sole question was whether the mere expectancy of an heir who became bankrupt passed by the assignment of the commissioners. Lord Eldon held that it did not; for it was not an interest or even a possibility in the land. It seems clear that the language of Lord Eldon ought to receive some modification from other language used by him on other occasions. Thus, in *Lord Dursley v. Fitzhardinge*, 6 Ves., 260, 261, he expressly admitted that an heir or the next of kin might enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate; for the law would frame an interest in respect of the contract. Again, *In re The Ship Warre*, 8 Price, 269, *note*, in reference to the doctrine of Lord Ellenborough in *Robinson v. Macdonnell*, 5 M & Selw., 228, Lord Eldon said that he should find it extremely difficult to say that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings forever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid. Again, in *Curtis v. Auber*, 1 Jac. & Walk., 506, 512, where an assignment was made of the present and future earnings of a ship, Lord Eldon supported it, and said: "In one case I think it was held that although you might assign the wool then growing on the backs of the sheep, you could not assign the future fleeces. See, *Grantham v. Hawley*, Hobart, 132; 1 Madd., Ch. Pract., 549, 2d edit. But still it was a good equitable assignment, and rendered the future earnings liable in equity."

The same doctrine was maintained by Mr. Vice-Chancellor Shadwell in *Douglas v. Russel*, 4 Simons, 524; and his decree was afterwards affirmed by the Lord Chancellor, 1 Mylne & Keen, R., 488, upon appeal, as to an assignment of freight earned and to be earned on an outward and homeward voyage, then about to be undertaken. And it was acted upon and supported in a like assignment of freight to be earned on a particular voyage in the case of *Leslie v. Guthrie*, 1 Bing., N. C., 697, 708, 709, where the whole subject was argued at large, in a suit of the assignees under a bankruptcy.

But the latest case, and certainly one of the most important and satisfactory in its reasoning, as well as its conclusion, is that of *Langton v. Horton*, 1 Hare, 549, before Mr. Vice-Chancellor Wigram. There, a deed of assignment by way of mortgage, was made of a whale ship and her tackle and appurtenances, and all oil and head-matter and other cargo, which might be caught and brought home in the ship on and from her then present voyage; and the

question arose between an execution creditor of the assignor, and the assignee, whether the assignment was good as to the future cargo obtained in the voyage after the assignment. The learned vice-chancellor decided that it was. Upon that occasion he said: "Is it true, then, that a subject to be acquired after the date of a contract, cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title, I do not now advert to; but cases recognizing the general proposition are of common occurrence. A tenant, for example, contracts that particular things which shall be on the property when the term of his occupation expires shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a court of equity will enforce such contracts, where they are founded on valuable consideration, and justice requires that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies, in terms, to implements, which shall be there at the time specified; and here neither construction nor decision has confined it to those articles which were on the property at the time the lease was granted. But it is not necessary that I should refer to such cases as these; for Lord Eldon, in the case of *The Ship Warre*, 8 Price, 269, n., and in *Curtis v. Auber*, 1 J. & W., 526, has decided all that is necessary to dispose of the present argument. Admitting that those cases are not specifically, and in terms, like the principal case, they are not of the less authority for the present purpose; for they remove the difficulty, which has been raised in argument, and decided, that non-existing property may be the subject of valid assignment. I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of 5,000*l.* to pay the crew and furnish an outfit; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a court of equity, upon a contract so framed, would hold, that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage, the whales taken, or the oil obtained, shall be his security for the amount of his advances. I cannot, without going in opposition to many authorities, which have been cited, throw any doubt upon the point, that Birnie, the contracting party, would be bound by the assignment to the plaintiffs."

§ 722. *Validity of contract to create a lien on property to which the party has not the title, or which is not in esse.*

Now, it seems to me, that this reasoning is exceedingly cogent and striking, and it stands upon grounds entirely satisfactory and conclusive upon the whole subject. What, then, is there to distinguish the case before the court from this reasoning? I confess myself unable to perceive any. It seems to me a clear result of all the authorities, that wherever the parties, by their con-

tract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy. See 2 Story on Eq. Jurisp., § 1231, and the authorities there cited; Cross on Liens, ch. 12, pp. 187, 188, 191, 192; *Prebble v. Boghurst*, 1 Swanst. R., 309; *Needham v. Smith*, 4 Russ., 318; *Randall v. Willis*, 5 Ves., 262, 274, 275; *Simond v. Hibbert*, 1 Russ. & Mylne, 719.

§ 723. *Right of mortgagor to retain possession of property.*

But, then, it is argued, that here the possession of the property was during the whole period of four years to remain in the mortgagors, and they were to take the rents and profits thereof for their own benefit. Nay, that they had the power to dispose of the stock in trade and the other property by sale, and thus they acquired and retained the full dominion over the same during that period, which is inconsistent with the nature and objects of such a mortgage, and against the policy of the law. In short, that as to creditors, it operates a virtual constructive fraud upon their rights. As to the possession and use of the property, and taking the rents and profits thereof, there is nothing in that part of the objection which will invalidate the mortgage.

Nothing is more common in mortgages of real estate than an agreement that the mortgagor shall take the rents and profits until breach of the condition thereof. And as to chattels there is as little question that where a mortgage or a lien is created on chattels by contract it is entirely competent for the parties to agree that the possession and use thereof shall be retained by the mortgagor until the breach of the condition, or by the debtor until the creditor shall assert his rights against it as a security for the debt. Even in cases of bankruptcy, a qualified possession of the property by the debtor will not oust the creditor of his rights as leaving the property in the order and disposition of the debtor under the statute of 21 Jac., 1, ch. 19, §§ 10, 11, or the statute of 6 Geo. 4, ch. 16, § 72. That was expressly held in *Crowfoot v. London Dock Co.*, 2 Crompt. & Mees., 637, where the possession of the debtor was not exclusive but was mixed up with that of the creditor, the property (steam engines and other apparatus) being employed by the debtor in operations conducted by the company, the possession of the debtor being in pursuance of an arrangement under which he had a right of user for the purposes of the contract. The case of *Hawthorn v. Newcastle & North Shields Railway Company*, reported in Cross on Lien, Appendix, 408, carried the doctrine a step farther, and decided that a covenant in a contract to build a bridge for the company, made by the builders, that the company should have a lien upon the machines, implements and materials of the builders, in or upon the land or grounds where the bridge was to be built, as a security for the completion of the works was good in favor of the company, in the case of the bankruptcy of the builders, as a lien in the nature of a shifting lien upon such materials as happened for the time being to lie upon the actual line of the railway or upon the adjacent land in possession of the company. Under the statute of Maine for the recording of mortgages of personal property (act of 1839, ch. 390), where the mortgage is recorded, it is valid without possession of the property mortgaged being delivered to the mortgagee, and a stipulation that it shall remain in possession of

the mortgagor until breach of the condition, has been upheld as within the true spirit and intendment of the act. *Forbes v. Parker*, 16 Pick. R., 462; Revised Statutes of Maine, ch. 125, § 32, p. 558, edit. 1841; *Abbott v. Goodwin*, 2 Appl. & Shep. R., 408.

§ 724. — *and to sell.*

Then as to the supposed right of sale of the stock in trade and other mortgaged property. Admitting it to exist, and to be fairly deducible from the language of the instrument (which certainly is not a strained construction of its apparent object and intent), that right, conceded by the mortgagee, is not inconsistent with the validity of the mortgage; for still the proceeds or other equivalent property may be substituted for it, and if the parties consent to such an arrangement there seems no legal objection to it. The case of *Abbott v. Goodwin*, 20 Me., 408 (2 Appl. & Shep., 408), manifestly proceeds upon this ground. In that case it was expressly decided that if the mortgagor should, under a stipulation in the mortgage giving him that authority, sell the goods mortgaged, and with the proceeds should purchase other goods, the latter goods would represent the first and be substituted for them; and would be equally with the first subject to the lien of the mortgagee. Now, in effect, precisely what the court thus decided to be the result of law is provided for by the agreement of the parties in the present mortgage. *Macomber v. Parker*, 14 Pick. R., 497, affirms the same doctrine; and both proceed upon principles analogous to those held in *Hawthorn v. Newcastle & North Shields Railway Company*, already cited.

§ 725. *Where the mortgage is recorded, the mere fact that the mortgagor is to retain possession until default is not a fraud as to creditors.*

This objection then falls to the ground and leaves the case stripped of every other consideration except the argument that the mortgage is a virtual fraud upon the other creditors and is against the policy of the law, and, therefore, cannot be protected against the claims of the other creditors, however it might stand valid as between the parties themselves. And this, in effect, is the remaining point arising upon the second question propounded at the hearing. Now, if the considerations already suggested are sound, they seem to dispose of this part of the controversy. There is no pretense of any fraud, either actual or constructive, intended by the mortgagor and mortgagee. So far as their intentions are concerned, they were upright, and honest, and correct. The mortgage was recorded, and there is no ground to suggest any intentional concealment. The possession of the property by the mortgagors, and the power to use it and dispose of it, was not only consistent with the deed, but was positively avowed and provided for by it. The creditors, therefore, were not allured by any false colors or false credit held out to mislead them. Now, I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence. Indeed, the law makes the registration of the deed constructive notice of its contents to all persons; since it was required to be registered, and was registered in conformity to law. What ground is there, then, to assert that the conveyance was against the policy of the law? The phrase itself is somewhat indefinite, and, in its actual application here, is difficult to be grasped and comprehended. I profess that I am not able to perceive any; and, as far as authorities go, they point the other way. Besides, the assignee here stands

before the court affected with all the equities of the original debtors; and the creditors here assert their rights through and under the assignee and not by any paramount title.

In every view, therefore, which I am able to take of the case, it seems to me that the claim of the assignee is not maintainable, and that his petition ought to be dismissed.

Under all the circumstances, as the questions are of a somewhat novel character, I incline to think that the respondents ought not to be allowed their costs; and that the costs of the assignee should be a charge on the bankrupt's estate. But this is a matter for the consideration of the district judge. I shall, accordingly, direct a certificate to be sent to the district court, answering both the questions adjourned into this court in the affirmative.

HAWKINS v. HASTINGS BANK.

(Circuit Court for Minnesota: 1 Dillon, 462-465. 1870.)

Action by an assignee in bankruptcy to set aside a mortgage made by the bankrupt.

§ 725a. *A seal attached to an instrument, which does not require the same by law, does not change its character or effect.*

Opinion by NELSON, J.

The mortgage is fair and valid upon its face. It is executed under seal by one partner, in the name of the firm, the copartner having subsequently given his parol assent thereto. There is nothing in the statutes of this state requiring such an instrument to be under seal, and the fact that a seal is attached, does not change its character or effect. 1 Met., 515, and cases cited. Indeed, if a seal was necessary to the validity of such an instrument, we are satisfied that the rigid common law rule has been relaxed, and the doctrine fully sustained by modern decisions, that one partner can bind the firm by an instrument in writing under seal, when both are interested in the transaction, if there is a previous parol authority, or a subsequent parol assent to the act. 4 Metcalf, 548; Smith v. Kerr, 3 Comst., 144; 4 T. R., 313; Kinner v. Dayton, 19 Johns., 513; 11 Pick., 400.

§ 726. *A clause in a mortgage making the mortgagors the agents of the mortgagees in selling the property, the proceeds to be applied to the main indebtedness, does not affect the mortgage with any taint of fraud.*

The consideration (\$6,000) was advanced at the time the mortgage was executed, and credit was given upon the bank check book for the amount, less interest and stamps, and although some past due paper, held by the bank against the mortgagors and their father, was paid, I do not think there was anything in this particular branch of the transaction to indicate unfairness or dishonesty. The conditions of the mortgage are a little out of the ordinary terms of such instruments, but as the consideration was a present one, and the money received was immediately appropriated to the payment of actual indebtedness to other creditors, to an amount nearly equal to the consideration expressed, the instrument is not necessarily void on that account. The stipulations which are pressed by counsel, as indicating fraud *per se*, are as follows: "And it is further agreed between the parties hereto, that until said sum of \$6,000 and interest shall be paid, the said parties of the first part shall remain in possession of said goods, as the agents of the party of the second part, and shall well and truly account to the said party of the second part, their as-

signs, monthly, for all sales made by them, of the aforesaid property, hereby mortgaged, until said sum of \$6,000 shall be fully paid and satisfied, . . . the intention of the parties to this mortgage being that the sale of the property herein specified be absolute to the said party of the second part, until said indebtedness shall be fully paid, with interest; *said parties of the first part only acting as the agents of the said party of the second part, in disposing of the goods hereinbefore mentioned, and accounting for the proceeds thereof, until said indebtedness is paid.*" These conditions do not render the mortgage void upon its face; if carried out in good faith, they certainly would not hinder, delay, or defraud creditors. The object, as expressed, was to subject the mortgaged property to the payment of the loan. This is the legitimate purpose of securities of this character, and as the mortgagors had the control of the stock of goods, there being no actual and continued change of possession, they could only rightfully dispose of it for the purpose of liquidating the secured debts. They could not sell for their own use; this would have been a fraud upon creditors, and if such permission was given by the terms of the instrument, or agreed and consented to by parol, the mortgage would be void. 4 Minn., 533; 17 Wend., 492; 9 N. Y., 213; 13 id., 577; 19 id., 123; 2 Hilliard on Mortgages, and cases cited. The possession of the mortgagors is explained by the very terms of the instrument, and is not inconsistent with good faith, within the meaning of sec. 1, p. 326, R. S. Minn., tit., "Fraudulent Conveyances and Chattel Mortgages." The mortgagees, however, must be bound by the agreement which they have entered into. They have created the mortgagors their agents, and authorized them to sell the mortgaged property, and account monthly for the proceeds, until the debt is paid. So far as creditors are concerned, the relation of principal and agent must be sustained. The acts of the mortgagors, within the scope of their agency, must be regarded as the acts of the mortgagees, and proceeds of all sales made must be credited *pro tanto* towards extinguishing the debt. 28 N. Y., 360. The remaining property, or its proceeds, must go into the hands of the assignee. The books of the bank showed that the deposits made by the mortgagors, after the execution of the mortgage, and before they were closed up, exclusive of the \$6,000 loan which had been placed to their credit, amounted to \$5,251.62; and although there is no direct testimony that these deposits were from the proceeds of the sales of this stock of goods, I think the presumption is strong that such was the case, as they were made in small amounts, from day to day, running through a period of nearly two months. However, the mortgage debt, in my opinion, would be extinguished, provided the sales, during the time the mortgagors were in possession, amounted to the debt and interest.

We shall refer the matter to a master and examiner, to take an account and ascertain the amount of sales, giving the mortgagee, in his report, a decree for the deficiency, if any should be found.

ROBINSON v. ELLIOTT.

(22 Wallace, 513-527. 1874.)

APPEAL from U. S. Circuit Court, District of Indiana.

STATEMENT OF FACTS.—John and Seth Coolidge, partners, executed a chattel mortgage on all the goods in their store in favor of Robinson, as trustee, to secure him as indorser, and Sloan as creditor of the firm. The mortgage was duly recorded as required by the statute of frauds of Indiana in cases where

possession of chattels does not follow the deed, and among other things provided that the firm should retain possession of the goods and carry on their business as usual, buy and sell, replacing goods sold with new goods, to be subject to the same trusts. After the expiration of two years the secured debts, though reduced in amount, were unpaid, and one of the partners died and the survivor became bankrupt. The assignee, Elliott, claimed the goods, and Robinson filed a bill against him, which, upon demurrer, was dismissed, and Robinson appealed.

Opinion by MR. JUSTICE DAVIS.

There are few subjects which have been more discussed in the courts of this country, with less uniformity of decision, than that of sales and mortgages of personal goods, without delivery of possession. In Indiana the statute of 13th Elizabeth has been adopted, and two provisions applicable to this case engrafted on it. The first declares that "no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee, or assignee, and retained by him, unless such assignment or mortgage" shall be duly recorded. And the second says, "that the question of fraudulent intent in all cases shall be deemed a question of fact."

§ 727. *A mortgage in Indiana which simply permits the mortgagor to retain possession until breach of condition is prima facie valid.*

Prior to the incorporation of these provisions in the statute it was necessary to the validity of chattel mortgages in Indiana that there should be a manual delivery of the mortgaged property to the mortgagee, who should continue to hold the same in his possession. These provisions changed the law in this particular, and permitted the retention of the possession of personal property by the mortgagor in a chattel mortgage given as a security for the payment of debts. And there can be no question that in Indiana a mortgage, which simply allows the mortgagor to retain the possession and use of the property until breach of the condition is, when duly recorded, *prima facie* valid. But it is insisted that the effect of these provisions is also to make a mortgage of a stock of goods, containing a provision authorizing the mortgagor to retain possession for the purpose of selling in the usual course of trade, *prima facie* valid, and that the court cannot, as a matter of law, pronounce it fraudulent. This, we think, is going beyond what the legislature intended. If registration was intended, as we think it was, as a substitute for delivery of possession, it was not meant to be a protection for all the other stipulations contained in a mortgage. If so, it could be used as a cover for any fraudulent transaction, which would have to be treated, on the theory advanced, as valid, until the contrary was shown.

§ 728. *Recording a chattel mortgage in Indiana is a substitute for delivery of possession, but does not operate to make it prima facie valid if it is otherwise faulty.*

It is true the law conferred on the parties the right to agree that the possession of the property could remain with the mortgagor, provided the mortgage be recorded; but if the mortgage contains other provisions, which, on legal principles, vitiates the whole instrument, it is difficult to see how recording it could make it even *prima facie* valid. The bill of sales registration act in England makes void all bills of sale not filed as required, if unaccompanied by possession. An eminent writer in speaking of this act says: "Of course the mere fact of due registration of a bill of sale, under this act, does not

necessarily make it good against creditors. The act was not passed with a view of making good a title which was not good before, but for the protection of creditors." May on Fraudulent Conveyances, p. 120. And to the same effect is *Wood v. Lowry*, 17 Wend., 495-6.

§ 729. *Under the statute of frauds in Indiana it is competent for the court to declare a deed void upon its face as fraudulent in law.*

It is argued, however, that there can be no such thing in this class of cases as constructive fraud, because under the statute the question of fraudulent intent is one of fact. But the supreme court of Indiana has decided the question differently. The statute of that state for the prevention of frauds embraces twenty-two sections. The tenth relates to the registration of chattel mortgages; the seventeenth enacts that every assignment, etc., of any estate in lands or of goods, made with intent to hinder, delay or defraud creditors, shall be void; and the twenty-first declares that the question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact. It will thus be seen that the last section applies to conveyances of land as well as to assignments of goods by way of mortgage. In *Jenners and others v. Doe on the demise of Pomeroy and others*, 9 Ind., 461, the question was whether a deed of trust on certain lands was void as to creditors who did not consent to it. The court of original jurisdiction held the deed void upon its face as a question of law.

§ 730. *If a deed on its face conforms to the law it can go to the jury, for whom the question of intent is an open one.*

It was contended that this ruling was erroneous, and that in all cases the instrument must be referred to the jury in connection with the facts. But the supreme court held the ruling to be correct. They say that the provisions embraced in the seventeenth and twenty-first sections of the statute have declared, not changed, the law on the subject; that the court must, in the first instance, determine upon the legal effect of a written instrument, and if that be to delay creditors it is rejected. If, however, on its face it conforms to the law, it is received in evidence, and the question of the intent with which it was executed is an open one for the jury. It would seem to be the view of the court in this case, as well as in the preceding one in the same volume, of *Nutter v. Harris*, that the twenty-first section applies to cases of actual or meditated and intentional fraud, and is not applicable to written instruments which the law adjudges to be fraudulent on their face and consequently void.

There is, therefore, nothing in the way of the consideration of the main question involved in this controversy on its merits.

If chattel mortgages were formerly, in most of the states, treated as invalid unless actual possession was surrendered to the mortgagee, it is not so now, for modern legislation has, as a general thing (the cases to the contrary being exceptional), conceded the right to the mortgagor to retain possession, if the transaction is on good consideration and *bona fide*. This concession is in obedience to the wants of trade, which deem it beneficial to the community that the owners of personal property should be able to make *bona fide* mortgages of it, to secure creditors, without any actual change of possession.

§ 731. *Stipulations in a mortgage which do not benefit the creditor, but operate to the advantage of the debtor and to the injury of other creditors, vitiate the instrument.*

But the creditor must take care in making his contract that it does not contain provisions of no advantage to him, but which benefit the debtor, and were

designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract. These principles are not disputed, but the courts of the country are not agreed in their application to mortgages, with somewhat analogous provisions to the one under consideration. The cases cannot be reconciled by any process of reasoning or on any principle of law. As the question has never before been presented to this court, we are at liberty to adopt that rule on the subject which seems to us the safest and wisest. It is not difficult to see that the mere retention and use of personal property until default is altogether a different thing from the retention of possession accompanied with a power to dispose of it for the benefit of the mortgagor alone. The former is permitted by the laws of Indiana, is consistent with the idea of security, and may be for the accommodation of the mortgagee; but the latter is inconsistent with the nature and character of a mortgage, is no protection to the mortgagee, and of itself furnishes a pretty effectual shield to a dishonest debtor. We are not prepared to say that a mortgage under the Indiana statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors. But there are features engrafted on this mortgage which are not only to the prejudice of creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bona fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged. As long as the bank paper could be renewed, Robinson consented to be bound, and in Mrs. Sloan's case it was not expected that the debt would be paid at maturity, but that it would be renewed from time to time, as the parties might agree. It is very clear that the instrument was executed on the theory that the business could be carried on as formerly by the continued indorsement of Robinson, and that Mrs. Sloan was indifferent about prompt payment. The correctness of this theory is proved by the subsequent conduct of the parties, for the mortgagees remained in possession of the property, and bought and sold and traded in the manner of retail dry-goods merchants, from July 7, 1871, to August 7, 1873. During this period of twenty-five months Robinson indorsed as usual, and Mrs. Sloan was content with the payment of a small portion of the principal of her debt. Instead of getting it renewed, as contemplated by the mortgage, she seems to have been willing to let it remain dishonored, and the fair inference from the averments of the bill is that Robinson would have continued to indorse, and Mrs. Sloan exhibit the same easy indifference on the subject of her indebtedness, if the death of Seth Coolidge had not dissolved the firm and compelled an inven-

tory and appraisement, showing the desperate condition of the mortgagors. It hardly need be said that a mortgage which, by its very terms, authorizes the parties to accomplish such objects is, to say the least of it, constructively fraudulent.

Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary this long-continued possession and apparent ownership were well calculated to create confidence and disarm suspicion. But apart from this, security was not the leading object. If so, why does Mrs. Sloan's note remain over due for twenty-one months, and why does Robinson continue to indorse? This conduct is the result of trust and confidence, which, as Lord Coke tells us, are ever found to constitute the apparel and cover of fraud.

In truth, the mortgage, if it can be so called, is but an expression of confidence, for there can be no real security where there is no certain lien.

§ 732. *A provision in a chattel mortgage that the mortgagor may sell goods and replace them with others, subject to the same trust, for an indefinite time, is void upon its face.*

Whatever may have been the motive which actuated the parties to this instrument, it is manifest that the necessary result of what they did do was to allow the mortgagors, under cover of the mortgage, to sell the goods as their own, and appropriate the proceeds to their own purposes; and this, too, for an indefinite length of time. A mortgage which, in its very terms, contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose. The views we have taken of this case harmonize with the English common-law doctrine, and are sustained by a number of American decisions. In the American editor's note to Twyne's case, in Smith's Leading Cases, vol. i, p. 52, 7th Am. ed., most of the cases in this country on the subject are collected and classified. See, also, *Mitnacht v. Kelly*, 3 Keyes, 407; *Yates v. Olmsted*, 65 Barbour, 43; *Barnet v. Fergus*, 51 Ill., 352; *Re Manly*, 2 Bond, 261; *Re Kahley*, 2 Biss., 383.

It is contended by the appellants that the rulings of the Indiana courts are in favor of the validity of this mortgage, and the main case relied on, to support this position, is *Maple v. Burnside*. The facts of this case are stated in the opinion of the court in a way to render it difficult for any practitioner outside of the state to understand the application to them of the legal rules which are discussed, but there is nothing to show that the mortgage there considered contained any provision permitting the mortgagor to remain in possession of the property and deal with it as his own, nor does the judgment of the court involve any such question. The case would seem to be chiefly valuable as an authoritative exposition of certain points of *nisi prius* practice. Although we have been unable to find any case from Indiana of similar facts with the one at bar, yet the decision in the *New Albany Insurance Company v. Wilcoxson*, 21 Ind. 355, would seem to imply that when such a case did arise it would be decided in accordance with the views we have presented. The point ruled in that case

is, that if a mortgage is executed merely to protect property in the hands of the mortgagor from his creditors other than the mortgagee, the mortgagor retaining possession and the right of disposition, and these facts appear upon the face of the mortgage, it would be fraudulent and void as against other creditors, and should be so declared by the court. And the court, to sustain this proposition, refer to *Freeman v. Rawson*, 5 Ohio St., 1, a standard authority in this class of cases, for the views we have advanced on this subject.

Finally, it is insisted if the mortgage is held void in law, still the delivery of the goods in pledge vests a sufficient lien, *prima facie*, to enable the appellants to enforce their lien in equity.

The answer to this is, that the case made by the bill does not proceed upon such a delivery at all, but upon the mortgage and seizure under it. Besides, if the appellants could turn the proceeding into a voluntary pledge by the debtors, it would not help them, for it would violate the preference clause of the bankrupt act, as they got the goods only twelve days before the petition in bankruptcy was filed.

Decree affirmed.

CROOKS v. STUART.

(Circuit Court for Iowa: 2 McCrary, 18-18. 1881.)

Opinion by McCrary, J.

STATEMENT OF FACTS.—The complainant, as assignee in bankruptcy of A. J. Nutter, bankrupt, and as representing the creditors of the bankrupt estate, brings this bill to set aside two certain mortgages executed by the bankrupt upon a stock of merchandise, and to subject the same to the payment of the debts of the estate. The mortgages are assailed upon the ground that the mortgagor retained the possession of the goods mortgaged, and used and disposed of the same as his own; and upon the further ground that the mortgage was not recorded until after the debts, represented by complainant, were contracted.

One of the mortgages expressly provided that the mortgagor might dispose of the goods in the usual course of business; the other contained no such provision, but it appears that there was in fact no change of possession, and that the mortgagor, after the execution of both mortgages, and with the assent of the mortgagees, retained the possession and continued to carry on the business, buying and selling in the usual course of trade, for about one year before the mortgages were recorded, and for a little more than a year before possession was taken under them.

The debts represented by the complainant were contracted while the mortgagor was in possession and before the recording of the mortgages, and the creditors had no notice of any incumbrance upon the property.

The statute of Iowa provides as follows: "No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged, like conveyance of real estate, and filed for record with the recorder of the county where the holder of the property resides." Code 1873, sec. 1923.

Two questions have been elaborately discussed by counsel, to wit: *First*. Whether, under the statute, a mortgage of personal property, not recorded, is valid as against a subsequent creditor who becomes such without notice of

such mortgage? *Second.* Whether, independently of the statute, a mortgage of personal property, where the mortgagor retains the possession and deals with the property as his own, is valid as against a creditor of the mortgagor who becomes such without notice of the mortgage?

The first of these, being a question as to the true construction of a statute of the state of Iowa, we are constrained to follow the decisions of the supreme court of the state, however much we may doubt the soundness of those decisions. Were this an original question, we should hold, without hesitation, that the statute was enacted to prevent the perpetration of fraud by the sale or mortgage of personal property, without the delivery of the possession, and without notice to persons subsequently dealing with the vendor or mortgagor.

§ 733. *The rule of common law is that a secret conveyance of personal property without delivery is fraudulent and void.*

Independently of any statutory provision, a manual delivery of the mortgaged property to the mortgagee would be necessary to the validity of the instrument. This rule of the common law had its foundation in the doctrine that possession of personal property is *prima facie* evidence of ownership. To allow the owner of such property to transfer the title by a *secret* conveyance, while retaining the possession and assuming to act as the owner, was regarded at common law as permitting a fraud upon all who should deal with him upon the faith of his ownership. His possession and apparent ownership, it was believed, gave him credit and afforded him the means of defrauding others.

§ 734. *The object and effect of the Iowa statute was to substitute recording of a chattel mortgage for the actual delivery of the chattel.*

The purpose of the legislature in enacting this statute was not, in our judgment, to set aside this wholesome doctrine, and thus enable dishonest persons to commit fraud by means of secret chattel mortgages; it was only to substitute recording for delivery. If thus construed, the statute affords a protection against fraud quite as effectual as that given by the common law; but if we hold that a secret unrecorded sale or mortgage may be enforced as against a creditor who deals with the vendor or mortgagor in ignorance of its existence, unless such creditor shall, by attachment or otherwise, obtain a lien before having notice of the instrument, it seems to us that the door for fraud is left wide open.

One who gives credit to a merchant, in the open and exclusive possession of a stock of merchandise upon which there is no recorded lien, has a right to assume that he is dealing with the owner of such stock, and to rely upon such ownership in extending credit. If he is to be affected by any secret lien upon such stock, which may be recorded before he secures a lien by levy or otherwise, it will generally happen that the first notice to him upon which he can make an affidavit for attachment will be the recording of the lien, so that the circumstance that gives him the right cuts off the remedy.

If, therefore, we were at liberty to construe the statute for ourselves, we should unhesitatingly hold the mortgages in question in this case to be void under the statute. But the supreme court of Iowa, whose decisions upon the construction of state statutes are rules of decision in this court, have reached upon this question a different conclusion. By a series of decisions that court has held that an unrecorded mortgage of chattels, where the mortgagor retains possession, is valid as against creditors who receive notice at any

time before obtaining a lien by levy or otherwise. *Hughes v. Cory*, 20 Ia., 399; *Allen v. McCalla*, 25 Ia., 465; and other cases cited in note to the case of *Cragin v. Carmichael*, 2 Dill., 519.

§ 735. *Effect of the fact that the mortgagor remains in possession with the assent of the mortgagee.*

The question remains whether these mortgages should be held void independently of the statute, upon the ground that the mortgagor retained the possession of the property, with power to dispose of the same in the usual course of trade. As already stated, the proof shows that the mortgagor remained in possession and continued the business with the assent of the mortgagees. The case of *Robinson v. Elliott*, 22 Wall., 513 (§§ 727-32, *supra*), is, we think, conclusive of this controversy. It was there distinctly held that a mortgage of chattels which permitted the mortgagor to remain in possession until default in payment of the debt secured, with power to sell the goods as theretofore, was fraudulent and void in law, and could not be enforced by a court of equity.

Mr. Justice Davis, who delivered the opinion of the court, expressed the opinion that to sustain the validity of such a transaction would be to permit the mortgagors, under cover of the mortgage, to sell the goods as their own and appropriate the proceeds to their own purposes; and he adds, that "a mortgage which in its very terms contemplates such results, besides being no security to the mortgagees, operates in the most effectual manner to ward off other creditors; and where the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose."

This is a doctrine of general jurisprudence, not depending for its support upon any provision of state law, and we are, therefore, bound by the decision of the supreme court of the United States. If there be anything in the decision of the supreme court of Iowa, in *Jordan v. Lendrum*, 10 N. W. R., 9, inconsistent with the doctrines announced in *Robinson v. Elliott*, *supra*, we must follow the latter and not the former. It is suggested that the mortgages in controversy, being good as between the parties, are also good as between the mortgagees and the assignee in bankruptcy of the mortgagor; but the rule is well settled that the assignee represents the rights of creditors, and may attack conveyances made by the bankrupt in fraud of his creditors.

The assignee may prosecute any suit to recover property in the hands of third parties, or to enforce the payment of claims that could have been prosecuted by the creditors themselves had not proceedings in bankruptcy been instituted. There will be decree for complainant.

LOVE, J., concurs.

BLENNERHASSETT v. SHERMAN.

(15 Otto, 100-122. 1881.)

APPEAL from U. S. Circuit Court, District of Iowa.

STATEMENT OF FACTS.—On the 18th of November, 1874, Allen executed a mortgage of all his property to Allen, Stephens & Co. of New York, to secure them in the sum of \$465,476.88, which he owed them, and for which they were responsible for him, and to secure, also, further advances. This mortgage was recorded January 19, 1875, in Cook county, Illinois, and on the next day in Polk county, Iowa. On the 26th of January, 1875, a bill was filed by Blen-

nerhassett and Stephens who, with Allen, the mortgagor, constituted the firm of Allen, Stephens & Co. The object of the bill was to foreclose the mortgage. It stated that further advances had been made, so that the mortgage now secured an indebtedness of \$900,000. On February 8, 1875, the mortgage was assigned to the Charter Oak Life Insurance Company, who intervened and became a party to the suit by supplemental bill. On the 23d of February a petition in bankruptcy was filed against Allen, and in the following April he was adjudged a bankrupt, and in July, 1875, Sherman was appointed his assignee. In August a bill of review was filed making Sherman a defendant. This bill, with the original bill, stated, as indeed the mortgage had done, that the advances had been made to the Cook County National Bank at Allen's request. Sherman's answer to this bill averred that the advances had been made to Allen himself and not to the bank; that Allen was largely indebted to persons and banks in New York; that he was insolvent when the mortgage was made, and that the Cook County National Bank was in the same condition. The answer charged Stephens and Blennerhassett with fraudulent practices towards Allen, and that they had extorted the mortgage from Allen to secure a preference over other creditors, and that the mortgage was made in fraud of the bankrupt law. Sherman filed a cross-bill, setting up the same grounds taken in his answer. Proofs were taken, and on the hearing the original bill was dismissed and a decree rendered in accordance with the prayer of the cross-bill. Complainants appealed. Further facts appear in the opinion of the court.

Opinion by MR. JUSTICE WOODS.

After an attentive consideration of the evidence in this case, much of which is conflicting and irreconcilable, we have reached the conclusion that the mortgage which is the basis of the suit is fraudulent and void at common law, because it was accepted by Allen, Stephens & Co., and used by them, to hinder, delay and defraud the creditors of Allen, the mortgagor, and that it is also void under that section of the bankrupt act now embodied in the revised statutes of the United States as sec. 5128.

We shall state the grounds of our conclusion as succinctly as the case will admit. We are relieved from any discussion of the question of the insolvency of Allen, the mortgagor, by the admissions of counsel for the appellants. They concede, and in our judgment the evidence abundantly shows, that he was insolvent not only at the date of the mortgage, on November 18, 1874, but also at the date of its registration, on January 19, 1875. It is conceded that at the same dates the Cook County National Bank was also insolvent. We may add to this concession, what is perfectly clear from the evidence, that the insolvency of both Allen and the bank was actual and absolute; that their assets were largely insufficient to pay their debts.

In order to a clear understanding of the controversy between the parties, it will be necessary to state generally the financial history of Allen and of the firm of Allen, Stephens & Co., of which he was the senior member, prior to the date of the mortgage. Allen commenced business as a private banker in Des Moines, Iowa, in 1856, and soon began dealing in Iowa lands. He bought claims, made entries and located them mainly in Polk county, Iowa. The real estate of which he was seized at the date of this mortgage had cost him \$242,616, and that of which he was seized on January 18, 1875, had cost him \$240,794.

He continued his business as a banker in Des Moines up to a short time before

the proceedings in bankruptcy were instituted against him. On October 31, 1867, he was appointed by the circuit court of the United States for the district of Iowa, receiver in the case of *Mark Howard v. The City of Davenport*, then pending in that court, and as such there came into his hands five hundred and forty-one bonds, of \$1,000 each, of the Chicago, Rock Island & Pacific Railroad Company, and between \$90,000 and \$100,000 in cash. The bonds bore seven per cent. interest per annum, which Allen collected as it fell due, amounting to \$37,870 per annum. He continued the custodian of this entire fund until May, 1873.

In 1868, according to his evidence, which is corroborated by his books, his assets amounted to \$1,641,017, and his liabilities, including his indebtedness as receiver, amounted to \$1,466,131, leaving an excess of assets over liabilities of \$174,886. Of these assets \$150,000 were invested in his house and furniture, in addition to the cost of the land, one hundred and thirty acres on which his house stood. It is, therefore, apparent that at the time mentioned he had little or no available capital of his own with which to carry on business. This state of his affairs caused him to succumb to the temptation to use the trust assets in his possession as receiver. Towards the close of the year 1868 he had deposited a part of the Chicago, Rock Island & Pacific Railroad bonds (which we shall call, for the sake of brevity, Rock Island bonds), which belonged to this trust fund, with Gilman, Son & Co., bankers in the city of New York, and borrowed upon them, as collateral security, the sum of \$55,000. At this time Blennerhassett was the confidential clerk of Gilman, Son & Co.

On November 2, 1868, Blennerhassett left that firm and became a partner in the banking house of George Opdyke & Co., in which Stephens was already a partner. At the solicitation of Blennerhassett, Allen, on December 19, 1868, changed his account from Gilman, Son & Co. to George Opdyke & Co. During the years 1869, 1870 and 1871, it is made clear by the letters of Allen to Opdyke & Co., which appear in the record, that he was pressed for money and embarrassed. During this time he was speculating largely in the stock of the Chicago, Rock Island & Pacific Railroad Company, and had used, through Opdyke & Co., a large part of the Rock Island bonds, which belonged to the receiver fund, in his possession.

In the fall of 1871 Stephens and Blennerhassett began negotiations with Allen with a view to a partnership between the three, to carry on the business of banking in the city of New York, which resulted in the creation of the partnership of Allen, Stephens & Co., which began business on January 1, 1872. It was agreed that Allen should furnish the capital on which the partnership was to do business. The amount named was \$50,000. At this time Allen was largely insolvent, and neither Stephens nor Blennerhassett had any means. Allen never contributed any money or property to the partnership capital. Stephens and Blennerhassett were not required by the partnership articles to pay anything, and they paid nothing. The firm, therefore, started without any capital whatever; two of the partners had no property, and the other owed more than he could pay.

The complainant, the Charter Oak Life Insurance Company, at once made a large deposit with the new firm, and in a few days their deposits amounted to more than \$200,000. With the funds thus placed in their hands they paid the over-drafts of Allen on Gilman, Son & Co., and received from them the securities which had been deposited with them by Allen, namely, one hundred and sixty-eight Rock Island bonds of \$1,000 each, certificates of three

thousand and fifty shares of stock of National State Bank of Des Moines, and of nine hundred and sixty shares of First National Bank of Des Moines.

It is unnecessary to trace minutely the shifts and devices to which Allen resorted to keep afloat. They are fully shown by the record. On October 7, 1872, it appears from a letter addressed to him by Stephens, for the firm of Allen, Stephens & Co., that he was indebted to the firm in the sum of \$379,000, and the security held by the firm was four hundred and sixteen Rock Island bonds. That these were the bonds which belonged to the fund, of which he was receiver, the record leaves no doubt. He so testifies; and there is no conflicting testimony, and his possession of so large an amount of these bonds is not otherwise accounted for.

He at various times pledged all the bonds which belonged to the receiver fund. They all passed through the hands of New York brokers as collateral security for loans made to him. In January, 1873, all the Rock Island bonds held by him as receiver, were in the hands of a broker in New York, held by him as security for advances made to Allen. This broker continued to borrow upon them for Allen until July 1, 1873, when he commenced selling, and continued to sell them until October, 1873, before which nearly all were disposed of, some of them at quite low prices.

During the months of February, March and April, 1873, Allen paid the broker, who negotiated these loans for him, the sum of \$43,000 extra interest over and above seven per cent. on the loans. Before May, 1873, it fairly appears from the evidence that Allen's losses had entirely consumed the receiver fund. In the month just mentioned he was ordered to pay into court by the middle of July the five hundred and forty-one bonds of \$1,000 each, which had come into his hands as receiver, or their equivalent in money. The residue of the fund, amounting to about \$300,000, was to be paid in May of the following year. He was in a desperate strait, and resorted to desperate means to save himself. On May 30, 1873, he purchased \$275,000 of the stock of the Cook County National Bank, of Chicago, Illinois, which gave him the control of the bank. He paid for a large part of this stock by his checks on the bank, and the residue by a check on Allen, Stephens & Co.

Having thus obtained the control of the Cook County Bank, which had a deposit of \$1,300,000, he paid the \$541,000 demanded of him as a part of the receiver fund, mainly by his checks on the bank. At this time the larger part of the receiver's bonds had been sold and their proceeds applied to the payment of moneys borrowed by him in New York on the pledge of the bonds. In the fall of 1873, he bought an interest in the New York State Loan and Trust Company. His purchases of stock in that institution amounted to nearly \$200,000. He paid for this stock by giving his notes and a check on the Cook County Bank. His object in making this purchase, as he states it, was to get control of the institution, and be enabled thereby "to carry his assets until he could realize on them." In other words, he bought the stock on credit with a view to get in his hands the cash assets of the Trust Company.

During the panic of September, 1873, the Cook County Bank lost \$100,000 by the purchase of worthless drafts drawn by one Badger. The bank suspended a short time, but soon resumed. During the fall of 1873, the private bank of Allen at Des Moines, and the National State Bank, of Des Moines, in which he was a large stockholder, were both overdrawn with the house of Allen, Stephens & Co. They were both hard pressed for money.

In January, 1874, Allen sold, through the house of Allen, Stephens & Co.,

to the Charter Oak Life Insurance Company, bills receivable, "in the shape of mortgages," drawn from his private bank in Des Moines, to the amount of \$114,000. This money all passed through the books of his private bank at Des Moines. In May, 1874, the house of Allen, Stephens & Co. made a loan of \$400,000 to two men of the name of Hussey and Gisbourne, and took for security a deed of trust to Stephens upon a silver mine, called the Mono mine, in Utah Territory. The Charter Oak Life Insurance Company took one-third of this loan off the hands of Allen, Stephens & Co. The mine proved worthless, and the entire loan was a total loss, taking from Allen, Stephens & Co. \$266,666. This largely exceeded all the profits made by the firm since it commenced business, and left it insolvent.

In October, 1874, it was arranged between Allen and the Charter Oak Life Insurance Company, the negotiation therefor having been carried on through Allen, Stephens & Co., that he should make his twelve notes for \$25,000, payable in five years from date, and deliver the same to the company, and secure the same by pledge of mortgage notes, stocks and bonds. The company was to advance to Allen \$300,000 on the notes so secured. Allen, on October 24, 1874, made his notes accordingly and delivered them to Allen, Stephens & Co. for the company, and the company sent \$300,000 of its paper to Allen, Stephens & Co. to be used for his benefit. His notes were secured by the pledge of mortgage notes, amounting to \$277,041; by Cook County Bank stock, \$70,000; New York State Loan and Trust Company stock, \$100,000; National State Bank of Des Moines stock, \$30,000; and county bonds, \$500; amounting in all to \$478,000.

On the same day Allen, for himself, executed to Allen, Stephens & Co. a paper writing in which he authorized them, in case he became indebted to them for loans or advances, or liabilities assumed by them for him, to sell, without notice to him, any property, things in action, collateral securities belonging to him and held by them, or to hypothecate the same and use their proceeds towards the payment of such indebtedness and the interest. On the same day he, as president of the Cook County Bank, executed and delivered to Allen, Stephens & Co. a similar paper.

Between the date of his appointment as receiver, and October 24, 1874, Allen had sustained great losses. In 1871, he had lost by stock speculations in New York City, \$200,000. He had lost \$50,000 by a subscription to the Canada Southern Railroad. He built for a church society at Des Moines a church edifice, in which was tied up the sum of \$60,000, and which afterwards resulted in a loss of \$50,000. In 1873 and 1874 he had lost \$200,000 as a member of the firm of B. F. Murphy & Co., and \$75,000 as a member of the firm of H. M. Bush & Co., and \$30,000 in the firm of Lewis & Stephens. In swamp, coal and mountain lands he lost \$61,000. He lost in corn speculations in Chicago and in property in the towns of South Evanston, Ill., and Sheffield, Ind., \$92,000. He sunk \$35,000 in the stock of the Toledo, Wabash & Western Railroad Company, and lost \$30,000 in the firm of A. T. Andreas & Co., and \$10,000 invested in the Grand Pacific Hotel in Chicago. Besides his residence and furniture at Des Moines, which cost him \$150,000, he had invested in a residence in Chicago \$50,000. His actual losses amounted to over \$1,000,000, and he had \$200,000 invested in unproductive real estate. It is true so inveterate a speculator sometimes made a fortunate venture, but his losses were greatly in excess of his gains.

The mortgage on which this suit is founded was given on November 18, 1874.

On that day the firm of Allen, Stephens & Co. was insolvent, and Stephens and Blennerhassett must have known it. Their profits since January 1, 1872, when the partnership was formed, had not exceeded \$200,000. They began with no capital. Both Stephens and Blennerhassett had drawn out their share of the profits. Allen's share remained, which was one-third, and amounted to about \$66,000. The loss of the firm in the Mono mine loan was \$266,000, leaving a deficit of \$200,000. As already stated, it is conceded that at the date of the mortgage both Allen and the Cook County Bank were insolvent. But they were not merely insolvent, but irretrievably so.

On that day Allen owed the depositors in his private bank at Des Moines \$736,783, he owed the Cook County Bank \$557,943, the Charter Oak Life Insurance Company \$300,000, the Newark Savings Institution of Newark, N. J., \$200,000, making an aggregate of \$1,794,726. At the same time, placing a liberal estimate on the value of his assets, they did not exceed \$800,000, leaving a deficit of \$994,727, which other smaller items of indebtedness shown by the record would swell to more than a \$1,000,000, the excess of his liabilities above his assets. The condition of the Cook County Bank on the same day may be approximately ascertained from the following facts: On November 18, 1874, its books showed its indebtedness to be \$1,891,620. The receiver of the bank testifying on August 26, 1876, said that he had admitted and given certificates for claims against the bank to the amount of \$803,035, that other claims had been presented to the amount of \$915,000, for which receiver's certificates had not been given, and that the amount collected from its assets was \$92,000. The cash on hand when the receiver took possession was \$4,000. Such was the condition of the firm of Allen, Stephens & Co., Allen and the Cook County Bank when the mortgage in suit was executed.

• § 736. *A mortgage of his entire estate, executed by an insolvent mortgagor to a creditor who knows of his insolvency, and who actively conceals the mortgage, withholding it from record, thus enabling the insolvent to contract other debts, is void at common law.*

There are several propositions of fact which in our opinion the evidence satisfactorily shows. A statement and discussion of the evidence which sustains them would extend this opinion beyond reasonable limits, and would not be profitable.

First, Allen when he gave the mortgage, and Stephens and Blennerhassett when they took it, knew that both he and the Cook County Bank were insolvent. A large part of the correspondence between Stephens and Blennerhassett and the firm of Allen, Stephens & Co. on the one hand, and Allen on the other, commencing before the partnership of Allen, Stephens & Co. was formed, down to the date of the mortgage, is to be found in the record. The record also contains the correspondence between the firm and the Cook County Bank, and many letters written by the firm, in the interest of Allen, and much correspondence between Stephens and Blennerhassett. This evidence shows that both he and the Cook County Bank were on the verge of suspension from the time when he was compelled to replace the bonds intrusted to him as receiver, down to the date of the mortgage in November, 1874, and the suspension of payment by him and the bank in January, 1875. It also brings home to Stephens and Blennerhassett the knowledge of the desperate shifts and devices to which he and the bank were driven to meet their engagements, and keep the fact of their utter bankruptcy from the knowledge of the public. It is impossible that men of much less business experience and intelligence than they are shown

to be should know what they did of the resources and practices of Allen and the Cook County Bank, and not have known of the insolvency of both.

Notice of his insolvency was also brought home to Stephens and Blennerhassett by their knowledge of the fact that he had appropriated to his own schemes and speculations a fund which, principal and interest, amounted to over \$800,000, committed to his custody as a trustee and receiver. The evidence that they knew of the fact of his appointment as receiver, the amount of the fund which came to his hands, and the appropriation of the fund to his own uses, is conclusive. During the sixty days which elapsed between the date of the mortgage and its registration, the proofs of the insolvency of Allen and the Cook County Bank accumulated, and Stephens and Blennerhassett knew that the insolvency was hopeless and irretrievable.

Second, The record shows that the mortgage covered all the property of Allen. His personal property had long been exhausted, and his real estate was all that remained which was not pledged for his debts.

Third, In order that the credit of Allen and the Cook County Bank might not be impaired, the mortgage was purposely withheld from record and actively concealed by Stephens and Blennerhassett until after the suspension of both Allen and the Cook County Bank, on January 18, 1875.

Blennerhassett testifies that after its execution he disposed of the mortgage as follows: "I put it in our safe, and kept it there until December 1, when I gave it in a sealed parcel to A. N. Denman. I said to Denman something like this: 'Here is a sealed package which contains instructions and valuable documents; you will go to Chicago, take quarters at some hotel there, and remain there, never leaving the hotel for any great length of time; and should a telegram come, you are to open that parcel and obey instructions.'"

The instructions directed Denman, when ordered by telegram to act, to have the mortgage recorded in Chicago, and then catch the first train for Des Moines, Iowa, and have it recorded there, etc. On January 18, 1875, Allen and the Cook County Bank both suspended. On the next day Allen, Stephens & Co. sent a telegram to Denman at Chicago, as follows: "Open your instructions and act." Denman opened his instructions and followed them. He filed the mortgage for record in Chicago on January 19, and in Des Moines on January 20.

Fourth, While the mortgage was thus kept from the record and from public knowledge, Stephens and Blennerhassett were busily engaged in sustaining the credit of Allen and the Cook County Bank, and, to accomplish their end, falsely and fraudulently represented him to be a man worth over a million of dollars, and of unlimited credit, and the Cook County Bank to be sound and good.

Fifth, That by means of these representations of Stephens and Blennerhassett, and the concealment of the mortgage and the withholding of it from the record, the creditors of Allen and the Cook County Bank were misled and deceived, and in consequence thereof they did, between the date and the registration of the mortgage, deposit large sums of money in Allen's private bank at Des Moines, and in the Cook County Bank, and, at the instance of Stephens and Blennerhassett, discounted the paper of Allen and the Cook County Bank to a large amount, and that such deposits and discounts, though due, still remain unpaid.

Sixth, That the mortgage was made by Allen, who was insolvent, with a view to give a preference to the firm of Allen, Stephens & Co., the firm being a creditor of Allen individually, and the firm and all its members having rea-

sonable cause to believe him to be insolvent, and knowing that the mortgage was made in fraud of the provisions of the bankrupt act, and it was withheld from the record and actively concealed for the period of two months preceding the failure of Allen and the filing of the petition in bankruptcy against him, for the purpose of protecting it from assault as a preference void under the provisions of the bankrupt act.

There is a large mass of evidence in the record which, in our opinion, establishes the truth of the foregoing propositions beyond controversy. The new debts which were contracted by Allen and the Cook County Bank after the date of the mortgage and before its registration, on the strength of the representations of Stephens and Blennerhassett, and the fact that Allen's property appeared to be unincumbered, amounted to a larger sum than the value of the real estate covered by the mortgage.

By the aid of the means thus obtained, Stephens and Blennerhassett were able to stave off the suspension of Allen and the Cook County Bank for a period of exactly two months after the date of the mortgage. They doubtless supposed this lapse of time would render the mortgage proof against any attack by an assignee in bankruptcy of his estate. He and the bank were then allowed to fail, and the mortgage was placed on record. Upon this state of facts we are of opinion that the mortgage was a fraud upon the creditors of Allen, and, therefore, void at common law and without regard to the provisions of the bankrupt act.

It is not to be disputed that, except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage.

But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from the record, and, while so concealing it, represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor.

It is not enough, in order to support a settlement against creditors, that it be made for a valuable consideration. It must be also *bona fide*. If it be made with intent to hinder, delay or defraud them, it is void as against them, although there may be in the strictest sense a valuable or even an adequate consideration. *Twyne's Case*, 3 Rep., 80; *Holmes v. Penney*, 3 Kay & J., 90; *Gragg v. Martin*, 12 Allen (Mass.), 498; *Brady v. Briscoe*, 2 J. J. Marsh. (Ky.), 212; *Bozman v. Draughan*, 3 Stew. (Ala.), 243; *Farmers' Bank v. Douglass*, 11 Smed. & M. (Miss.), 469; *Bunn v. Ahl*, 29 Pa. St., 387; *Root v. Reynolds*, 33 Vt., 139; *Kempner v. Churchill*, 8 Wall., 362; *Kerr on Fraud and Mistake*, 200.

As long ago as the case of *Hungerford v. Earle*, 2 Vern., 261, it was held that "a deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money." This doctrine has been repeatedly reaffirmed. *Hildreth v. Sands*, 2

Johns. (N. Y.) Ch., 35; *Scrivenor v. Scrivenor*, 7 B. Mon. (Ky.), 374; *Bank of the United States v. Housman*, 6 Paige (N. Y.), 526.

In *Coates v. Gerlach*, 44 Pa. St., 43, a deed of land had been made directly by a husband to his wife. The deed bore date March 23, 1857, but was not filed for record until December 2, 1857. On January 21, 1858, the husband, professing to act for his wife, sold the land to a third party. The creditors of the husband attached the unpaid part of the purchase money in the hands of the vendees, and between them and the wife a contest arose on the question, which had the better right to the proceeds of the sale. Touching this controversy, Mr. Justice Strong, delivering the opinion of the court, said: "There is another aspect of the case not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it, in fact concealed its existence until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by the husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."

So in *Hilliard v. Cagle*, 46 Miss., 309, it was held that a deed of trust in the nature of a mortgage, valid on its face, and not made or received with any intent to defeat existing or future creditors, may nevertheless be held to be fraudulent and void as to all creditors, existing and future, by evidence *aliunde*, showing the conduct of the parties in their dealings in reference to the deed. The principal circumstance relied on in this case to avoid the deed, was the fact that the grantor retained possession of the property and the deed was withheld from record, and the mortgagor was thereby enabled to contract debts upon the presumption that the property was unincumbered. The court declared that "the natural and logical effect of the agreement and assignment, and the conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to the mortgagor, which he could not have obtained if the truth had been known, and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object."

In the case of *Gill v. Griffith & Schley*, 2 Md. Ch., 270, the court decided that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request and to keep the public from a knowledge of its existence, withhold it from record for an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession and ostensible ownership of that very property by the mortgagor have induced to confide in him. The mortgage which was in controversy in this case was, therefore, declared void. Upon appeal, the court of appeals affirmed the decree for the reasons assigned by the chancellor. See note of the reporter at the end of the case.

So in the case of *Hafner v. Irwin*, 1 Ired. (N. C.) L., 490, which grew out of the making of a deed of trust by one Dwight to the plaintiff Hafner, to secure certain creditors named thereon, it was said: "There was evidence tending to show that it was a condition of this instrument, and as understood between the parties thereto, that it should not be registered nor put in use,

but kept a secret from the world until after the 20th of February ensuing the date. . . . There was also evidence tending to show that it was a further part of the agreement between the parties that the transaction should be kept secret, at all events until the debtor should escape beyond the reach of the process of his creditors. . . . We need not and cannot lay down as a rule of law that those who take securities from a debtor about to abscond must apprise creditors of his intention to place himself beyond their reach, under penalty of forfeiting such securities; but we feel ourselves justified in holding that, when secrecy is part of the consideration of such securities, the securities are contaminated thereby, and ought not to be regarded as given *bona fide*."

In *Hildeburn v. Brown*, 17 B. Mon. (Ky.), 779, a mortgage was executed by one Sherrod to the plaintiffs, which they withheld from record. Commenting on that fact, the court said: "The petition of appellants avows that the arrangement between their agents and Sherrod was to withhold the mortgage from registration, for the purpose of sustaining the latter in business, and 'not to record the same unless there was danger of Sherrod's failure.' . . . The effect of the arrangement, though it may not have originated in any actual, fraudulent or evil purpose, was to secrete from the public eye the true condition of the debtor, and thereby enable him, under the semblance of being the owner of unincumbered real estate, to deceive and mislead other persons by inducing them, upon the faith of his supposed unembarrassed condition, to give him credit which would otherwise have been withheld. Such contrivances or acts, though not designed to perpetrate an actual fraud upon other persons, have an inevitable tendency that way, and are obviously opposed to the general policy of the law requiring the public registration of all liens and incumbrances upon property permitted to be retained and claimed by debtors. If not directly within that class of acts which the law denominates constructive frauds, it approximates so nearly to it that the party avowing himself a participant in such transaction ought not to receive the countenance or aid of the chancellor in enforcing any lien or claim growing out of it as against a third person."

Neslin v. Wells, 104 U. S., 428, arose in the territory of Utah, where the law permitted, but did not require, the registration of mortgages, but where there was a general custom to record such instruments. *Neslin*, the vendor of land, took from Smith, his vendee, a mortgage to secure a part of the purchase money, but did not file it for record until after a subsequent mortgage, executed by the vendee on the same land to one Kerr, had been filed for record, Kerr having no notice, actual or constructive, of the prior mortgage to *Neslin*. It was held by the court, Mr. Justice Matthews delivering its opinion, that, "under the circumstances of the case, there arose a duty on the part of *Neslin*, the vendor, to record his purchase money mortgage, towards all who might become subsequent purchasers for value in good faith, a breach of which in respect to Kerr, the subsequent mortgagee, without notice, constituted such negligence and laches as in equity requires that the loss which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned." See, also, *Worseley v. De Mattos*, 1 Burr., 467, and *Tarback v. Marbury*, 2 Vern., 510.

The principles upon which these decisions are based are, in our opinion, conclusive of this case. None of the cases cited disclose such a premeditated and contrived purpose to deceive and defraud other creditors of the mortgagor as appears in this. We are of opinion, therefore, that the mortgage executed by

Allen to Allen, Stephens & Co., on November 18, 1874, which the complainants in this case seek to foreclose, is a fraud upon the creditors of Allen, and void at common law.

§ 737. *A mortgage fraudulent under the bankrupt act.*

We further declare that a mortgage executed by an insolvent debtor, with intent to give a preference to his creditor, who has reasonable cause to believe him to be insolvent, and knows it to be made in fraud of the provisions of the bankrupt act, and who, for the purpose of evading the provisions of that act, actively conceals and withholds it from record for two months, is void under the bankrupt act, notwithstanding the fact that it was executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor.

If the mortgage had been executed within the period of two months next before the filing of the petition in bankruptcy, it would have been void under the letter of the bankrupt act. Where all the other circumstances necessary to render it void concur, the device of concealing it until the two months have elapsed cannot save it. It is, notwithstanding the lapse of time, a fraud on the policy and objects of the bankrupt law, and is void as against its spirit.

The conduct of the mortgagees in this case shows them to be without claim to the consideration of a court of equity. On the contrary, it clearly appears to be the duty of the court to take care that they shall not reap the fruits of their fraudulent practices. Their assignee of the mortgage, the Charter Oak Life Insurance Company, stands in no stronger position.

Decree affirmed.

MR. JUSTICE GRAY did not sit in this case.

§ 738. *Mortgages.*—Independent of any statute on the subject, a mortgage is fraudulent and void as to creditors if the mortgagor is permitted to retain possession of the goods and to sell and deal with them as his own. *In re Morrill*, 2 Saw., 356.

§ 739. A mortgage which is not accompanied and followed by possession is fraudulent as to a subsequent purchaser without notice. *The Schooner Romp, Olc.*, 196.

§ 740. Continued possession by the grantor in a deed of trust is not evidence of fraud where such possession is entirely consistent with the use raised by the deed. *Bank of United States v. Lee*, 5 Cr. C. C., 319.

§ 741. If a mortgagor of personal property retains possession of it after the execution of the mortgage, it is a badge of fraud. *McLean v. Lafayette Bank*, 8 McL., 587.

§ 742. Failure by a mortgagee to take possession of the property may be slight evidence of fraud. But this is not so where a vessel is mortgaged and it is agreed in the instrument that the owners shall take her upon an immediate voyage. *Leland v. The Ship Medora*, 2 Woodb. & M., 92.

§ 743. The fact of possession not accompanying an absolute bill of sale is conclusive evidence of fraudulent intent, and as to creditors and subsequent purchasers the sale is fraudulent and void. But the continuance of possession by a mortgagor is not considered as having the same conclusive and vitiating effect upon the mortgage. The possession in the former case is incompatible with the deed, whereas in the latter there is no such incompatibility. Possession, therefore, by a mortgagor before forfeiture cannot be construed to be fraudulent; nor is the continuation of such possession after breach of condition, of itself, unconnected with any other circumstance of lapse of time, a badge of fraud. The farthest the doctrine extends is that the tribunal, whose province it is to decide the facts, may infer fraud from the fact of possession remaining in the mortgagor; and this inference may be dispelled by proof of good faith. *Merrill v. Dawson, Hemp.*, 563.

§ 744. A mortgage upon a stock of goods, fixtures, furniture, etc., is a fraud upon the creditors and void as to all the property, if the mortgagee agrees that the mortgagor may continue the sale of the goods and use the proceeds for his own benefit. *In re Burrows*, 7 Biss., 526.

§ 745. When a mortgagor of a stock of goods is allowed to remain in possession and sell the goods in the ordinary course of his business, the question whether this is a fraud is one of fact for the jury. *Brett v. Carter*,* 2 Low., 458.

§ 746. A mortgage of a retail stock of goods, where the mortgagor remains in possession and continues to sell with the assent of the mortgagees, is fraudulent and void as to creditors. Such a mortgage is also void in Kansas under their statute requiring that it shall be recorded if the statute is not complied with. *Bank of Leavenworth v. Hunt*,* 11 Wall., 391.

§ 747. Where a mortgagor of his stock of goods and store fixtures is permitted to remain in possession and carry on business as before, making sales and purchasing additional stock, and no claim to the possession of the stock and fixtures is made by the mortgagee until after the institution of proceedings in bankruptcy against the mortgagor, the mortgage is void as to creditors. *In re Manly*, 2 Bond, 261.

§ 748. A mortgage upon a stock of goods of which the mortgagor is to remain in possession and sell in the regular course of his business, and which is to attach to goods to be purchased to replace those sold, is fraudulent and void under the statute of frauds. The necessary result of the mortgage is to allow the mortgagor under cover of the mortgage to sell the goods as his own, and appropriate the proceeds to his own purposes, and this too for an indefinite length of time. A mortgage which in its very terms contemplates such results, besides being no security to the mortgagee, operates in the most effectual manner to ward off other creditors, and where an instrument shows on its face that its legal effect is to delay creditors, the law imputes a fraudulent purpose. *Robinson v. Elliott*, 22 Wall., 525 (§§ 727-32).

§ 749. A mortgage of a stock of goods to secure the payment of a debt due and payable, with power in the trustees to take immediate possession and sell, and no right of possession reserved to the mortgagor, is fraudulent and void as to creditors, unless it is accompanied and followed by possession, though acknowledged and recorded according to the Maryland act of 1729, chapter 8, section 5. *Noyes v. Brent*, 5 Cr., C. C., 656.

§ 750. Under the act of Maryland of 1729, chapter 8, section 5, a deed of trust of personalty to secure a present debt which is due and payable and which has no time to run, with power in the trustees to take immediate possession and sell, and no right of possession reserved to the mortgagor, is void if possession does not accompany and follow the deed, although it is acknowledged and recorded according to the act. *Noyes v. Brent*,* 5 Cr., C. C. 657.

§ 751. A statute of New York declares that a chattel mortgage not accompanied by a change of possession of the property shall be void as against creditors and subsequent purchasers in good faith, unless filed in the town or city where the mortgagor, "if a resident of that state, shall reside at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument." Under this statute it is held that a mortgage by a firm upon firm property is void unless filed in the city or town where the individual members of the firm severally reside, although filed in the town where business of the firm is carried on, the members of the partnership being residents of the state. *Stewart v. Platt*, 11 Otto, 731.

§ 752. The New York statute declares that an unrecorded chattel mortgage, not accompanied by an immediate delivery and continued change of possession of the thing mortgaged, "shall be absolutely void as against the creditors of the mortgagor, and as against purchasers and mortgagees in good faith." It is held that the creditors spoken of are those having judgments and executions; and that the subsequent purchasers or mortgagees are those who pay or advance money upon the security of the property, without knowledge of the previous incumbrance. *In re Collins*, 12 Blatch., 548.

§ 753. Under the statute of Iowa declaring that "no sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice, unless recorded," and that from the time that such mortgage is duly recorded "it shall be deemed complete as to third persons, and shall have the same effect as though it had been accompanied by an actual delivery of the property mortgaged," the courts of that state hold that an unrecorded mortgage of chattels, where the mortgagor retains possession, is valid as against attaching creditors with notice of its existence at any time before levy. And this construction will be followed by the courts of the United States. *Cragin v. Carmichael*, 2 Dill., 519.

§ 754. Under the statute of California, declaring that a chattel mortgage shall not be valid, "unless possession of the mortgaged property be delivered to and retained by the mortgagee," the change must be immediate, and a subsequent delivery before a creditor acquires a lien does not render it valid as to such a creditor. *Edmondson v. Hyde*, 2 Saw., 205. The same is held under a similar statute in Nevada. *In re Morrill*, 2 Saw., 356.

§ 755. An absolute bill of sale of chattels without change of possession is void as against creditors and subsequent *bona fide* purchasers without notice. This also is true of a mortgage of a vessel which gives the mortgagor the possession of the property till the mortgagee shall have a reasonable time to enforce his mortgage, if the rights of subsequent *bona fide* purchasers intervene. *The Schooner Romp, Olc.*, 200.

§ 756. A conveyance of personal property conditioned to be void if the grantor should pay

to the grantee a certain sum on demand, is void as against the creditors of the grantor, if there is no change of possession, though the conveyance is acknowledged and recorded. *Smith v. Hunter*,* 5 Cr. C. C., 467.

§ 757. An Indiana statute provides that a chattel mortgage shall not be valid against any other than the parties thereto, when the goods are not transferred to the mortgagee and retained by him, unless it is recorded within a certain time after its execution; and that the question of fraudulent intent shall in all cases be deemed a question of fact. It is held, under this statute, that a mortgage unobjectionable upon its face, is not rendered invalid because accompanied by a verbal agreement allowing the mortgagor to retain possession of the goods, add them to his stock in trade, and sell them in the usual course of his retail business, and apply the proceeds in payment of the debt, where there is no intention thereby to hinder, delay and defraud creditors. That the mortgagor fails to keep a separate account of the sales, and apply the proceeds in payment of the mortgagee's debt, will not change the rule. *Overman v. Quick*,* 8 Biss., 134.

§ 758. An unrecorded chattel mortgage, being by the laws of Indiana void as against all but the "parties thereto," if possession is retained by the mortgagor, is void as against the mortgagee's assignee in bankruptcy. *Moore v. Young*, 4 Biss., 128.

§ 759. Possession by grantor as agent.—An absolute deed of household furniture and stock in trade, the possession remaining with the grantors, is void. *Reed v. Minor*,* 3 Cr. C. C., 82.

§ 760. Otherwise if the property was delivered to the grantee, and redelivered to one of the grantors as agent, who received and exercised exclusive possession *bona fide*, publicly and notoriously, for the sole use and benefit of the grantees, so that the change of possession from the grantors to the grantees, or their agent, was notorious and unequivocal. *Ibid.*

§ 761. But held, that the possession by both grantors was inconsistent with the possession by one as agent. *Ibid.*

§ 762. Joint possession.—A conveyance by a man while indebted of all his property to his son is, if he continues in possession, evidence of an intent to hinder, delay and defraud creditors thereby. But if it is *bona fide* and for a valuable consideration, a joint possession by the grantor with the grantee, after the deed, will not make it constructively fraudulent. *Middleton v. Sinclair*,* 5 Cr. C. C., 409.

§ 763. A deed is not fraudulent because the grantor retains possession, if the retaining of such possession by him is consistent with the terms of the deed. *Smith v. Ringgold*, 4 Cr. C. C., 124.

§ 764. If possession does not accompany an absolute conveyance, the transaction is void only as to the creditors of the grantor. *Ibid.*

§ 765. Possession of the land and taking the profits by the vendor after the conveyance, when not consistent with the terms of the deed, and not proved to be held and done as agent for the vendee, is evidence of fraud. *Alexander v. Todd*, 1 Bond, 175 (§§ 838-42).

§ 766. Possession by the seller after a sale of real estate does not *per se* raise a presumption of fraud, as it does in the case of personal estate. In the latter case possession is evidence of ownership, but not so in the former. In the case of real estate the possession must be inconsistent with the sale and repugnant to its terms or operation before it raises a presumption of fraud. *Phettiplace v. Sayles*, 4 Mason, 312 (§§ 560-65).

§ 767. When the question of whether a conveyance is fraudulent arises between the grantee and the creditor of the grantor, the creditor may always show that, notwithstanding the conveyance the grantor remained in possession and control. To this end acts of the grantor implying ownership and control may be shown, and also, as a part of the *res gestæ*, the declarations accompanying such acts or possession may be proved to show the nature, extent and purpose thereof. *United States v. Griswold*,* 7 Saw., 311.

§ 768. If a debtor in failing circumstances conveys his land by deed, without reservations, and, as a part of the consideration paid by the purchaser, secretly, and contrary to the face of the deed, reserves to himself the right to possess and occupy the land for a certain time for his own benefit, the conveyance is fraudulent and void as to the creditors of the grantor. It makes no difference in the legal aspect of the case whether the interest thus reserved is large or small. The fraud in such a case is an inference of law. *Lukins v. Aird*,* 6 Wall., 78.

§ 769. Intent to defraud.—A conveyance by a debtor to his brother, expressly declared by him at the time to be made with the intention of placing the property beyond the reach of creditors, made without consideration and without the knowledge of the grantee, accompanied by a general power of attorney in the grantor to do as he pleased with the property, and not delivered otherwise than by being recorded, was held to be fraudulent as to creditors, the grantor having continued in possession. *Wilcoxon v. Morgan*,* 2 Colo. T'y, 473.

§ 770. Assignment for benefit of creditors.—Retention by the debtor of property assigned for the benefit of certain creditors is not an imputation upon the fairness of the transaction, where the property assigned consists of unsettled accounts and choses in action, which he is

much more competent to settle than a stranger could be, and where he does actually settle up the accounts and pay over the money to the creditors for whose benefit the assignment is made. *Thompkins v. Wheeler*, 16 Pet., 106.

§ 771. It is by statute, as construed by the supreme court of the state, the law in Missouri that a conveyance of personal property to secure creditors, when the grantor, by the understanding of the parties, express or implied, is to remain in possession of the property with a power of sale, it is void upon principles of public policy, irrespective of any question of intended fraud. *Re Kirkbridge*,* 5 Dill., 116.

§ 772. It is held in Missouri that when a conveyance to secure a creditor is not actually fraudulent, and where a power of disposition is retained by the mortgagor as to part of the property, and as to part not retained, it is constructively fraudulent only as to that part of the property as to which the power of disposition is retained. This rule was followed by the circuit court of the United States in a case where a druggist had mortgaged his stock and fixtures by a conveyance duly recorded, and the grantor had remained in possession making sales in the usual manner by retail of the stock, but not of the fixtures, the mortgage having been silent as to this power, but no objection having been made to it by the trustee or the beneficiary. *Ibid*.

§ 773. An agreement by insolvent debtors with a creditor, in order to secure existing debts and future advances, to turn over to the creditor on his demand all the goods which they may at the time have on hand, is void as against other creditors, on account of the retention of the possession by the debtors. *Bank of Leavenworth v. Hunt*,* 11 Wall., 891.

§ 774. Where property cannot be delivered.—Where from the nature of the case property cannot be delivered when sold or mortgaged, as, for example, where it is at sea, want of possession by the vendee or mortgagee is not presumptive evidence of fraud. *Conard v. Atlantic Ins. Co.*, 1 Pet., 886; *Conard v. Nicoll*, 4 Pet., 291.

§ 775. A sale or assignment of a ship at sea is good without an immediate delivery of possession, if the vendee or assignee takes possession and asserts his title within a reasonable time and manner after her return; and it is of no consequence that the creditors of the vendor or assignor attach her before such possession is taken. *Wheeler v. Sumner*, 4 Mason, 183.

§ 776. Actual possession is not essential to the transfer of personal property, and the want of it is not even an indicium of fraud where, from the circumstances, it cannot be obtained. The indorsement of a bill of lading for a cargo at sea, for a valuable consideration, transfers the property, although actual possession is not taken by the assignee. *United States v. Delaware Ins. Co.*, 4 Wash., 418.

§ 777. Want of possession of property assigned is not *per se* a badge of fraud so as to avoid the assignment, if possession cannot from the circumstances of the property be within the power of the parties. It is held therefore that an assignment of goods at sea and their proceeds, or an outward cargo ready for sea, is not *per se* fraudulent, if all proper means are used by the assignee to get possession of the proceeds on their arrival. *Harris v. DeWolf*, 4 Pet., 147; *DeWolf v. Harris*, 4 Mason, 515.

§ 778. An assignment of an outward cargo, on board and ready for sea, although possession is not delivered nor are the bills of lading indorsed and delivered, gives the assignee a right to take the proceeds of the cargo, and hold them as against any person but the consignee of the cargo, or a purchaser from the consignee without notice. *Ibid*.

§ 779. On sale of goods possession must accompany and follow the bill of sale. *Moore v. Ringgold*,* 3 Cr. C. C., 434.

§ 780. A sale of personal property, which is left in the absolute possession of the vendor, though fraudulent and void as to creditors, is valid as between the parties. *Phettiplace v. Sayles*, 4 Mason, 312 (§§ 560-65).

§ 781. An absolute sale of chattels is *per se* fraudulent, unless possession accompanies and follows the deed. This conclusion of law cannot be displaced by proving the *bona fides* of the transaction, and that the possession remains with the grantor for justifiable purposes. *The Schooner Romp, Olc.*, 196.

§ 782. A conveyance of personal property though not acknowledged or recorded, and though there is no change of possession, is valid as between the parties. *Prather v. Burgees*, 5 Cr. C. C., 377.

§ 783. Where, by the terms of a conveyance of chattels, possession is to be given to the grantee, but as a matter of fact it is not, but remains with the grantor, such deed is fraudulent in law and void, though recorded as required by law. But such conveyance is only void against the creditors of the grantor. *Smith v. Ringgold*, 4 Cr. C. C., 126.

§ 784. An absolute bill of sale of property unaccompanied by a delivery of possession to the vendee, is *per se* fraudulent as to creditors. And it is immaterial that a creditor has notice of the sale after he has attached the property. *Monroe v. Hussey*,* 1 Or., 188.

§ 785. A sale of goods in the possession of a bailee of the vendor is fraudulent as to credit-

ors if the possession does not follow the sale, or unless an order by the vendor to deliver the goods to the vendee be served upon the bailee before the insolvency of the vendor. *Gilman v. Herbert*,* 2 Cr. C. C., 58.

§ 786. By the common law a grant or assignment of goods and chattels is valid between the parties without actual delivery thereof, and the property passes immediately upon the execution of the deed. But as to creditors the title is not considered perfect unless possession accompanies and follows the deed. The want of possession constitutes, in point of law, an actual fraud which renders the transaction void as to creditors. *Meeker v. Wilson*, 1 Gall., 422, (§§ 703-7).

§ 787. A. sold out to his partner, the latter agreeing to employ the former in the business, and possession was delivered. The purchaser subsequently sold to B., who took possession, and subsequently, by agreement with A., left the latter in possession. There was also an agreement by B. to sell to A., but the sale was never perfected. It having been contended that the sale to B. was fraudulent, and that he was acting in collusion with A. to shield the property from the creditors of the latter, it was held that, as neither B. nor the other person had any knowledge of the existence of any debts owing by A., and as the possession of A. was explained without the necessity of supposing fraud, the inference of fraud was negatived. *Erdhouse v. Hickenlooper*,* 2 Bond., 392.

§ 788. An absolute transfer of a chattel is fraudulent as against creditors unless possession accompanies and follows it. But if the sale or transfer is on a condition, or on trust as security for a debt, or for any purpose which does not entitle the vendee to the immediate possession, the possession of the vendor until such condition is performed, or the objects of the trust are fulfilled, is consistent with the transfer, and is therefore no badge of fraud. *Atlantic Ins. Co. v. Conard*, 4 Wash., 662.

§ 789. Under the act of Maryland of 1729, chapter 8, sections 5 and 6, a deed of personalty, to be void if the grantee shall pay to the grantor a certain sum upon demand, is void as to the creditors of the grantor, if possession does not accompany and follow the deed, although recorded agreeably to the act. It is not the intention of this act to make valid a deed which would be void as to creditors by the common law. *Smith v. Hunter*,* 5 Cr. C. C., 467.

§ 790. If the owner of a factory and store and the goods therein has them in the possession of an agent who resides there and conducts the business as agent in the name of the owner, he is constructively in possession; and if he sells to a third person who immediately sells to the agent, though the sales are in good faith and for valuable considerations, the goods are still liable for the debts of the original owner, unless the agent, in some mode or other, makes known to the public that his possession is no longer as agent for the owner but in his own right. The sales, being private and without witnesses, and producing no visible change in possession or ownership, are fraudulent and void as against the creditors of the original owner, unless the change in the title and the character of possession is made known as above stated. *Comly v. Fisher*,* Taney, 121.

§ 791. Although the statute provides that, in the case of a sale, the absence of an actual, immediate and continued change of possession shall be conclusive evidence of fraud, and shall avoid the transaction as against creditors and subsequent purchasers, it is held in this case, following *Stewart v. Platt*, in the supreme court of the United States, that, even though property sold is not delivered as required by law, an assignee in bankruptcy of the vendor can maintain no claim founded on that circumstance. *Lloyd v. Foley*,* 6 Saw., 424.

§ 792. A bill of sale absolute upon its face, though acknowledged and recorded according to the Maryland act of 1729, chapter 8, sections 5 and 6, is void as to subsequent purchasers without notice, if possession does not accompany and follow the deed. *Hamilton v. Franklin*, 4 Cr. C. C., 729.

§ 793. A statute in Missouri declares that "every sale made by a vendor of goods and chattels in his possession and under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property), and be followed by an actual and continued change of possession of the things sold, shall be held to be fraudulent and void as against the creditors of the vendor, or subsequent purchasers in good faith." It is held, under this statute, following the construction placed upon it by the state courts, that a sale of household furniture between parties living in the same house and using the furniture sold, without any change of possession except a pointing out of the property, the parties continuing to live in the house and use the furniture as before, is fraudulent and void in law. *Allen v. Massey*, 2 Abb., 60; 1 Dill, 40; *Allen v. Massey*,* 17 Wall., 351.

§ 794. A bill of sale of chattels is void as to creditors if the possession does not accompany and follow the deed; and if the vendor and vendee live together in the same family it will be presumed that the possession is unchanged unless the contrary is shown. *Travers v. Ramsay*,* 3 Cr. C. C., 355.

§ 795. Where the vendor and vendee of chattels lived in the same house, the court instructed the jury that if the possession remained with the grantor the deed was void as to creditors. *Ibid.*

III. VOLUNTARY CONVEYANCES.

[As to Ante-nuptial and Post-nuptial Settlements, see DOMESTIC RELATIONS.]

SUMMARY—*Subsequent creditors*, §§ 796, 800, 805, 816.—*Magnitude of estate conveyed*, § 797.—*Failure soon after conveyance*, § 798.—*Purchaser from volunteer*, § 799.—*Existing and subsequent creditors*, § 800.—*Conveyance of the whole of one's property*, § 801.—*No written contract, no payment and no security*, §§ 802, 804.—*False statement of receipt of consideration*, § 803.—*Payment of full consideration does not negative presumption of fraud*, § 804.—*Transactions between husband and wife; post-nuptial and ante-nuptial settlements*, §§ 805-824.—*Transactions between parent and child*, §§ 825-837.

§ 796. A voluntary deed is void only as to antecedent and not as to subsequent creditors, unless made with a fraudulent intent. *Hinde v. Longworth*, §§ 875-80.

§ 797. The proportional magnitude of the estate conveyed by a voluntary deed may awaken suspicion, and strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud. *Sexton v. Wheaton*, §§ 865-71.

§ 798. A shortly subsequent failure of the grantor is to be considered in determining the *bona fides* of a voluntary conveyance. *Ibid.*

§ 799. If it be admitted that a person who holds by purchase from a volunteer takes the property subject to the creditors of the original donor, a creditor is not compellable to proceed against such purchaser, and a decree cannot be made against him in aid of a volunteer who is able to pay the debt. *Hopkirk v. Randolph*, §§ 881-93.

§ 800. It is held in Missouri, under the statute of that state, which is borrowed from the statute of Elizabeth, that a voluntary conveyance by a person in debt is not, as to subsequent creditors, fraudulent *per se*. *Wallace v. Penfield*, §§ 852-53.

§ 801. To make it so there must be proof of actual or intentional fraud. As to existing creditors, if the effect and operation of the conveyance are to hinder or defraud them, it may, as to them, be justly regarded as invalid. *Ibid.*

§ 802. A voluntary conveyance by a man owing \$15,000, of property worth \$25,000, when he has no other property of value, is clearly fraudulent as to creditors. *Alexander v. Todd*, §§ 838-45.

§ 803. It is strong if not conclusive evidence of fraud in a conveyance of very valuable property by a debtor, that there is nothing put in writing respecting the contract, that no payment is made, and that no security or evidence of indebtedness is taken. *Ibid.*

§ 804. A conveyance is impeachable on the ground of fraud where the admission contained in it, that the whole consideration has been paid, is wholly false. *Ibid.*

§ 805. The presumption of fraud arising from the non-payment of the consideration of a conveyance, and the failure of the vendor to take from the vendee any evidence of indebtedment for the property sold, may be rebutted if subsequently, and in pursuance of the intention of the parties at the time the deed was executed, the consideration is paid in good faith. *Ibid.*

§ 806. But proof of the payment of a full consideration does not decisively negative the presumption of fraud, as the intention of the parties and not the fact of payment is the test by which the transaction is to be judged. *Ibid.*

§ 807. To avoid a post-nuptial settlement insolvency need not be presumed or shown. Such a settlement, including a very large amount of property made by a merchant doing business largely on credit, with scattered and uncertain assets overestimated in value, is void as against creditors, both at common law and under the statute of Elizabeth. *Parish v. Murphy*, §§ 846-47.

§ 808. A conveyance of property by an insolvent member of an insolvent firm, by means of a third person, to his wife, made for the purpose of preventing the property from coming into the hands of the creditors of the firm, is fraudulent in contemplation of law. *Moyer v. Adams*, §§ 848-49.

§ 809. And the fact that the wife's money helped to purchase the property originally will make no difference, where she has permitted the husband for a series of years to treat the property as his own, with all the indicia of ownership, and thus hold himself out to the world as the owner, and trade and do business upon the faith of such ownership. *Ibid.*

§ 810. Formerly, according to the English rule of jurisprudence, a voluntary conveyance by a debtor was void as to his prior creditors. But it is now established that prior indebted-

ness is only presumptive and not conclusive evidence of fraud, and that this presumption may be explained and rebutted, the question of fraud being always one of fact with reference to the intention of the grantor, and good faith being the only test. Thus where the grantor, at the time of a gift to his wife, reserved property worth more than twice and a half the amount of his debts, expecting and intending to pay all that he owed, and continued able to do so until he lost all of his means by hazardous business, and the creditor took no steps to collect his debt until after the misfortune of the debtor, the conveyance was sustained. *Lloyd v. Fulton*, §§ 850-51.

§ 811. The fact that a gift by a husband to his wife is made in pursuance of a promise in consideration of the marriage, which is void because not in writing, is not material in determining whether the gift is fraudulent and void as to creditors. *Ibid*.

§ 812. Where a man in active business, with fair prospects and good credit and reputation, and whose indebtedness was not such in amount or character as, taking into consideration the value of his other property interests, rendered it unjust to creditors, existing or future, that he should provide a home for his family out of his income or estate, purchased a tract of land, taking the title in the name of his wife, and made permanent improvements thereon with his own means, using the premises as a family residence, it was held that the transaction was not fraudulent as to creditors, no actual fraud having been proved, and the deed having been duly acknowledged and filed for record within a few days after its execution. The circumstance that the deed did not give an accurate description of the land intended to be conveyed was held not to defeat the settlement, inasmuch as it left no doubt that the tract intended to be conveyed was that in dispute. *Wallace v. Penfield*, §§ 852-53.

§ 813. A conveyance of property in trust for his wife by a man of large means and independent fortune and who has no creditors at the time, cannot be impeached by subsequent creditors because it is voluntary. It must be shown to have been fraudulent or made with a view to future debts. *Barker v. Barker*, §§ 854-58.

§ 814. A purchase of real or personal property made during coverture by the wife of an insolvent debtor is justly regarded with suspicion; and, in a contest with his creditors, it is upon her to prove distinctly that she paid for it with funds not furnished by her husband. But this rule does not apply in contests between creditors of her husband and one claiming as a *bona fide* purchaser from her without knowledge of any weakness in her title. *Simms v. Morse*, §§ 859-61.

§ 815. The fact that in a purchase from a *feme covert*, the purchaser secures a debt due by her husband to him, does not render the conveyance assailable; if she appropriates her property to the payment of any particular creditor of her husband, the other creditors cannot complain of it. *Ibid*.

§ 816. The statute of 18th Elizabeth, chapter 5, is in force in the county of Washington, District of Columbia, but it does not affect, as to subsequent creditors, a voluntary conveyance in trust by a husband for his wife and children, unless fraud is intended when it is made. Such settlements, though voluntary, are founded on a meritorious consideration, and will be upheld and enforced in equity against the husband. *Mattingly v. Nye*, §§ 862-63.

§ 817. Where a conveyance is made by a husband in trust for his wife upon an inadequate consideration, a court of equity may properly consider the deed as held in trust for the wife to the extent of the consideration paid, and in trust for the husband's creditors as to the balance; but in a court of law a deed must be held entirely good or entirely void. *Wright v. Stanard*, § 864.

§ 818. The release by a wife of her dower in certain premises is a good consideration, in the sense of the statutes against fraudulent conveyances, for the settlement upon the wife by the husband of other lands; that is, it is a good consideration for a fair equivalent of its value. But the mere inadequacy of the consideration in such a case is not a fraud for which the court will pronounce the deed absolutely void. But it may, if great, be evidence of fraud to be submitted to the jury. *Ibid*.

§ 819. An allegation that the wife of the defendant has aided him in practicing a fraud upon the plaintiff, by creating or giving countenance to the opinion that he was more wealthy than in truth he was, is not made out so as to impair any of her rights, by the fact that she had seen a letter written by the defendant to the plaintiff, in which he gave, as she thought, too flattering a representation of his circumstances, and had dissuaded him, as she thought, from sending it. *Sexton v. Wheaton*, §§ 865-71.

§ 820. A voluntary settlement made upon his wife by a man who is not indebted at the time, cannot be impeached by subsequent creditors on the ground of its being voluntary. *Ibid*.

§ 821. The mere existence of a disputed claim will not be sufficient to set aside a voluntary settlement, especially where it turns out, upon its adjustment, that the grantor is the creditor instead of the debtor. *Ibid*.

§ 822. A conveyance by a husband to his wife, on his going to sea, in pursuance of a prior

understanding between them that on his death she and her children were to have all of his estate, is voluntary, and receives no legal support from such prior understanding. *Wiswell v. Jarvis*, §§ 872-74.

§ 823. A debtor, in perfect fairness to all of his creditors, and without any intent to hinder, delay or defraud them, gave his wife an estate worth \$5,000. He was owing at the time but \$3,000, and retained of personal property more than four-fold that amount. By the most extraordinary misfortunes he finally lost nearly all his entire estate, without fault on his part. For at least four years after the conveyance the creditors could have received their full pay at any time, the debtor having offered to pay them and they having refused it. It was held that the creditors could not attack this conveyance as fraudulent, it having been a reasonable and proper provision for the wife and her family, as then situated. *Ibid.*

§ 824. Under the Revised Statutes of Maine, chapter 61, section 1, declaring that "when property is conveyed by the husband to his wife without a valuable consideration made therefor, it may be taken as the property of the husband to pay his debts contracted before such purchase," it is held that it must appear that the conveyance was fraudulent as to creditors. *Ibid.*

§ 825. Where a deed from father to son, expressed to be in consideration of love and affection, is attacked as fraudulent by evidence of circumstances outside of the deed, and unconnected with it, the fact that the father was indebted to the son may be shown, not for the purpose of contradicting the deed by showing that it was for a valuable consideration, but for the purpose of showing that it was not made with a fraudulent intention. *Hinde v. Longworth*, §§ 875-80.

§ 826. If a deed from father to son expresses the consideration to be love and affection, judgments against the grantor may be introduced to show that he was in debt at the time, in order to show the deed to be fraudulent and void as to creditors, although the grantee is no party to such judgments. *Ibid.*

§ 827. A deed from a parent to his child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances, but the mere fact of being in debt to a small amount will not make the deed fraudulent, if it can be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and left enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive and not conclusive evidence of it, and may be met and rebutted by evidence on the other side. *Ibid.*

§ 828. A gift of money by a father to a child may be constructively fraudulent as to creditors, under the statute, as well as a gift of property. *Hopkirk v. Randolph*, §§ 881-93.

§ 829. Where a father gives property to his children, an agreement on the part of a judgment creditor of the father to delay execution upon a promise of one of the volunteers, acting as agent for his father, to pay the debt in instalments, will not prevent the judgment creditor from proceeding against another of the volunteers to avoid his gift as fraudulent. *Ibid.*

§ 830. Under the statute of Elizabeth it is a general rule that a voluntary conveyance is void as to creditors where debts exist at the time it is made. But the relative value of the gift to the estate and debts of the donor must always be a material circumstance, a gift of so inconsiderable a value as to come under the denomination of a present, made under circumstances entirely free from suspicion, not being regarded as fraudulent. Where the gift is from a father to his children, it is also a material circumstance whether the children are grown so as to be advanced in life by the gift, or young infants who cannot be so advanced and who are not in a situation to take the property out of the possession of the father. *Ibid.*

§ 831. A gift by a gentleman of ample fortune, not embarrassed in his circumstances nor so much indebted as to create any suspicion of difficulty in the payment of his debts, of a slave waiting-maid and a riding-horse to his daughter, such gifts being usual in the country, comes under the denomination of a present, and is too inconsiderable to be considered as a voluntary conveyance of property in fraud of creditors. *Ibid.*

§ 832. It seems that while a subsequent marriage will not make a voluntary gift by a father to his daughter good, yet the circumstance is not without weight to uphold the gift, a reasonable gift made contemporaneously with a marriage, and accompanied by delivery of possession, having strong claims to be considered as a gift in consideration of marriage. *Ibid.*

§ 833. Where a conveyance is made by a parent to children of property to a large amount, charged with debts bearing no proportion to its value, the children cannot be considered as purchasers of the whole, but must take the clear surplus value of the property as volunteers. Such voluntary conveyance, with respect to a debt for which no provision is made by it, is fraudulent and void. *Ibid.*

§ 834. A father divided the greater part of his estate among his sons, stipulating that each of them should execute a bond for a certain amount to his son-in-law. The latter took no part

in the proceedings but afterwards parted with the bonds. The bonds being in fact a gift from the father to his daughter, it was held that they were within the statute against fraudulent conveyances, and that the son-in-law was liable to the creditors of the father for the amount which he had actually received for them. *Ibid.*

§ 835. Whether payments upon a voluntary bond given by a father to his son-in-law are to be considered as voluntary acts under the statutes against fraudulent conveyances, *quære*. *Ibid.*

§ 836. Where a father conveys property to his children in fraud of his creditors, it is not the rule that each is accountable to the creditors of the father only for such proportion of his debts as the property received by him bears to the property received by the other children: but the whole amount conveyed to any is liable for the debts of the father's creditors. *Ibid.*

§ 837. If a father makes a deed of gift of slaves to his son, which is constructively fraudulent as to creditors, and the son takes possession, and upon the subsequent death of the father becomes his administrator *de bonis non*, such property is not considered as assets in his hands, the gift being valid as between the parties under the statute of Elizabeth. And the fraud being only constructive and not actual the donee and administrator is liable to creditors of the estate only for the value of the slaves, including their issue in existence, and their profits from the time they are claimed by the creditors, and for money actually received for those which have been sold, and for interest on that money from the same time. *Backhouse v. Jett*, §§ 894-95.

[NOTES.— See §§ 896-976].

ALEXANDER v. TODD.

(Circuit Court for Ohio: 1 Bond, 175-189. 1858.)

Opinion of the Court.

STATEMENT OF FACTS.— This is a bill in equity, prosecuted by the plaintiff as the assignee in bankruptcy of the defendant Woods, to set aside, as fraudulent and void, a conveyance of real estate by him to the defendant Todd. The allegations of the bill are, substantially, that in April, 1838, the defendant Woods, having a title in fee to a tract of nearly forty acres of land, on the Ohio river, in Belmont county, in this state, opposite the lower part of the city of Wheeling, then valued by Woods at \$25,000, and having no other property of any considerable value, and being at the time indebted on his own account and as a surety to the amount of nearly \$20,000, conveyed the said real estate to the said Todd, his brother-in-law, with the intent to defraud his creditors and evade the payment of his debts. The bill charges that Todd was privy to the fraud, and received the deed really as a trustee for the benefit of Woods, and that no consideration was paid by Todd, and that the possession remained virtually in Woods after the conveyance. The prayer is, that the deed may be set aside as fraudulent, and that Todd shall account for any moneys received by him for any part of said property sold; and that such part as is unsold be now sold and the proceeds paid to the plaintiff, for the benefit of the creditors of Woods.

The defendants were not required to answer under oath, but have filed answers, not sworn to, denying the fraudulent purpose alleged in the bill, and asserting that the sale and purchase of the property were in good faith, and that the consideration named in the deed was paid. As the answers are not evidence, it will not be necessary to refer specially to the facts stated in them.

The deed, which is impeached as fraudulent, is among the exhibits in the case. It bears date April 28, 1838, and appears to have been executed and acknowledged according to the requirements of law, and was left for record in the office of the recorder of Belmont county, by the grantee, on the day of its execution. It purports, in consideration of \$25,000, paid by Todd, to

convey to him in fee the tract described, together with all the ferry rights and privileges pertaining to it. It is not signed by Mrs. Woods, the wife of the grantor; but it appears that, some time after its date, she released her right of dower.

The only evidence which relates directly to the execution of the deed is before the court in the deposition of the defendant Woods, who, by his own consent and the consent of the counsel for the plaintiff, has been examined as a witness. He is therefore a competent witness, and entitled to credit, so far as his testimony is not contradicted or weakened and rebutted by the probabilities of the case. He states that the sale and purchase of the real estate had been a subject of conversation between him and Todd for some time prior to the execution of the deed, but no written agreement had been signed, and the terms of the sale do not appear to have been specifically settled. He also states that he lived on the property at the date of the deed and had occupied it for many years before, and that Todd resided about a mile from it. On April 28, 1838, the parties went to the town of St. Clairsville, the county seat of Belmont county, distant about twelve miles from their homes, where they procured an attorney to write the deed, which was signed, acknowledged and put on record as before noticed. No money was paid at that time, nor was any note or other writing given by Todd, evidencing his liability to pay the consideration named in the deed or any other sum. Woods says, in his deposition, that there was a verbal understanding that the purchase money was to be paid as he might require it in his business, except \$1,600, the payment of which was to be deferred until it could be made from the sale of the property conveyed by the deed. He also testifies, and it is otherwise proved, that in the summer of 1838, some twenty acres of the tract were laid off in town lots and called West Wheeling, a plat of which was made and entered of record in Todd's name. No part of the money, according to the evidence of Woods, was paid to him until August 8, 1839, when he received from Todd \$23,400. As something will be said hereafter concerning this payment, it will not be noticed further in this place.

§ 838. *Whether the conveyance in this case was voluntary.*

Before proceeding with this investigation, the inquiry is suggested, whether from the facts connected with the execution of this deed, apart from the alleged payment at a subsequent day, such indications of fraud are found as will invalidate it. Thus considered, it is clearly a mere voluntary conveyance, and void as impairing the rights of creditors. It is too clear to admit of doubt that Woods was not in a position to make a legal transfer of this property for any other purpose than the benefit of his creditors. His debts at that time exceeded \$15,000, and he possessed no property of any value except the real estate conveyed to Todd. If, therefore, the evidence fails to establish the fact of a *bona fide* payment of the consideration money, the deed is void as a fraudulent conveyance to the injury of creditors.

§ 839. *A conveyance of real estate by a debtor is fraudulent, if at the time of its execution no consideration is paid and no security or evidence of indebtedness is taken.*

But, without further remarks on this view of the case, I will notice some of the facts in relation to the transaction in question which justify a strong suspicion, if not the positive conclusion, that it is infected with fraud. There are circumstances in proof, relating to the conveyance in question, which are

hardly accordant with an honest purpose in these parties. Without noticing all the facts inducing the suspicion of fraud, there is one so marked in its character and so widely variant from the usage of the country in such cases, as to be significant, if not conclusive. It will be readily seen that the amount involved in this transaction, especially in reference to these parties and the time it occurred, may well be regarded as large; and, on the supposition that the sale was a real one, and free from any taint of a fraudulent intent, would have induced great caution and vigilance in its consummation. But the remarkable fact appears, that although the sale had often been a subject of conversation prior to the execution of the deed, and the terms had been, to some extent, settled between the parties, nothing had been put in writing respecting it. It is, however, still more remarkable, and wholly without explanation, that Woods executed the deed containing an acknowledgment, in the most solemn form, that the entire sum of \$25,000 had been paid by Todd, when in fact no part of it had been paid, or any promise or security given that it would be paid. It seems incredible that any man of sane intellect, intending to make a *bona fide* sale of real estate, of large value, should neglect to take even the written acknowledgment of the party, in the form of a promissory note or otherwise, as evidence of the indebtedment. It is usual, in such cases, for the purchaser either to give the vendor a note with undoubted personal security, or a mortgage, to assure the payment of the purchase money. In this case, on the theory that the payment was made, nearly sixteen months elapsed from the date of the deed, during which time Woods was in possession of no evidence of Todd's liability to pay. The payment, therefore, if made, was wholly voluntary on his part, and without any pretense that interest on the amount was either demanded or paid.

§ 840. — *authorities reviewed.*

In the case of *Hendricks v. Robinson*, 2 Johns. Ch., 283, the learned Chancellor Kent held that a conveyance was impeachable for fraud, where the consideration was large, on the ground that the vendor had taken the promissory notes of the vendee payable on time, without security. After stating that for the remainder of the consideration, amounting to \$221,793, notes were taken, payable in one, two, three, four and five years, the chancellor remarks, "that the whole of this immense debt, created by the sale of the real estate at its fair value, was thus left to rest on the personal promise of H. F., without any other security, real or personal." It is true, in the case referred to, there were other indications of fraud, but great stress was laid by the chancellor on the fact above stated. He remarks, "It is contrary to the ordinary course of dealing, and repugnant to the maxims of common prudence to alienate such an immense real estate without payment or security."

The conveyance from Woods to Todd was clearly fraudulent at the time of its execution, for the reason that no consideration was paid, and no security — not even the promissory note of the purchaser — was taken. It is also impeachable on the ground of the falsity of the admission contained in it, that the whole amount of the consideration had been paid. In the case of *Watt v. Grover*, 2 Sch. & Lef., 501, the lord chancellor says, that "solemn instruments, duly executed, are *prima facie* conclusive on the parties. Where they state truly the transactions on which they are founded they are binding in equity as well as at law, if the consideration stated is sufficient for the purpose. But, if it appears that transactions are not truly stated, the instruments may lose all their binding quality in equity, even if conclusive at law."

§ 841. *The presumption of fraud, arising from the fact that no payment was made nor any security given, may be rebutted by evidence of subsequent payment of the consideration in good faith.*

But it is insisted, by the counsel for the defendants, that the consideration stated in the deed, though not paid or secured at the time of its execution, was paid some fifteen months after; and that, conceding the instrument to have been void at its inception, the subsequent payment purged from all taint of fraud. It is a grave question, perhaps, whether a transaction clearly fraudulent in law, at the time it took place, can be relieved from the imputation by any subsequent act. It is not proposed to consider this question in its application to this case. It is, however, proper to remark that the presumption of fraud arising from the non-payment of the consideration, and the failure of the vendor to take from the vendee any evidence of indebtedment for the property sold, may be rebutted, if subsequently, and in pursuance of the understanding of the parties at the time the deed was executed, the consideration is paid *in good faith*.

§ 842. *Proof of the payment of a full consideration does not decisively negative the presumption of fraud.*

It is, therefore, a proper subject of inquiry, in this case, whether payment was made, as asserted by the defendants. But, before considering this question, it is proper to remark, that proof that a full consideration for the property sold was paid does not decisively negative the presumption of fraud. The intention of the parties, and not the fact of payment, is the test by which the transaction is to be judged. Judge Story has clearly stated the law on this subject. He says, the consideration must be valuable, and must also be *bona fide*; and that if there is an "intent to defraud or defeat creditors, it will be void, although there may, in the strictest sense, be a valuable, nay, an adequate consideration." And he remarks further, that "cases have repeatedly been decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed; yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent, and therefore set aside. Thus, where a person with knowledge of a decree against the defendant, bought the house and goods belonging to him, and gave a full price for them, the court said, that the purchase, being with the manifest view to defeat the creditor, was fraudulent, and, notwithstanding the valuable consideration, void." 1 Story's Equity, sec., 369.

But was the consideration stated in the deed paid by the defendant Todd? The evidence on this point is that contained in the depositions of the defendant Woods, his brother Andrew Woods and Richard Miller. A proposition, it would seem, was made by the plaintiff that the defendant Todd should be examined as to the payment, but it was declined, and his statement is not before the court, except as it is contained in his answer, not verified by oath. The defendant Woods swears positively that \$23,400 was paid to him by Todd, in August, 1839, in bank-notes, in the presence of his brother Andrew. Andrew Woods testifies that he was present, and assisted in counting the notes, and that the amount was as above stated. The witness Miller says he was in the room and saw a large pile of bank-notes on the table, but does not know the amount.

If these witnesses are entitled to credit, the fact of the transfer of bank-notes by Todd to Woods, amounting to \$23,400, is proved. But, the question still remains, was this a *bona fide* payment of the consideration expressed in

the deed? Without referring to the mass of evidence bearing on this point, I can only notice some of the more material facts sustaining the conclusion that this payment was not made in good faith, but was a device intended to give an appearance of fairness to the sale, when, in fact, it was the intention of the parties to place the property beyond the reach of the creditors of Woods.

1. There can be no question as to the fact that Andrew Woods was largely indebted in April, 1838, when the deed was executed. It does not change the legal aspect of the subject, that the larger part of his indebtedness was as surety for other persons. Nearly all these debts were due to banks, for which all the parties were held as principal debtors, with warrants of attorney to enter up judgments at their maturity. The defendant, therefore, was liable to judgment and to execution for these debts at the date of the execution of the deed. And, it is not controverted, that if the persons for whom he was surety were not then insolvent, they were known to be so shortly after.

2. It is a significant fact that, although the sum alleged to have been paid by Todd to Woods was large, no evidence is offered to prove from whom or in what manner Todd obtained it. The defendant Woods, and his brother Andrew Woods say, in their depositions, they do not know where he procured this money. Nor does Todd, in his answer, give any information on this point. There is evidence that for many years prior to his removal to Ohio, in the year 1832, he had been a physician at Wheeling, and, in connection with his profession, was also interested in a drug store in that city. It is the opinion of the witnesses who have testified as to this point, that his business was lucrative; and it appears that he was the owner of real estate in Wheeling of considerable value. But, as negating the fact of his having in his possession nearly \$24,000 in August, 1839, it is in evidence that he disposed of no real estate about that time, and that he had no deposits, to any considerable amount, in any of the banks at Wheeling, or that vicinity. And there is also evidence, in regard to some of his pecuniary transactions, showing that his cash means were quite limited.

§ 843. *Where defendants are apprised by a bill in equity that a deed executed by them is to be impeached, it is incumbent on them to explain.*

Now, as upon the theory on which the defendants attempt to sustain the deed in question, it was obviously important to prove not only the payment of the consideration, but that the purchase by Todd was free from all imputation of fraud or covinous purpose, their failure to adduce any proof as to the source whence the large sum in question was obtained may well excite suspicion as to the character of this transaction. And this suspicion is certainly in no degree weakened by the omission of the defendant Todd to state the facts, which were within his knowledge, relating to this point. The defendants were apprised by the bill that the deed was to be impeached; and it was incumbent on them to contradict or explain every fact tending to cast suspicion on it.

§ 844. *No receipt or other written evidence of payment taken.*

3. In addition to the facts that no note or other writing was given when the deed was executed, as evidence that the consideration money was due, and that for more than fifteen months the business remained in this uncertain and perilous position, the still more extraordinary fact is developed that when the money was paid no receipt or other written evidence of payment was required by Todd or given by Woods. In a transaction of so much importance to these

parties, it is almost incredible that they should be content to leave it resting in the knowledge or memory of a single witness.

4. In the next place, the conclusion is irresistible from the evidence before the court that no satisfactory account is given of the application of the money alleged to have been paid by Todd to Woods. After a rigid examination, the statements of Woods in his depositions are, in some particulars, vague and unsatisfactory, and as to others in direct conflict with the reliable evidence of other witnesses. I do not propose to notice the evidence at length on these points. It is remarkable, however, that Woods produces no book or voucher showing the payment of a dollar of the funds received from Todd in extinguishment of his debts. He states that he paid to different persons to whom he was indebted some \$13,000, and that he lost largely by investments in steamboats. The accuracy of these statements is seriously impugned by the evidence of other witnesses, proving that at least two debts of considerable amounts were paid prior to August 8, 1839, and could not, therefore, have been paid out of the funds received from Todd.

§ 845. *Continued possession of property evidence of fraud.*

5. There is still another view of this transaction which, in my judgment, exhibits its real character in a light that clears it of all doubt and forces on the mind the conclusion that it is infected with legal, if not actual, fraud. I refer to the fact established by the proofs that there was no real change of possession after the alleged sale to Todd. Chancellor Kent, in the case of *Hildreth v. Sands*, before referred to, says that "possession of land and taking the profits after an absolute conveyance is evidence of fraud within the statute of frauds, unless such possession is consistent with the terms and object of the deed or the character of it be openly and explicitly understood." 2 Johns. Chan., 46. There is no pretense that the deed to Todd contains any reservation of the right of possession in Woods. Nor is there any evidence conducing to prove, in any legal sense, that Woods was the agent of Todd, and retained the possession and exercised acts of ownership in that character. Several of the persons who purchased lots after the town was laid out state that they were not aware of any conveyance to Todd, and supposed the title was in Woods until they received their deeds from Todd. It is true that in some instances Woods professed to act as Todd's agent in the sale of lots, and after receiving payment procured the deeds to be made in his name. Woods received in cash and otherwise more than \$4,000 for lots thus sold, and there is no evidence that he ever paid this sum or in any way accounted for it to Todd. In one case it appears that as late as the year 1842, subsequent to the discharge of Woods under the bankrupt law, he received pay in part for a lot sold in work on a ferry-boat. And it is also proved that he offered to pay a debt due from him, by the sale of a lot in the town, and with this view procured Todd to execute a deed to his creditor.

There is one fact bearing on the question of Woods' possession after his conveyance to Todd that seems to be conclusive. It has been already noticed that some months after the date of this conveyance, some twenty acres of the land described in it were laid off in town lots, leaving about seventeen acres not included in the town plat. This part of the tract was mostly a hill-side, in which there was a valuable coal-bank that had been worked for many years before the conveyance to Todd. On this seventeen-acre tract was situated a dwelling house in which Woods had long resided, and where, without any change and without any lease from Todd, he continued to reside, and perhaps

yet resides. It also appears that the ferry, which was an appendage of the property, has been ever since carried on by Woods, the license therefor always being in his name. It is also in proof that he has continued to take coal from the coal-bank for the use of his ferry-boat, and that he has also sold large quantities of coal taken from that bank.

It is true the defendant Woods says in his deposition that he agreed to pay Todd \$300 a year for the ferry and for the coal required for the use of the ferry-boat; and was also to account at a price agreed on for the coal sold by him. No written agreement to this effect is exhibited; nor is there any evidence of any agreement, by parol or otherwise, except what is contained in the deposition of Woods. It is obvious from the position he occupies in reference to this case that his testimony must be received with great caution. He testifies under the influence of a strong desire to sustain the fairness of this transaction, and thus vindicate his character from the imputation of fraud. In reference to facts of such materiality as those now under consideration, it is most reasonable to require that his testimony should in some way receive confirmation. If he was *bona fide* the tenant of Todd, and in that character retained the possession and use of the dwelling house, the ferry, and the coal-bank, it may be well asked why some proof of the fact beyond his own statement is not adduced? It is strange, indeed, that this arrangement should be allowed to continue for many years without some note or memorandum in writing of its existence. There is not only the absence of such proof, but the statements of Woods as to his being *bona fide* the tenant of Todd are strongly impeached by facts drawn from him in the progress of his examination. Although he states that he settled with Todd for the rent of the ferry and the use of the coal-bank, he admits that he kept no account in any form of their dealings, and does not exhibit any book or voucher showing the payment of anything to Todd on account of rent. He also states that he does not know that Todd kept any book showing the state of their accounts. It would certainly require a great stretch of credulity to believe that if the relation of landlord and tenant existed between these parties in good faith, there would be such looseness and carelessness in the transaction of their business. And I can not resist the conclusion that in reference to the dwelling house, the ferry, and the coal-bank, the possession remained unchanged in Woods after the conveyance to Todd; and that he enjoyed all the benefits and advantages of that part of the tract not included in the town plat, on which was situated the dwelling house with its appendages, as also the coal-bank, as fully as before the alleged sale to Todd. This remark would seem also to apply to the ferry and the privileges connected with it.

It is also worthy of notice as an indication of the real character of this transaction, that while it is alleged in the answers of both the defendants that it was verbally agreed that Woods should act as the agent of Todd in the sale of lots, and while Woods states in his deposition that such was the agreement, and that he sold lots and received payment as an agent, there is no satisfactory evidence that any accounts were kept between them showing the existence of the relation of principal and agent. Woods states distinctly that he kept no account of sales made or moneys received, and that he does not know that Todd had any books or papers showing these facts. The omission to do this, and the vague and unsatisfactory statements as to the settlements between these parties, involving large amounts of money, are certainly indications of the real character of the conveyance to Todd. Men of ordinary intelligence

and prudence do not conduct their business in this loose manner. The instincts of self-interest usually induce all men in their business transactions to make full and exact entries of moneys received or paid. And the mind is forced to the conclusion, in the absence of any proof that this was done, as between a principal and agent, that the parties did not recognize the existence of the relation. In this case there is no book, voucher or paper of any kind showing any receipts of moneys by Woods as the agent of Todd, or any payments to the latter in that capacity. This is not accounted for by the lapse of time since these alleged transactions took place. The deposition of Woods was taken within less than ten years from the date of their occurrence; and it is not reasonable to suppose that within that period the written evidence of what passed between the parties could have been lost or destroyed. There is no pretense in this case of such loss or destruction.

Without further remarks or comments, I am obliged to say that, looking to the conduct of these parties from the first to the last of their transactions, it seems irreconcilable with the supposition that the transfer of the property in question was made in good faith. I can not doubt that it was a mere device to put the property of Woods beyond the reach of his creditors; and viewed in this light, it has the infection of legal fraud. That both the parties are implicated in it seems hardly to admit of doubt. It is indeed insisted that there is no proof that the defendant Todd had any knowledge of the embarrassment of Woods at the time of the execution of the deed. There is no such direct evidence; but can it be doubted, considering that the parties were brothers-in-law, living near to each other, and were on terms of intimacy and friendship, that he had such knowledge? Todd was then an aged man and in infirm health; and it is altogether improbable that he would have purchased this property under such circumstances at a price greatly beyond its real value, with the purpose of laying off a town and making profit by the sale of town lots. While it is quite conceivable that he may have been influenced by a benevolent desire to shield his brother-in-law from impending pecuniary ruin, and, for this object, was willing to place himself in the position of a purchaser of the property, yet, in a legal aspect, he was a mere trustee for the creditors of Woods. And it avails nothing that these parties insist or swear that the sale was in good faith. In the case of *Hendrickson v. Robinson*, before cited, Chancellor Kent remarks: "It is indeed true, that the purchaser and the vendors say that this was an honest and *bona fide* sale, but do not the facts, which they all admit, outweigh the declaration? And can a mere assertion be compared to the unequivocal language of facts and the necessary inference of law?"

It results from these views that a decree must be entered for the plaintiff. It must declare the conveyance from Woods to Todd fraudulent and void; but as it is admitted by the plaintiff's counsel that those who have purchased lots in the town are purchasers for a valuable consideration and without notice of any fraud in the sale to Todd, their rights are not to be affected by the decree. The decree must also direct that the unsold portion of the tract be sold for the benefit of the creditors of Woods. And so far as Todd has received moneys for the sale of lots or the rent of the dwelling house, coal-bank and ferry, he must be held to account for the same. This will involve the necessity of a reference to a master, who will be authorized to examine the defendant Todd on oath and report to this court.

PARISH v. MURPHREE.

(18 Howard, 92-100. 1851.)

Opinion by MR. JUSTICE McLEAN.

STATEMENT OF FACTS.— This is an appeal in chancery from the district court of northern Alabama. The bill was filed to set aside a deed of settlement, made by George Goffe, dated the 12th of September, 1837, on his wife and four daughters, on the ground that it was made in fraud of creditors.

At the date above stated, Goffe and wife, by a deed of general warranty, conveyed to Thomas Williams, Jr., six hundred and forty acres of land, including the "Blount Spring Tract," in Blount county, state of Alabama, for the consideration of \$64,000. To secure the payment of the consideration, on the same day, Williams executed a deed of trust on the same property, to Joseph M. Goffe and George Goffe, for which notes bearing interest were given, \$5,000 payable March 1, 1838, \$5,000 payable on the 1st of October following, \$10,000 the 1st of October, 1840, \$10,000 the 1st of October, 1842, \$10,000 the 1st of October, 1844, \$10,000 the 1st of October, 1846, and \$14,000 the 1st of October, 1848. Williams was to remain in possession of the land, and was authorized to sell parts of it, to meet the above payments. On the same day George Goffe executed a deed of settlement, signed also by Joseph M. Goffe, by which he appropriated to his four daughters the four \$10,000 notes above stated, and the \$14,000 note to his wife, in consideration of "the natural love and affection he had for them."

The complainants represent that George and J. M. Goffe did business together as merchants, and that on the 2d of February, 1837, they executed to them their promissory note for \$5,169, payable in thirteen months; and, on the same day, another note, payable in twelve months, for \$5,168.25; also another note on the 22nd of September, 1837, for \$953.25, payable nine months after date. On all of which notes judgments were obtained in the district court, amounting to the sum of \$14,667.42, at November term, 1841. Executions having been issued on the judgments, were returned no property, and the defendants are alleged to be insolvent. And the complainants pray that George Goffe may be decreed to pay the amount due them, and, on failure to do so, that Williams may be decreed to pay the same, and in default thereof, that the lands and real estate or debts, assigned to Mrs. Goffe and her children, may be converted into money, by sale or otherwise, so as to pay the sum due the complainants. The defendants deny the allegations of the bill, and aver that at the time of the settlement the Goffes were able to pay their debts; that their assets exceeded their liabilities, and that the complainants have failed to collect their claims through their own negligence.

The statute of frauds of Alabama declares that "every gift, grant or conveyance of lands, etc., or of goods or chattels, etc., by writing or otherwise, had, made, or contrived of malice, fraud, covin, collusion, or guile, to the end or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, etc., shall be from henceforth deemed and taken only as against the person or persons, his, her, or their heirs, etc., whose debts, suits, etc., by such means, shall or might be in anywise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void," etc.

This statute appears to have been copied from the English statute of the 13th Elizabeth; and most of the statutes of the states, on the same subject, embrace substantially the same provisions. The various constructions which

have been given to the statutes of frauds, by the courts of England and of this country, would seem to have been influenced to some extent from an attempt to give a literal application of the words of the statute instead of its intent.

§ 846. *When a settlement will be held fraudulent.*

No provision can be drawn so as to define minutely the circumstances under which fraud may be committed. If an individual, being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments and without reference to future responsibilities. But between these extremes numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion of the statute. It did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which, at the time, subjected creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the statute. And if a settlement be made, without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void.

In the case before us, two of the debts, exceeding \$10,000, were contracted in February, 1837, seven months before the settlement deed was executed. The other debt of \$953.25 was contracted the 22d of September, ten days after the settlement. The property conveyed amounted to \$64,000, \$54,000 of which were covered by the settlement.

This conveyance is attempted to be sustained on the ground that Mrs. Goffe relinquished her dower to the tract conveyed, and that George Goffe, including the partnership concerns, held an aggregate property, after the settlement, amounting to the sum of \$65,000; and that the debts against Goffe individually, and also against the partnership, did not exceed \$25,000. It appears that in the fall of 1837, and in the early part of 1838, a large amount of his paper being due at New York, including the plaintiffs', was not paid. Suits were commenced against him, and early in 1839, his property, within the reach of process, was all sold. Goffe, it is proved, sent to Texas in 1839, by his brother, ten negroes and other property, worth about \$10,000. In 1840, George Goffe went to Texas, where he afterwards died. Twenty-seven judgments were rendered against him, four of which were on notes dated the 27th of February, 1837, and four on notes given in September and October following, independent of the plaintiffs' judgments.

§ 847. *What necessary to be shown to avoid a settlement.*

These facts are incompatible with the assumption that Goffe's assets were more than double his liabilities. His aggregate of property must have been made of exaggerated values, and too low an estimate was made of his eastern debts. After the settlement, and, as it would seem, before it was known to his eastern creditors, his purchases of merchandise were large, and his business at home was greatly extended. Several stores were established by him in partnership with his brother. After having abstracted from his means

\$54,000, this enlargement of his business shows a disposition to carry on a hazardous enterprise, at the risk of his creditors. In less than three years after the settlement, judgments were obtained against the partnership for between twenty-five and thirty thousand dollars; no inconsiderable part of which had been contracted and was due at the time of the settlement. These facts prove that, after the voluntary conveyance, Goffe was unable to meet his engagements. Nothing can be more deceptive than to show a state of solvency by an exhibit on paper of unsalable property, when the debts are payable in cash. Such property, when sold, will not, generally, bring one-fifth of its estimated value. And such seems to have been the result in the case before us.

But to avoid the settlement, insolvency need not be shown nor presumed. It is enough to know that, when the settlement was made, Goffe was engaged in merchandising principally on credit; his means consisted chiefly of a broken assortment of goods, debts due for merchandise, scattered over the country in small amounts, wild lands of little value, a few negroes, and a very limited amount of improved real estate, the value of which was greatly over-estimated. On such a basis, no prudent man, with an honest purpose and a due regard to the rights of his creditors, could have made the settlement. A conveyance under such circumstances, we think, would be void against creditors at common law; and we are not aware that any sound construction of the statute has been given which would not avoid it. *Sexton v. Wheaton et ux.*, 8 Wheat., 229; *Hinde's Lessee v. Longworth*, 11 Wheat., 199; *Hutchinson et al. v. Kelley*, 1 Robinson, Va. Rep., 123; *Miller v. Thompson*, 3 Porter's Rep., 196.

The decree of the district court is reversed, and the cause is remanded to that court, with instructions to enter a decree for the complainants as prayed for in the bill.

MOYER v. ADAMS.

(Circuit Court for Indiana: 9 Bissell, 390-396. 1890.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—The case of *Moyer v. Adams* was a bill filed in the district court by the assignee of Stoner and Moyer, to set aside conveyances made on the 24th of November, 1877, by Moyer to Stephen C. Shank, and by Shank to the wife of Moyer, on the ground that they were fraudulent as against creditors. Stoner and Moyer were adjudicated bankrupts on their own petition on May 18, 1878.

It does not clearly appear by the evidence submitted to the court in this case, at what time Moyer became the owner of the property covered by the conveyance. The inference is that it was not later than 1869. Moyer bought the land with his own money and property. He had sold some real estate belonging to him many years before the bankruptcy, when he was comparatively free from debts, and made a present to his wife out of the proceeds of the sale, of the sum of \$500, and she took possession of the money and retained it, as she says, about a year. Then she gave it to him for the purpose of being used in the construction of the house placed on the property, and in which they lived; this must have been as early as 1869. When she gave her husband the money no note or other evidence of the debt was executed to her. There was no agreement about paying any interest. He says that the deed was made to her to secure her the \$500; that she had insisted upon it

before that time, but that he had neglected to have the deed executed. Shank was made use of simply as the channel through which the property was conveyed to the wife by the husband. The house cost between \$1,200 and \$1,500. The husband says that when he got the money from the wife he was to pay it back to her. Moyer always paid the taxes on the property and the insurance, and seems to have treated it as his own prior to the conveyance made to his wife. The language used by Moyer is as follows: "When I got it (the money) from her I was to pay her back; there was no time set; I just said I would pay her back; no note was given or anything put in writing about it; I never put down in any book that I owed her \$500." The property in controversy was worth \$2,500 to \$3,000.

The case of *Stoner v. Adams* was also a bill filed in the district court by the assignee of Stoner and Moyer, to set aside a conveyance made November 6, 1877. The facts that give rise to the controversy in that case are these.

Stoner and his wife were married in January, 1859, and the wife, about 1868, received from her father's estate the sum of \$600. With this money the lot in controversy was purchased, and the deed taken in the name of the husband, July 14, 1868. Stoner built a house on the lot about three years after it was purchased, for which he paid \$1,500 of his own money. This property, when the deed was made to her, was worth about \$2,500, or \$3,000. He had always paid the taxes on the property, and he resided in the house as his own. He had instructed a real estate agent to offer the house for sale at one time, in consequence of which he became liable to him for a commission which he did not pay, and for which he was sued, and a judgment obtained against him, which he subsequently paid. No writings passed between the husband and wife in relation to the \$600, with which the lot had been purchased. No note was ever given by the husband for the amount, and no agreement was made to pay any interest. It is said by both that the intention was that the property should be conveyed to the wife at the time of the purchase; it, however, was not done until November 6, 1877, as already stated. The wife says that when the deed was made to her she paid him \$20 in money that she had made herself since her marriage. A mortgage had been given on the house and lot for \$1,000, which had been borrowed by the husband for the purpose of building the house. They both executed the mortgage. She says for years she had insisted that the property should be placed in her own name before it was done, but that he had put it off from time to time. She says, also, she did not know at the time, that the deed was made to him, although of course, she must have ascertained the fact shortly afterwards. The husband had never paid her the \$600 or any interest on it.

These two cases were argued as one, and as they relate to the property of two partners engaged together in trade, who became bankrupts, and as the facts are somewhat similar, and the same principles are involved in each case, they will be considered together.

Several cases have been cited by the appellants' counsel in support of the deeds made to the wife, but they do not seem to go to the full extent necessary in these cases. In *Parton v. Yates*, 41 Ind., 456, the supreme court of this state sustained a deed made by the husband to the wife, where the property had been conveyed to the husband, and the whole consideration paid therefor belonged to the wife; but the court in that case laid stress on the fact that no money or property of the husband had become united with the real estate which was the subject of controversy. It is true, there being a

balance due as part of the purchase money, the husband had given a note for it, and he and his wife had executed a mortgage on the premises to secure its payment, but it was entirely unpaid, which the court considered an important fact in the case. *Summers v. Hoover*, 42 Ind., 153, was a case where the real estate was conveyed to the husband, but the consideration proceeded solely from the wife, and the deed was made to the husband without the wife's consent, and the court intimated, in such a case, the deed to the wife would be valid; but it was clearly, as in the other case, on the ground that neither money nor property of the husband had entered into the land which was the subject of controversy. In both these cases the property was conveyed to the wife by the husband through a trustee. These are the only cases cited from the supreme court of Indiana which bear any analogy to the case now before the court. In *Catherwood v. Watson*, 65 Ind., 576, the supreme court merely decided that where a tract of land was purchased by the wife with her money, and a deed was taken in her husband's name, there was no resulting trust in favor of the wife as against a judgment and execution creditor who levied on the land, and had no notice of the wife's interest in the land. In *Glidewell v. Spaugh*, 26 Ind., 319, the court decided where a conveyance of real estate was made to one person, and the consideration therefor proceeded from another, that no trust arose under the statute unless there was an agreement without fraud to hold the title for the use of the person paying the purchase money.

§ 848. *Circumstances under which a conveyance from a husband to his wife will be held invalid although part of the money expended on the property for its purchase and improvement was furnished by the wife out of her separate estate.*

The district court, in each of the cases now under consideration, sustained the bill, and held that the conveyances respectively made to the wife were fraudulent as against the creditors of the bankrupts. From that decision an appeal was taken in each case by the wife, and by her husband. I think the decision of the district court was right in each case. The deeds were made to the wife in the fall of 1877, at a time when there can be no reasonable doubt that the firm of Stoner & Moyer was insolvent, as well as each member of the firm. Neither can there be any doubt that these conveyances were respectively made for the purpose of preventing the property from coming into the hands of the creditors of Stoner & Moyer, and so were fraudulent in contemplation of law, unless the fact that some money of the wife entered into the property changed the principle. The supreme court of this state has sustained conveyances made to the wife where the whole consideration was paid by her, where no money or property of the husband became an integral part of the estate conveyed, and where the deed had been taken in the name of the husband; but this is as far as the supreme court has gone. It may be questionable, I think, where the wife has permitted the real estate to remain for a long time in the name of her husband, has permitted him to exercise apparently the sole control over it, and treat it as his own, with all the indicia of ownership, for a series of years, thus holding himself out to the world as the owner of the property, and trading and doing business upon the faith of such ownership, whether we ought on principle to sustain a conveyance to the wife under such circumstances; but however this may be as an abstract principle, if these cases were within the rule established by the supreme court, it would be the duty of this court to follow it as one of property in the state. But these cases now before the court are different from those cited, in this: that in each there was a large share of the value of the property, the subject of controversy here,

which had been contributed by the husband. In the one case he had purchased the property with his own means, and had merely made a gift to his wife many years before the conveyance was made to her; in the other, she had advanced the purchase money out of her own estate, but he had contributed a large share to the value of the property, and in both cases the husband had exercised apparent ownership over the property for many years, traded on it and used it as his own, so far as we know, without any action on the part of the wife in hostility thereto. To allow the wife under such circumstances as these to retain the property, or even any part of it, as against creditors, would, it seems to me, be inequitable.

§ 849. *Whether wife's interest in property may be severed from that of husband.*

It is true that the law discriminates between the property of the husband and that of the wife, and allows the wife protection in her individual property; but we know how frequent it is for them, although there may be separate property in the wife, to consider it as common; and how often the wife allows the husband to treat her property as his own. A court of equity would go very far, even in such a case, to protect a wife in her individual rights; but it is hardly permissible for her to allow her husband for a series of years to treat the property as his own, and to incorporate a part of his own means in it, and then claim the whole of it as against the creditors of the husband. It is possible that where the question came before a court of equity immediately after the fact, that it might feel inclined to separate that portion of the value of the property which belonged to the wife, and give her the benefit of it in some of the modes within the province of a court of equity; but where so much time has elapsed without action on the part of the wife, and the husband has been permitted for so long to treat the property as his own, it would seem to be inequitable as well as impracticable to sever the interest of the wife from that of the husband.

For these reasons the decree of the district court in each case is affirmed, with costs.

LLOYD v. FULTON.

(1 Otto, 479-487. 1875.)

APPEAL from U. S. Circuit Court, Northern District of Georgia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—All the testimony in this case was taken by the appellee. He was complainant in the suit. Only two witnesses were examined, himself and his brother-in-law, James S. Hamilton. There is no discrepancy in their statements. The facts lie within narrow limits.

Fulton, the appellee, married Virginia F. Hamilton, the daughter of Thomas N. Hamilton, in the year 1851. Her father was a man of very large fortune. Fulton received by her, before and after her father's death, more than \$100,000. He had himself, at the time of his marriage, substantially nothing. His father-in-law died intestate in 1859. Before and after his marriage, Fulton promised his father-in-law to settle his wife's fortune upon her. After his father-in-law's death, he made the same promise to her brother, James S. Hamilton, who administered upon his father's estate. Nothing in fulfilment of these promises was done by Fulton until the 14th of September, 1864. On that day he executed to James S. Hamilton the deed made a part

of the bill. It conveyed the premises in controversy in trust for the sole and separate use of the wife of the appellee and her children. The deed contained, among other things, a provision that, if Hamilton should die, resign or be removed from the trusteeship, she might appoint her husband or any other fit person as trustee in his place. On the same day, Hamilton resigned and Fulton was appointed. On the 16th of May, 1861, Fulton executed to James Lloyd two notes of \$5,000 each, one payable on the 1st of September following, the other on the first of September, 1862. There was due on these notes, at the date of the trust deed, \$11,780. Fulton then owed to other persons not exceeding \$2,000. This was the extent of his indebtedness. The aggregate of his liabilities was less than \$14,000. He retained in his hands property worth \$36,000, besides non-enumerated articles worth \$20,000 in Confederate currency. The point of depreciation which that currency had then reached is not shown. The property reserved was of greater value than that conveyed. After the execution of the deed, he was able to pay the notes. In 1862 he offered to pay them in Confederate currency, which was then but little depreciated. Payment in that medium was refused. His ability to pay continued until 1866. In that year he embarked in the enterprise of raising cotton in Arkansas. The result wrecked his fortune and ruined him. He has since been unable to pay the notes. Suit was commenced against him upon the notes in February, 1868, and in May, 1871, judgment was recovered for \$10,000, with interest amounting to \$6,447.81, and costs. Execution was issued and levied upon the trust property described in the bill. This suit was brought to enjoin the sale, and the circuit court decreed in favor of the complainant.

§ 850. *As to validity, under statute of frauds, of promises made before and after marriage, for benefit of wife.*

The provision of the English statute of frauds, touching promises made in consideration of marriage, is in force in Georgia. The promise of Fulton to Thomas N. Hamilton before the marriage was, therefore, void. Browne's Stat. Frauds, 220, 514. His promise after the marriage was without consideration, and therefore of no validity. The same remark applies to the like promise to James S. Hamilton, the administrator. The principle of the wife's equity has no application to this case. *Wicks v. Clarke*, 3 Ed. Ch., 63. The trust-deed was clearly a voluntary conveyance. Lloyd was a prior creditor. Was the deed good against him? This question is the core of the controversy between the parties.

Formerly, according to the rule of English jurisprudence, such deeds, as against such creditors, were void. *Townsend v. Windham*, 2 Ves., 10. The same principle was applied in such cases in this country. *Read v. Livingston*, 3 J. C. R., 481. It has been overruled in the English courts. *Lush v. Wilkinson*, 5 Ves., 384; *Townsend v. Westcott*, 2 Beav., 345; *Gale v. Williamson*, 8 M. & W., 410; *Shares v. Rogers*, 3 B. & A., 96; *Freeman v. Pope*, 5 Ch. App. Cases Eq., 544, 545. It has been also overruled by this court. *Hinde v. Longworth*, 11 Wheat., 213 (§§ 875-80, *infra*); *Kehr v. Smith*, 20 Wall., 35 (Dom. REL., § 589), and in most of the states of our Union. The state adjudications to this effect are too numerous to be cited. We shall refer to a few of them. *How v. Ward*, 4 Me., 195; *Moritz v. Hoffman*, 35 Ill., 553; *Leroy v. Wilmarth*, 9 Allen, 382; *Miller v. Wilson*, 15 Ohio, 108; *Young v. White*, 25 Miss., 146; *Taylor v. Ewbank*, 3 Marsh., 329; *Salmon v. Bennett*, 1 Conn., 525; *Worthington v. Shipley*, 5 Gill., 449; *Townsend v. Maynard*, 45 Penn., 199. Such is

also the law of the state whence this case came to this court. *Weed v. Davis*, 25 Ga., 686. It is a rule of property there; and this court is therefore bound to apply it, in the case in hand, as if we were sitting as a local court in that state. Jud. Act of 1789, sec. 34; *Olcott v. Bynum*, 17 Wall., 44.

§ 851. *Rule as to validity of voluntary conveyances in case of prior indebtedness.*

The rule as now established is, that prior indebtedness is only presumptive and not conclusive proof of fraud, and this presumption may be explained and rebutted. Fraud is always a question of fact with reference to the intention of the grantor. Where there is no fraud, there is no infirmity in the deed. Every case depends upon its circumstances, and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test.

Perhaps no more striking illustration can be found of the application of this principle, and of the opposition its establishment encountered, than is presented in the several cases of *Van Wick v. Seward*. On the 6th of November, 1817, Seward assigned a judgment to Van Wick, and gave him a guaranty that it was collectible. The judgment was a lien upon lands fairly to be presumed more than sufficient to satisfy it. On the 16th of April, 1818, Seward conveyed all his real estate, consisting of a farm of two hundred acres, to his son. The consideration of the deed was the payment of a specified sum to each of two daughters of the grantor, and an annuity for life of \$500 to the grantor himself, who was then aged and infirm. The lands bound by the lien of the judgment were sold under execution and bought in by Van Wick for a nominal sum. He thereupon sued Seward upon his guaranty, and recovered a judgment, which was docketed on the 13th of September, 1820.

Van Wick thereupon sold under execution and bought in the farm which Seward had conveyed to his son, and brought an action of ejectment to recover possession. The jury found that there was no actual fraud. The supreme court, nevertheless, upon the ground that the liability was prior to the deed, following the ruling of Chancellor Kent in *Reed v. Livingston*, gave judgment for the plaintiff's lessor. *Jackson v. Seward*, 5 Cow., 67. This judgment, upon grounds chiefly technical, was reversed by the court of errors of New York. *Seward v. Jackson*, 8 Cow., 423. Van Wick thereupon filed a bill in equity to avoid the deed. Chancellor Walworth concurred with the jury in the prior case as to the absence of fraud; and upon that ground, and the further ground of the circumstances of the sale of the property covered by the lien of the judgment, dismissed the bill. *Van Wick v. Seward*, 6 Paige, 63. The court of errors, upon appeal, affirmed this decree by a majority of one. The vote was fourteen to fifteen. *Van Wick v. Seward*, 18 Wend., 375. So ended the litigation. Perhaps in no case was the subject more elaborately examined. This case was fatal to the old rule. We think the new one more consonant to right and justice, and founded in the better reason.

In *Miller v. Wilson*, 15 Ohio, 108, the doctrine of this case was expressly affirmed by the supreme court of Ohio, though the result upon the facts was in favor of the creditors. The facts of the case in hand are more favorable for the support of the deed than those in *Van Wick v. Seward*. Here the debtor reserved property worth more than twice and a half the amount of his debts. He expected and intended to pay all he owed. He continued able to do so until he lost his means by the hazards of business. The creditor rested supine for a long time. He did not take his judgment until more than eight years

after the second note matured, and more than six years after the execution of the trust-deed. More than seven years had elapsed when the levy was made. The validity of the deed was then challenged for the first time. The creditor quietly looked on until after misfortune had deprived the debtor of the ample means of payment which he had reserved, and now seeks to wrest from the wife the small remnant of property which her husband acquired by means derived wholly from her estate, and which, in part fulfilment of his promise repeatedly made both before and after his marriage, he endeavored to secure to her and her children.

The evidence, as it stands in the record, satisfies us of the honesty of the transaction on his part. The non-payment and the inability to pay are the results, not of fraud, but of accident and misfortune. When Fulton executed the deed, he did what he then had the right to do, and was morally, though not legally, bound to do. The proofs would not warrant us in holding that the settlement does not rest upon a basis of good faith or that it is not free from the taint of any dishonest purpose. The decree of the circuit court is affirmed.

WALLACE v. PENFIELD.

(16 Otto, 260-264. 1882.)

APPEAL from U. S. Circuit Court, Eastern District of Missouri.

STATEMENT OF FACTS.—Bill by trustee of judgment creditors to subject to the payment of their demands, lands conveyed by the defendant to his wife before the debts in question had been contracted. The charge in the bill was that the conveyance in question was made in fraud of creditors and the decree of the court below was to that effect. Defendants appealed.

Opinion by MR. JUSTICE HARLAN.

A very careful scrutiny of the record has brought our minds to the conclusion that the decree below cannot be sustained. The evidence clearly establishes that Williams, with his own means, purchased the land in question with the intention of immediately improving it and making it the permanent residence of himself and family. Indeed, the fact is substantially admitted in the answer of himself and wife. But fraud is not shown upon his part, either in causing the conveyance to be made to her, or in using his means, to the extent that he did, in improving the land. The facts are entirely consistent with an honest purpose to deal fairly with any creditors he then had, or might thereafter have in the ordinary course of his business. It is true that he was somewhat indebted at the time of this voluntary settlement upon his wife, but his indebtedness was not such in amount or character as, taking into consideration the value of his other property interests, rendered it unjust to creditors, existing or future, that he should, out of his income or estate, provide a home for his family by improving this tract. When it was conveyed to her, as well as during all the period when he improved it by the erection of a dwelling and other houses thereon, he had, according to the weight of the evidence, property which his creditors could reach, exceeding in value all his existing indebtedness by several thousand dollars. He was engaged in active business, with fair prospects, good credit, and, as we may infer from the record, unsullied reputation. His indebtedness existing at the time of the settlement upon the wife, as well as that which arose during the period of the improvements, was subsequently, and without unreasonable delay, fully discharged by him. Commenced in 1868, they were all, with trifling exceptions, completed and

paid for before the close of the summer of 1869. So far as the record discloses, no creditor, who was such when the settlement was made or the improvements were going on, was materially hindered by the withdrawal by Williams, from his means or business, of the sums necessary to pay for the land and improvements. Those who seek, in this suit, to impeach the original settlement, or to reach the means he invested in improving his wife's land, became his creditors some time after the improvements (with slight exceptions not worth mentioning) had been made and paid for. If they trusted him in the belief that he owned the land, it was negligent in them so to do, for the conveyance of February 11, 1868, duly acknowledged, was filed for record within a few days after its execution.

§ 852. *Misdescription which will not vitiate a deed.*

The circumstance that the original deed did not give an accurate description of the land intended to be conveyed ought not to defeat the original settlement upon her, inasmuch as the description could leave no one in serious doubt that the land intended to be conveyed was that now in dispute. There is no intimation in the pleadings that the bank supposed, when contracting with him, or accepting from others commercial paper upon which his name appeared, that the deed of February 11, 1868, described land other than that upon which he, after that date, resided. On the contrary, the amended bill proceeds, in part, upon the ground, distinctly stated, that the land intended to be conveyed by that deed is that now in dispute, and that the only purpose of the deed of December 13, 1871, was to correct the erroneous description in the deed of 1868.

An effort is made to show that some of the debts, evidenced by the notes upon which the banks obtained judgment, existed when the conveyance of 1868 was executed or the improvements in question were made. But the evidence furnishes no basis for such a contention, except as to the note for \$1,635.25, executed August 14, 1871, held by the La Grange Savings Bank. As to that note, the president of the bank states that in it was merged a prior note for \$800 or \$1,000, given by the parties last named in 1866 or 1867. But his evidence shows that he is not at all clear or positive in his recollections upon the subject; and, according to the decided preponderance of testimony, Williams was not a party to the note, which, it is claimed, was merged in that of August 14, 1871. The proof, upon this point, renders it quite certain that no part of the debt evidenced by that note existed against Williams, until, as surety for Simpson, he signed that note.

§ 853. *A voluntary conveyance will not be set aside at the instance of subsequent creditors unless actual and intentional fraud be shown.*

The principles of law which must determine the rights of the parties are well established by the decisions of the supreme court of Missouri. In *Pepper v. Carter*, 11 Mo., 540, that court, after remarking that the question as to what would render a voluntary conveyance void as to creditors under the statute of Elizabeth, from which the Missouri statute was borrowed, had undergone much discussion, and been the subject of contradictory opinions, said: "Some would make an indebtedness *per se* evidence of fraud against existing creditors. Others would leave every conveyance of the kind to be judged by his own circumstances, and from them infer the existence or non-existence of fraud in each particular transaction. Without determining the question as to existing creditors, we may safely affirm that all the cases will warrant the opinion that a voluntary conveyance as to subsequent creditors,

although the party be embarrassed at the time of its execution, is not fraudulent *per se* as to them; but the fact, whether it is fraudulent or not, is to be determined from all the circumstances. I do not say that the fact of indebtedness is not to weigh in the consideration of the question of fraud in such cases, but that it is not conclusive." In the later case of *Payne v. Stanton*, 59 Mo., 158, the same court, while quoting approvingly the language just cited from *Pepper v. Carter*, said that the "doctrine is well settled that a voluntary conveyance by a person in debt is not, as to subsequent creditors, fraudulent *per se*. To make it fraudulent, as to subsequent creditors, there must be proof of actual or intentional fraud. As to creditors existing at the time, if the effect and operation of the conveyance are to hinder or defraud them, it may, as to them, be justly regarded as invalid; but no such reason can be urged in behalf of those who become creditors afterwards."

These decisions control the present case. Neither the conveyance to the wife nor the withdrawal of the husband's means from his business for the purpose of improving the land settled upon her, had the effect and operation to hinder or defraud his then existing creditors. Nor does the evidence justify the conclusion that the conveyance was executed, or the improvements made, with an intent to hinder or defraud either existing or subsequent creditors. Giving full weight to all the circumstances, there is no reason to impute fraud to the husband. Decree reversed with directions to dismiss the bill.

BARKER v. BARKER'S ASSIGNEE.

(Circuit Court for Louisiana, 2 Woods, 87-92. 1874.)

Opinion by Woods, J.

STATEMENT OF FACTS.—The facts of the case are these: On the 30th of September, 1857, Jacob Barker was seized in fee and was in possession of a certain parcel of real estate in the city of New Orleans. On that day, by his deed of that date, he conveyed the real estate to his son, Abraham Barker, the complainant. Although the deed was absolute on its face, yet the conveyance was made to Abraham Barker in trust for Elizabeth Barker, wife of Jacob Barker, and mother of complainant. The consideration, as claimed by complainant, was \$8,000, made up by the cancellation of two notes for \$1,300 each, with interest, made by Jacob Barker and held by Elizabeth Barker, the payee, by the payment by the trustee, for Jacob Barker, of a balance due Barker Brothers, and a credit for the remainder in favor of Jacob Barker on the books of the trustee.

The deed was not recorded until the 14th of July, 1869. In the meantime, about the year 1861, Mrs. Elizabeth Barker died, having provided by her last will that the whole income of her estate, or so much thereof as might be necessary, and, if required, the principal, or some part thereof, should be devoted to the support of the said Jacob, and such members of the family as might, in his discretion, require it. Both before and after the death of Mrs. Barker, Jacob Barker collected the rents and paid the taxes upon the property, he being a resident of New Orleans, where the property was situated, and Abraham Barker, the trustee, a resident of Philadelphia.

In June, 1867, Jacob Barker was adjudged a bankrupt by the United States district court of Louisiana, and placed upon his schedules, through inadvertence and mistake, as he testifies, the parcel of real estate conveyed to complainant in 1857, and afterwards it was sold by the assignee to the defendant,

Samuel Smith. Jacob Barker, for many years prior to the date of his deed to Abraham Barker, had been a prominent business man and banker in New Orleans, of great reputed wealth, and so continued until the date of his bankruptcy in 1867.

The prayer of the bill is that the sale to Smith may be set aside and the property reconveyed to the complainant, or that he may receive the proceeds of the sale made to Smith. Samuel Smith, one of the defendants, filed an answer, in which he says he is willing to abide by the order of the court in the premises, and if the court shall decide that the sale to him should be annulled, consents thereto on the repayment to him of the purchase money.

The assignee defends against the bill on two grounds: (1) Because the deed to Abraham Barker was simulated and intended to defraud the creditors of Jacob Barker; and (2) Because the failure to record the deed rendered it null and void; and as the assignee was appointed before the deed was recorded, he can, as the representative of the creditors, insist on the invalidity of the deed. These defenses present the points that demand our attention.

§ 854. *A conveyance cannot be impeached, because voluntary, at the instance of creditors who became such long after the execution of the deed.*

First. Is the deed of September 30, 1857, void because executed in fraud of creditors? There is not a word of evidence in the record to show that in 1857 Jacob Barker had a creditor in the world. On the other hand, all the facts in the case are consistent with the theory that, being a man of large means and independent fortune, in no pecuniary strait, and wishing to put in the hands of a trustee trust property held by him for his wife, he made the deed in question. As all the parties were members of the same family, it was not thought necessary to transact the business with the formality and precision usually employed when the transaction is between strangers. Had it really been the purpose of Jacob Barker to defraud his creditors, he would have been careful to see that the deed was executed and recorded in strict compliance with law. But it is not necessary to argue the question of fraudulent intent against creditors, because there is, as just stated, no proof that there were any creditors when the deed was executed and delivered.

§ 855. *A deed may be held fraudulent if it be proved to have been made with a view to future debts.*

Can those who were not creditors at that time, but who became so years afterwards, complain of the deed as fraudulent? It seems clear that generally they cannot. The doctrine established by the supreme court of the United States is, that a voluntary conveyance made by a person not indebted at the time, in favor of his wife or children, cannot be impeached by subsequent creditors on the ground of its being voluntary. It must be shown to have been fraudulent or made with a view to future debts. *Sexton v. Wheaton*, 8 Wheat., 229 (§§ 865-71, *infra*); *Hinde v. Longworth*, 11 id., 199 (§§ 875-80, *infra*). See also *Bennett v. Bedford Bank*, 11 Mass., 421. There is nothing in the record which tends in the slightest degree to show that any of the creditors of Jacob Barker, who are represented by the assignee, were such at the date of the deed to Abraham Barker, nor that the purpose of that conveyance was to defraud any of his present creditors.

§ 856. *Effect of concealment to render a deed void as to subsequent creditors.*

If the present creditors have any right to complain, it is not because the deed of 1857 was made in actual fraud of those to whom Jacob Barker was then indebted, but because it was not recorded, and because they have given

him credit on the strength of his presumed ownership of the property conveyed thereby. A deed, not at first fraudulent, may become so by being concealed, because by its concealment persons may be induced to give credit to the grantor. *Sands v. Hildredth*, 2 Johns. Ch., 35; *Hilderburn v. Brown*, 17 B. Mon., 779. A deed concealed from the public, the grantor remaining in possession and acquiring credit on the strength of his supposed ownership of the property, is fraudulent. *Worseley v. De Mattos*, 1 Burr., 467; *Hungerford v. Earle*, 2 Vern., 261; *Lewkner v. Freeman*, 2 Freem., 236; *Constantine v. Twelves*, 29 Ala., 607.

§ 857. *Rule in Louisiana as to registration of conveyances. The creditors against whom an unrecorded deed is void. Rights of general creditors.*

This brings up the second question, whether the failure to record the deed avoids it as to creditors. The code of Louisiana gives no effect to acts of alienation as against creditors or *bona fide* purchasers, unless they have been regularly registered. This is conceded; but counsel for complainant says that the creditors, as against whom an unrecorded deed is void, are those only who have obtained a judgment which created a lien or privilege on the land, and not general creditors. Whether the provision of the law is thus limited is the precise question now for solution. The general rule is, that a creditor cannot proceed to set aside a conveyance of real estate, either really or constructively fraudulent, unless he has a lien thereon, or has reduced his claim to judgment, and the fraudulent conveyance is an obstacle to a sale on execution. *Jones v. Green*, 1 Wall., 330; *Coleman v. Crocker*, 1 Ves. Jr., 160; *Brinkerhoof v. Brown*, 4 Johns. Ch., 671.

§ 858. *An assignee in bankruptcy may impeach a deed of a bankrupt as fraudulent, although there is no judgment nor specific lien.*

Conceding that a general creditor having no lien or judgment could not file a bill to set aside as void an unrecorded conveyance of real estate, and to subject the property to the payment of his debt, does this rule apply to an assignee in bankruptcy? In the case of *Carr v. Hilton*, 1 Curt., 231, a bill in equity was sustained by an assignee to subject property conveyed by the bankrupt in fraud of his creditors to administration for their benefit. In many other cases this has been done.

It would appear that an adjudication of bankruptcy removes the necessity for a lien or judgment before a bill can be filed to subject the property fraudulently conveyed, or when the transfer is for other reasons invalid. If the rule were otherwise, then no property conveyed by a bankrupt in fraud of his creditors, or by any void or invalid conveyance, unless the creditors had reduced their claims to judgment, could be subjected by the assignee in bankruptcy to the payment of debts. For after an adjudication of bankruptcy, no creditor whose debt is provable is allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the bankrupt's discharge shall be determined. Bankrupt Act, sec. 21.

The question under consideration was decided by Woodruff, circuit judge (*In re Leland*, 10 Blatch., 507), in the case of an unrecorded mortgage of chattels. The learned judge says: "It is claimed, because the mortgage is valid without being properly filed as against the bankrupts, it is, therefore, good as against their assignee in bankruptcy, and that no creditor but a judgment creditor can impeach or deny its validity.

"The proceedings in bankruptcy arrest the ordinary proceedings of creditors to obtain judgments, and thereby to secure an appropriation of the

debtor's property to their use, and the assignee in bankruptcy represents them. He is trustee for them, and whatever right they might assert, if they had obtained judgments, he may, for their benefit, assert, whether it be to set aside conveyances by the bankrupts which are fraudulent and void as against creditors, or which are otherwise as against them invalid."

The case stands thus: Jacob Barker, in 1857, was seized of the real estate in dispute. He attempted to convey it by a deed which his grantee failed to record, and he remained in possession. This failure to record the deed made it inoperative as against subsequent purchasers and creditors. So far as their rights are involved, the title still remained in Jacob Barker until his bankruptcy in 1867. By the adjudication, the rights of the creditors were vested in the assignee. The want of judgments in their favor is supplied by the adjudication of bankruptcy, which authorizes the assignee to file a bill to subject the property to administration, just as if he was a judgment or lien creditor. But the property has been delivered to him without suit, and its proceeds are in his hands for distribution. If it is rightfully thus, if under the circumstances of this case by his bill in equity, he could have subjected the property, then it follows, his rights are superior to the rights of the grantee of the unrecorded deed to the property, and that the bill of the latter to set up his claim is without equity. The bill must therefore be dismissed.

SIMMS v. MORSE.

(District Court for Maryland: 4 Hughes, 579-588. 1890.)

Opinion by MORRIS, J.

STATEMENT OF FACTS.—Bill in equity to set aside certain deeds as fraudulent and void and in fraud of the provisions of the bankrupt act. It appears from the proceedings and testimony that in 1868 Augustus Morse was the proprietor of the City Hotel, in Annapolis, which he had purchased but had not paid for; that the furniture of the hotel belonged to his wife; that he was generally known to be in doubtful credit, difficult to collect any money from, and was, in reality, insolvent. In 1868 a property adjoining the hotel, on the Duke of Gloucester street, was offered at auction by the heirs of John Campbell and was knocked down to Morse for \$1,800, and he then ostensibly became the owner of it; that on the 5th of November, 1869, a deed was put on record, signed by the heirs of Campbell, conveying the property to Morse's wife, the deed being dated and acknowledged on the 3d of August, 1868, which was about the date of the sale; that on the 8th of November, 1869, a deed was executed and recorded, conveying the property from Mrs. Morse to Samuel Barth in consideration of \$2,300; that on the 10th of May, 1869, a lease was executed and recorded, by which, in consideration of \$1,000 and the reservation of a rent of \$48 a year, extinguishable upon the payment of \$800, the property was conveyed by Barth to Martha R. Wilson; that on the 21st of April, 1869, Morse, on his own petition, was declared a bankrupt, and the complainants were subsequently appointed his assignees.

The bill alleges that the consideration for the property conveyed by Campbell's heirs to Caroline Morse was not paid by her, but by her husband, and that Morse procured the deed to be made to her with design to defraud his creditors, and that the deed was kept unrecorded for fifteen months in furtherance of that design, he in the meantime holding himself out as the owner; that the consideration in the deed from Caroline Morse to Barth was not paid

to her but to her husband, and that Morse caused said deed to be made to Barth, who then had reasonable cause to believe Morse was insolvent or acting in contemplation of insolvency, with a view to prevent his property from coming to his assignee in bankruptcy, and in fraud of the provisions of the bankrupt act. The bill prays for a decree against Barth and that Mrs. Wilson may be decreed to hold the property under the lease to her for the benefit of the assignees, and prays for other relief. The answers aver the good faith of all the transactions.

The testimony of Barth shows that he lived in Baltimore, and for a year or more prior to 1868 he had been dealing with Morse and supplying the hotel with liquors, and that in November, 1868, Morse owed him a balance of \$398.75; that prior to the 5th of November, 1868, he cashed a draft for Mrs. Morse for \$625, drawn by her on her son-in-law in Massachusetts, with which money she proposed to pay a balance due on the purchase money of the property in question; that the draft came back to him protested, and he went to Annapolis to see Mrs. Morse about it; that she said to him she had expected the money from Massachusetts, but had been disappointed, and proposed to sell him the property for \$2,300; that he consented to take it at that price, provided she allowed him, as a payment on account of the purchase, the debt of \$398.75 due him by her husband, together with the draft he had cashed for her; that upon these terms he made the purchase, and paid to her the balance of the purchase money.

The contention of the complainants is that Barth knew that Morse had for a long time been insolvent, and knew that the property conveyed to his wife was paid for by him and conveyed to her in fraud of his creditors, and that Barth's purchase of the property was a method of securing the debt due him by Morse, and for that reason he aided Morse in conveying away the property in fraud of the bankrupt act.

The testimony shows that Barth, in November, 1869, had good reason to believe that Morse was insolvent, and had been so for some time; but there is no evidence to show that he had any knowledge that the property had not been bought by her, or that the money which had been paid on account of the purchase of the property in question was not Mrs. Morse's money, as she claimed. The testimony of Mrs. Morse, and of her husband and her son, tend to show that she did pay the money out of her own funds. Mrs. Morse, in her testimony, says: "I purchased the house on the Duke of Gloucester street, in Annapolis, from Mary A. Campbell and others. The deed was not put on record, because the purchase money was not all paid until November, 1869. The last payment was procured by a draft on my son-in-law for \$600 or \$700, indorsed by Barth, which he paid. The balance of the money I obtained from the sale of real estate in Massachusetts belonging to myself, conveyed to me by deed, and I received some money from my sister."

§ 859. *The rule that a wife's purchase of property during coverture is suspicious, and devolves upon her the burden of proving good faith, is applicable to relations with her husband's creditors, but not to a bona fide purchaser.*

The son testifies that he knows that his mother received the money from the sale of property in Massachusetts belonging to her, from being present at the sale; and Mr. Morse, the husband, testifies that all the money paid for the property belonged to his wife, except what was furnished by Barth. It was held by the supreme court of the United States, in *Leitz v. Mitchell*, 94

U. S., 580, that purchases of real or personal property made during coverture by the wife of an insolvent debtor are justly regarded with suspicion, and that she cannot prevail in contests with his creditors unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof, and that the burden is upon the wife to prove distinctly that she paid for it with funds not furnished by her husband. This doctrine has been fully adopted and applied by the court of appeals of Maryland, in the recent case of *Henkle v. Wilson*, October 7, 1879. And in the present case it may well be that if this was a contest between Mrs. Morse and her husband's creditors, or his assignees in bankruptcy, the testimony given by herself, her husband and her son, although not contradicted or impeached, or shaken in any way (it having been taken in Brooklyn, under commission and without cross-examination), might not satisfy the court as to the source from which she obtained the money paid for the property, other than that furnished by Barth. But this is not a contest with her, but a contest with one claiming to be a *bona fide* purchaser from her without knowledge of any weakness in her title.

If the deed from Campbell's heirs had been made to Morse and the property then conveyed to his wife, the case would be clearly within the rule in *Green v. Early*, 39 Md., 223. The deeds would have disclosed that it was an acquisition of property by her from her husband, and Barth would have taken from her no better title than she had, and if she could not defend her title neither could he; but in the present case there was nothing, so far as the proof shows, to affect Barth with notice of any defect or latent equity in her title, except the fact that, at the time he was negotiating with her, her husband was insolvent, and had probably been so for a considerable time previous. Granting that this was sufficient to have put him upon inquiry, what could he have learned? Both Mr. and Mrs. Morse then asserted that her money had been paid for the property, and they now, when they have less interest in the matter, solemnly swear to it, and the husband's creditors have been able to produce no direct evidence to discredit their statements.

§ 860. *What is not notice to a purchaser.*

Circumstances amounting to mere suspicion of fraud are not to be deemed notice, and where an inference of notice is to affect an innocent purchaser it must appear that the inquiry suggested would have, if fairly pursued, resulted in the discovery of the defect, where the title of the wife does not come through a conveyance from the husband, and is in form perfect, although impeachable by his creditors. I know of no case in which the title of a purchaser from her, having no knowledge of the weakness of her title, has not been upheld; and in the present case, without some authoritative decision in the face of the affirmative testimony in support of the payment by her of the consideration of the deed to her, I should not feel justified in setting aside her conveyance to Barth. *Sedwick v. Place*, 12 Blatch., 174, affirmed, 95 U. S., 3; *Fletcher v. Peck*, 6 Cranch, 133 (Const., §§ 1805-12); *Anderson v. Roberts*, 18 Johns., 515; *Ledyard v. Butler*, 9 Paige, 132.

§ 861. *A wife's payment in a sale of her property of a particular debt of her husband does not invalidate her title to the property sold and is not evidence of fraud.*

The fact that in the purchase of the property by Barth he secured a debt due to him by the husband does not render the conveyance by the wife to him assailable. If the property was hers, and she chose to appropriate any part of

it to the payment of any particular creditor of her husband, it is not a matter by which his assignee in bankruptcy or creditors are affected. *Stewart v. Platt*, 101 U. S., 731 (Conv., §§ 1773-81). Bill dismissed.

MATTINGLY v. NYE.

(8 Wallace, 370-376. 1869.)

APPEAL from the Supreme Court of the District of Columbia.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is an appeal in chancery from the decree of the supreme court of the District of Columbia. The case as disclosed in the record is as follows: On the 10th of June, 1863, the complainant recovered a judgment at law against the defendant, J. W. Nye, for \$2,450, with interest from the 21st of July, 1860, until paid, and costs; a *fi. fa.* was issued and returned *nulla bona*. The defendant has no property liable to execution. On the 25th of June, 1857, Nye bought and paid for the property described in the bill. It was conveyed by deed of that date to the defendant, Harkness, in trust for Mary Nye, the wife of J. W. Nye, and her children. The legal title is still in Harkness upon that trust. The bill is a creditor's bill, filed to reach this property. It alleges, in addition to the facts already stated — which are not controverted — that a large part of the indebtedness for which the recovery at law was had, subsisted at the time the property was bought and conveyed, and that hence it is liable in equity to be applied in satisfaction of the judgment.

Nye and Harkness only answered. Harkness denies that there was any indebtedness by Nye to the complainant at the time of the purchase and conveyance of the trust property. Nye alleges usury in the transactions between him and the complainant to a very large extent; that they had settled everything before the trust property was conveyed to Harkness, and that he then owed the complainant nothing; that the judgment was rendered by default; that he intended to defend and could have done so successfully but that he was prevented by extreme illness. Testimony was taken upon both sides. The court below dismissed the bill.

§ 862. *Voluntary conveyance good against subsequent creditors.*

The case involves several legal propositions which it is proper here to state.

1. The statute of 13 Eliz., chapter 5, is in force in the county of Washington, but it does not affect a conveyance like this as to subsequent creditors, unless fraud was intended when it was made. *Sexton v. Wheaton*, 8 Wheaton, 239 (S. C. 1, American Leading Cases, 1). The whole learning of the law upon this subject is so fully developed in the note to this case in the work last mentioned that it would be a waste of time to do more than refer to it.

§ 863. *Voluntary conveyances, when consideration is meritorious, will be enforced.*

2. Such settlements, though voluntary, are founded upon a meritorious consideration, and will be upheld and enforced in equity against the husband. *Ellison v. Ellison*, 1 Leading Cases in Equity, 199. 3. The judgment is conclusive in respect to the parties to it. It cannot be impeached collaterally, and it cannot be questioned upon a creditor's bill.

If in this case there is any ground of equitable relief, it should have been presented by a cross-bill, or other proper proceeding had directly to affect the judgment. *Bank of Wooster v. Stevens*, 1 Ohio St., 233; *Marine Insurance Co. v. Hodgson*, 7 Cranch., 336; *Peck v. Woodbridge*, 3 Day, 30; *Davol v.*

Davol, 13 Mass., 265; Story's Equity Pleadings, § 782. Here the question is not as to the conclusiveness of the judgment, but as to the indebtedness of Nye to the complainant when the property was conveyed to Harkness. The trust deed bears date on the 23d of June, 1857. The judgment was recovered on the 10th of June, 1863, nearly six years later. The judgment was founded upon an assignment by Nye to the complainant of \$2,450 of a claim in favor of Bargy and Stewart against the United States. Nye was the assignee of those parties, and his assignment to the complainant is dated July 21, 1860. This was about three years before the date of the judgment.

But it is alleged by the complainant that the consideration of this assignment included two debts due to him from Nye, evidenced by instruments bearing date on the 2d of November, 1853, and amounting together to \$1,650. One is an order by Nye on General McCalla to pay the complainant the sum of \$1,450 out of the claim of Bargy and Stewart, before mentioned. The other is a like order for the payment of \$200 out of the same claim, or out of another claim, which is mentioned, payment to be made out of the first money which should be received on either, after reserving \$500 to meet a previous order which Nye had given. The complainant insists that these two orders represented debts which subsisted more than two years before the execution of the trust deed, and which still subsist. Nye insists that they were given and received in discharge of all his liabilities to the complainant down to their date, and that the complainant took them at his own risk. Here lies the stress of the controversy between the parties.

Nye and the complainant were both examined as witnesses. A considerable mass of other testimony is found in the record. It is to some extent conflicting, but we have had no difficulty in coming to a satisfactory conclusion as to the facts. We think they are as follows:

The complainant made advances of money to Nye from time to time and charged him high rates of usury. Nye evinced a strange fatuity in submitting to whatever terms the complainant thought proper to impose. The order for \$1,450 was given to the complainant for a much larger sum than he claimed to be due; Nye testifies that it was for double the amount. It was not doubted then that the claim to which the order refers would be speedily sanctioned by congress and paid by the government. A committee of the house of representatives had unanimously reported a bill to pay it. This has occurred more than once since. There has been at no time any adverse action; but the claim has not yet been finally acted upon and is still pending before congress. According to the testimony of Nye, at the same time that he gave this order to the complainant, he gave a like order to William G. White for double the amount of a debt due to him. The condition upon which both orders were given was the same. It was that the creditors should take them in discharge of their debts, and that Nye was to be under no further personal liability touching either the debts or the orders. He avers that they were received by the complainant and White respectively with this agreement.

White was examined as a witness. Speaking of these orders, he says: "That order in my favor was taken by me in full satisfaction of my claim on Mr. Nye; *I understood from Mr. Mattingly that he received the order from Mr. Nye in satisfaction of his claim.*" The complainant in his testimony admits that he advanced but \$100 for the order for \$200, but says, the balance was "*in consideration of advantages, benefits and favors I had done him.*" This order was taken like the other, with the understanding that there was to

be no personal liability on the part of the drawer. The creditor was to look alone to the fund upon which it was drawn for payment.

These conclusions receive strong support from the fact that on the 5th of January, 1857, the complainant addressed a letter to S. W. McKnew, in which he stated that he had settled with Nye, and, in effect, that Nye owed him nothing. He complains that this letter was obtained from him by unfair means. The testimony of McKnew shows that in this he is mistaken.

In regard to the assignment of \$2,450 of the Barge and Stewart claim, upon which the judgment was recovered, Nye testifies that the only consideration for it, in addition to the pre-existing orders of \$1,450 and \$200, was a further advance by the complainant of \$200 — \$100 in money and the same amount in groceries.

The complainant says: "We had in 1860 such a settlement as we always had. He obtained further advances — one of \$400, one of \$200, and some smaller amounts at different times which I do not recollect." Even this would leave a large margin of difference between the amount assigned and the amount of the consideration. There are several features in the complainant's testimony which impress us unfavorably, but it is not necessary to dwell upon them. Nor is it material to consider the facts relating to the last assignment. We are entirely satisfied that the orders of November 2, 1853, were taken by the complainant upon the terms stated by Nye and White. There was, therefore, no indebtedness by Nye to the complainant when the trust deed was executed to Harkness, nor subsequently, until the assignment of July 21, 1860, was given, if there were before the rendition of the judgment. This is decisive of the case before us. Harkness and Mrs. Nye were neither parties nor privies to the judgment. Their rights, legal and equitable, were vested and fixed by the deed. Neither Nye nor the complainant could do anything subsequently to impair them. The settlement of 1860 between those parties, and the judgment recovered upon the instrument then given, could have no retroactive effect, so far as the rights of trustee and *cestui que trust* were concerned. The court below, we think, properly dismissed the bill, and the decree is affirmed.

WRIGHT v. STANARD.

(Circuit Court for Virginia: 2 Marshall, 311-317. 1828.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.— This cause comes on upon a special verdict, found in an ejectment brought to obtain possession of a lot in the city of Richmond, which was taken by virtue of a writ of *elegit* issued on a judgment of this court. The ejectment being the prescribed mode for obtaining actual possession in such a case, the question is, was this lot subject to the writ when it was executed?

The judgment was rendered in favor of the plaintiffs, against John King, on the 18th day of December, in the year 1824. The writ of *elegit* issued on the 14th of November, 1825. The special verdict finds, that John King was seized in fee of the lot on which the inquisition was taken, on the 30th of September, 1819, on which day he conveyed a part of the premises to John Gibson and John M'Crea, in trust for the security of a debt in the deed mentioned. On the 9th of October, he conveyed the residue of the premises to the same trustees also, for the benefit of a creditor in that deed mentioned.

The debt secured by the deed of September, 1819, was payable by instal-

ments, the last of which fell due on the 16th day of January, 1822, and the deed stipulated that the said King should retain the possession and receive the profits until default should be made in the last payment. The debt secured by the deed of October was also payable by instalments, the last of which fell due on the 24th day of January, 1825, and the trustees were to sell, if on that day any part of the debt should remain unpaid. The interest of the said John King, so far as it was a present interest, was unquestionably subject to an *elegit*. It remains, then, to inquire whether this interest has been so transferred as to be placed out of the reach of that writ.

On the 22d of March, 1820, John King and Helen S. King, his wife, in pursuance of an agreement to make a reasonable provision of the dower of the said Helen S., which is recited in the deeds, conveyed the dower right of the said Helen S. to certain real estate, which had been previously conveyed by the said John King, in trust for certain creditors in the said deeds mentioned.

On the 30th of March, 1820, John King conveyed certain real property, including the premises in the declaration mentioned, to Peter V. Daniel and James Rawlings, in trust for his said wife. This deed professes to be made in consideration of the agreement recited in the deed of the 22d of the same month, and after its execution the trustees received the rents of the said tenement for the benefit of the said Helen S. The jury find that at the date of this deed John King was greatly embarrassed in his circumstances, and had conveyed a great part of his property in trust for his creditors. They also find that the dower right conveyed in the deed of the 22d of March was worth \$1,016.67, and that the dower right of the said Helen S. in other property conveyed by her husband, but not by herself, was worth \$1,777; and that the property conveyed by the deed of the 30th of March, in satisfaction of dower released by the deed of the 22d of March, was worth \$3,040.

The defendant claims under a sale made in pursuance of an interlocutory decree of the court of chancery for the state, which was pronounced on the 20th day of March, 1825, in a suit brought by Mollin, Rankin & Gallop, creditors of the said King, to set aside the deed of the 30th of March, 1820, as being fraudulent as to creditors.

The plaintiffs were not parties to this suit, and consequently are not bound by the decree. They have therefore a right to re-examine the validity of the deed, which was the subject of that decree. Having obtained their judgment before the decree was pronounced, and having issued their writ of *elegit* while that judgment was in force, the decree, however correct in its principles, must leave the property subject to the lien, if any, which was created by the judgment.

§ 864. *Mere inadequacy of price for property conveyed by a husband in trust for the benefit of his wife, in consideration of the relinquishment of dower in other property, not conclusive evidence of fraud.*

If the deed of the 30th of March, 1820, was absolutely void, then the interest which the deed of the 22d of the same month left in John King was liable to his creditors, and was bound by the plaintiffs' judgment. If that deed was valid, no interest remained in John King other than an equity of redemption. The dower relinquished by Mrs. King constituted, certainly, a valid consideration for a deed which should settle on her a fair equivalent for that right. But the dower which she relinquished was worth but little more than one-third of the property conveyed to her as that equivalent. A court of chancery may very properly, and does, consider such a deed as being held in trust

for the wife to the value of the dower she has released, and for the creditors as to the residue. But how is such a deed treated in a court of common law? At law, the deed cannot be sustained in part only, but must be entirely good or entirely void.

The statute of frauds avoids all covinous conveyances made with the intent to delay, hinder, or defraud creditors, but does not extend to conveyances which are made on good consideration and in good faith. It has been already said that the dower released by Mrs. King, under an agreement to make an adequate settlement on her, was a good consideration in the sense in which those words are used in the act, and I can find no case in which a court of law has ever held a deed of settlement on a wife to be absolutely void because the estate conveyed was worth more than the price for which it was conveyed. Mere inadequacy of price may be so great as to be evidence of fraud, to be submitted to a jury, but has never been determined to be, in itself, a fraud for which a court will pronounce a deed to be absolutely void. In this case the jury have not found fraud. There is no secret trust for the benefit of the husband. On the contrary, the trustees were put in possession of the property and received the profits for the separate use of the wife.

The plaintiffs contend that though the jury have not found fraud, they have found facts which amount to fraud, and have submitted the question to the court whether upon those facts the law be for the plaintiffs. Without affirming or denying that a verdict may present a case to the court which, though it does not contain a specific finding that the deed is covinous or fraudulent, or made to deceive or delay creditors, may contain such equivalent matter as will, in point of law, show the deed to be void, I will hazard the opinion that mere evidence of fraud, circumstances which may or may not accompany covin, do not constitute such a case. The court will consider those circumstances on which the plaintiffs rely as amounting in themselves to a fraud.

1. The first is the difference between the value of the dower which has been relinquished, and the property which has been settled in compensation for that dower. The court has already said that this difference, if the conveyance be made with a real intent to pass the property, does not of itself vitiate the deed in a court of law. If the value of the dower had been a few dollars or cents less than the value of the property conveyed in satisfaction of it, no person would suppose the deed to be a nullity on that account. And if a small difference of value would not avoid it, what is the difference that will? Where does the law stop? The difference may be so great as to satisfy the conscience of the jury that the conveyance is intended to cover the property from the just claims of creditors; but as a mere question of law, I can find nothing in the books which will justify a court in saying that a deed, otherwise unexceptionable, is void because the consideration is of less value than the property conveyed.

2. The other circumstance on which the plaintiffs rely is that the deed of the 30th of March conveys all the property of John King, which property still remained in his possession. The verdict finds the deed, but does not find that it comprehended all his property. On this subject the jury say: "We find that at the date of the deed last mentioned the said King was greatly embarrassed in his circumstances, and the greater part of his property was conveyed by deeds of trust to secure the debts in those deeds specified." This finding certainly does not show that the whole of his property was comprehended in the deed of the 30th of March, 1820. The jury find a subsequent deed dated

on the 24th of May, in the same year, which purports to convey other property to trustees for his creditors. The deed of the 30th of March certainly stipulates for the surplus money arising from his property which was conveyed in trust, but only the greater part of his property was so conveyed.

Neither does the verdict show that King retained possession of the property. The deed itself does not stipulate for his retaining possession, and it authorizes the trustees to receive the rents for the separate use of his wife. It authorizes her residence in any tenement which she might elect, which was not rented out, but this is not a stipulation for the possession even of that tenement, much less of the whole property by the husband. The verdict does not show that this privilege was ever exercised or could have been exercised. It appears to me that the deed of the 30th of March, 1820, was valid at law, and conveyed the interest which was left in the said John King, by the deed of the 30th of September, 1819.

It remains to inquire how far the proceedings in chancery can affect this cause. The court of chancery sustained the deed to the extent of the consideration which moved from Mrs. King, but no farther, and directed the property to be sold and the residue of the money to be paid to the creditor, at whose suit the sale was decreed. The plaintiffs in this cause were not parties to that suit, and were consequently not bound by the decree; but if they would avail themselves of it they must admit its validity. They cannot take a part and reject a part of it.

The decree ascertains the value of the dower-right of Mrs. King, and limits her claim under the deed to that value, which amount was received before the service of the *elegit*. The sale under the decree was made while the marshal of this court was taking the inquisition for the extent of the lot, and the chancellor has directed a conveyance to be made to the purchaser.

The counsel for the plaintiffs has taken several exceptions to the proceedings in chancery, which would be considered, if the verdict showed a title at law in the plaintiffs, independent of the decree of the court of chancery. But the verdict, I think, does not show such a title, and I do not think that this is a case in which the decree can be taken in part, and rejected in part. I am therefore of opinion that the law on this special verdict is for the defendant.

SEXTON v. WHEATON.

(8 Wheaton, 229-253. 1823.)

APPEAL from the Circuit Court for the District of Columbia.

Bill by Sexton to subject a house and lot in the city of Washington, the legal title to which was in the defendant, Sally Wheaton, to the payment of a debt for which the plaintiff had obtained a judgment against the husband, Joseph Wheaton. The facts are stated in the opinion.

Opinion by MARSHALL, C. J.

The allegation that the house in question was purchased with a view to engaging in mercantile speculations, and conveyed to the wife for the purpose of protecting it from the debts which might be contracted in trade, being positively denied, and neither proved by testimony nor circumstances, may be put out of the case. The allegation that the defendant, Sally, aided in practicing a fraud on the plaintiff, or in creating or giving countenance to the opinion that the defendant, Joseph, was more wealthy than in truth he was,

is also expressly denied, nor is there any evidence in support of it, other than the admission in her answer that she had seen a letter written by him to the plaintiff, in the autumn of 1809, in which he gave, she thought, too flattering a picture of his circumstances. This admission is, however, to be taken with the accompanying explanation, in which she says that she had dissuaded him, she had hoped successfully, from sending the letter in its then form. This fact does not, we think, fix upon the wife such a fraud as ought to impair her rights, whatever they may be.

The plaintiff could not know that this letter was seen by the wife or in any manner sanctioned by or known to her. He had, therefore, no right to suppose that there was any waiver of her interest, whatever it might be, nor had he a right to assume anything against her or her claims in consequence of his receiving this letter. The case is very different from one in which the wife herself makes a misrepresentation or hears and countenances the misrepresentation of her husband. The person who acts under such a misrepresentation acts under his confidence in the good faith of the wife herself. He has a right to consider that faith as pledged, and if he is deceived he may complain that she has herself deceived him. But in this case the plaintiff acted solely on his confidence in the husband. If he was deceived, the wife was not accessory to the deception. She contributed nothing towards it. When she saw and disapproved the letter written by her husband, what more could be required from her than to dissuade him from sending it in that form? Believing, as we are bound to suppose she did, that the letter would be altered, what was it incumbent on her to do? All know and feel, the plaintiff as well as others, the sacredness of the connection between husband and wife. All know that the sweetness of social intercourse, the harmony of society, the happiness of families, depend on that mutual partiality which they feel, or that delicate forbearance which they manifest, towards each other. Will any man say that Mrs. Wheaton, seeing this letter, remonstrating against it, and believing that it would be altered before sending it, ought to have written to this stranger in New York to inform him that her husband had misrepresented his circumstances, and that credit ought not to be given to his letters? No man will say so. Confiding, as it is natural and amiable in her to confide, in his integrity, and believing that he had imposed on himself and meant no imposition on another, it was natural for her to suppose that his conduct would be influenced by her representations and that his letter would be so modified as to give a less sanguine description of his circumstances. We cannot condemn her conduct.

§ 865. *Married women liable for deception.*

A wife who is herself the instrument of deception, or who contributes to its success by countenancing it, may, with justice, be charged with the consequences of her conduct. But this is not such a case, and we consider the rights of Mrs. Wheaton as unimpaired by anything she is shown to have done. Had the plaintiff heard this whole conversation, as stated in the answer; had he heard her express her disapprobation of the statements made in the letter and dissuade her husband from sending it without changing its language; had he seen them separate, with a belief on her part that the proper alterations would be made in it, he would have felt the injustice of charging her with participating in a fraud. That act cannot be criminal in a wife because it was not communicated which if communicated would be innocent. Admitting the

representations of this letter to be untrue, they cannot be charged on the wife, since she disapproved of them and believed that it would not be sent in its exceptionable form.

So much is a wife supposed to be under the control of her husband, that the law in this district will not permit her estate to pass by a conveyance executed by herself, until she has been examined apart from her husband by persons in whom the law confides and has declared to them that she has executed the deed freely and without constraint. It would be a strange inconsistency if a court of chancery were to decree that the mere knowledge of a letter containing a misrepresentation respecting her property should produce a forfeiture of it, although she had not concurred in its statements, had dissuaded her husband from sending it and believed he had not sent it. Without discussing the conduct of Mr. Wheaton in this transaction, it is sufficient to say that it cannot affect the estate previously vested in his wife. The cause, therefore, must depend on the fairness and legality of the conveyance to her.

§ 866. *A voluntary settlement made on his wife by a man not indebted at the time is good against subsequent creditors.*

The allegation that the purchase money was derived from her private individual funds is supported by circumstances which may disclose fair motives for the conveyance, but which are not sufficient to prove that the consideration, in point of law, moved from her. It must, therefore, be considered as a voluntary conveyance, and if sustained must be sustained on the principle that it was made under circumstances which do not impeach its validity when so considered.

The bill does not charge Mr. Wheaton with having been indebted in January, 1807, when this conveyance was made. The fact that he was indebted cannot be assumed. Indeed, there is no ground in the record for assuming it. The answers aver that he was not indebted and they are not contradicted by any testimony in the cause. His inability to pay his debts in 1811 or 1812 is no proof of his having been in the same situation in January, 1807. The debts with which he was then overwhelmed were contracted after that date. This conveyance, therefore, must be considered as a voluntary settlement made on his wife by a man who was not indebted at the time. Can it be sustained against subsequent creditors?

It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law.

The law which is considered by the plaintiff's counsel as limiting this power in the case at bar, is the statute of 13th Elizabeth, chapter 5, against fraudulent conveyances, which is understood to be in force in the county of Washington. That statute enacts, that "for the avoiding and abolishing of feigned, covinous and fraudulent feoffments," etc., "which feoffments," etc., "are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors, and others, of their just and lawful actions," etc., "not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all plain dealing, bargaining and chevisance between man and man. Be it, therefore, declared," etc., "that all and every feoffment," etc., "made to, or for, any intent or pur-

pose before declared and expressed, shall be from henceforth deemed and taken (only as against that person," etc., "whose actions," etc., "shall or might be in anywise disturbed," etc.) "to be clearly and utterly void."

§ 867. *Construction of statute of 13th Elizabeth, chapter 5. Authorities reviewed. Distinction as to previous and subsequent creditors.*

In construing this statute, the courts have considered every conveyance not made on consideration deemed valuable in law, as void against previous creditors. With respect to subsequent creditors, the application of this statute appears to have admitted of some doubt. In the case of *Shaw v. Standish*, 2 Vern., 326, which was decided in 1695, it is said by counsel in argument, "that there was a difference between purchasers and creditors, for the statute of 13th Elizabeth makes not every voluntary conveyance, but only fraudulent conveyances, void as against creditors; so that as to creditors, it is not sufficient to say the conveyance was voluntary, but must show they were creditors at the time of the conveyance made, or, by some other circumstances, make it appear that the conveyance was made with intent to deceive or defraud a creditor."

Although this distinction was taken in the case of a subsequent purchaser, and was, therefore, not essential in the cause which was before the court, and is advanced only by counsel in argument, yet it shows that the opinion that a voluntary conveyance was not absolutely void as to subsequent creditors, prevailed extensively. In the case of *Taylor v. Jones*, 2 Atk., 600, a bill was brought by creditors to be paid their debts out of stock vested by the husband, in trustees, for the benefit of himself for life, of his wife for life, and afterwards, for the benefit of children. Lord Hardwicke decreed the deed of trust to be void against subsequent as well as preceding creditors.

There are circumstances in this case which appear to have influenced the chancellor, and to diminish its bearings on the naked question of a voluntary deed being absolutely void, merely because it is voluntary. Lord Hardwicke said, "now, in the present case, here is a trust left to the husband in the first place under this deed; and his continuing in possession is fraudulent as to the creditors, the plaintiffs." His lordship, afterwards, says: "and it is very probable that the creditors, after the settlement, trusted Edward Jones, the debtor, upon the supposition that he was the owner of this stock, upon seeing him in possession."

This case, undoubtedly, if standing alone, would go far in showing the opinion of Lord Hardwicke to have been that a voluntary conveyance would be void against subsequent as well as preceding creditors; but the circumstances that the settler was indebted at the time, and remained in possession of the property as its apparent owner, were certainly material; and, although they do not appear to have decided the cause, leave some doubt how far this opinion should apply to cases not attended by those circumstances. This doubt is strengthened by observing Lord Hardwicke's language in the case of *Russell v. Hammond*, 1 Atk., 13. His lordship said: "Though he had hardly known one case, where the person conveying was indebted at the time of the conveyance, that the conveyance had not been fraudulent, yet that, to be sure, there were cases of voluntary settlements that were not fraudulent, and those were where the persons making them were not indebted at the time, in which case subsequent debts would not shake such settlements." It would seem from the opinion expressed in this case, that *Taylor v. Jones*, 2 Atk., 600, must have been decided on its circumstances.

The cases of *Stileman v. Ashdown*, and of *Fitzer v. Fitzer and Stephens*, reported in 2 Atk., 477 and 511, have been much relied on by the appellant; but neither is thought to establish the principle for which he contends. In *Stileman v. Ashdown*, the father had purchased an estate, which was conveyed jointly to himself and his son, and of which he remained in possession. After the death of the father, the son entered on the estate, and the bill was brought to subject it to the payment of a judgment against the father, in his life-time. The chancellor directed the estate to be sold, and one moiety to be paid to the creditor, and the residue to the son.

In giving his opinion, the chancellor put the case expressly on the ground that this, from its circumstances, was not to be considered as an advancement to the son. He says, too: "A father, here, was in possession of the whole estate, and must necessarily appear to be the visible owner of it; and the creditor, too, would have had a right, by virtue of an *elegit*, to have laid hold of a moiety, so that it differs extremely from all the other cases." In the same case the chancellor lays down the rule which he supposed to govern in the case of voluntary settlements. "It is not necessary," he says, "that a man should be actually indebted at the time of a voluntary settlement, to make it fraudulent; for, if a man does it with a view to his being indebted at a future time, it is equally fraudulent and ought to be set aside."

The real principle, then, of this case is, that a voluntary conveyance to a wife or child, made by a person not indebted at the time, is valid, unless it were made with a view to being indebted at a future time. In the case of *Fitzer v. Fitzer and Stephens*, the deed was set aside because it was made for the benefit of the husband, and the principal point discussed was the consideration. The lord chancellor said: "It is certain that every conveyance of the husband that is voluntary and for his own benefit is fraudulent against creditors." After stating the operation of the deed, he added: "Then consider it as an assignment which the husband himself may make use of to fence against creditors, and consequently it is fraudulent." This case, then, does not decide that a conveyance to a wife or child is fraudulent against subsequent creditors because it is voluntary, but because it is made for the benefit of the settler, or with a view to the contracting of future debts.

The case of *Peacock v. Monk*, in 1 Vesey, 127, turned on two points. The first was that there was a proviso to the deed which amounted to a power of revocation, which the chancellor said had always been considered as a mark of fraud; and second, that, being executed on the same day with his will, it was to be considered as a testamentary act.

In the case of *Walker v. Burrows*, 1 Atk., 93, Lord Hardwicke, adverting to the statute 13 Elizabeth, said that it was necessary to prove that the person conveying was indebted at the time of making the settlement or immediately afterwards in order to avoid the deed.

Lord Hardwicke maintained the same opinion in the case of *Townshend v. Windham*, reported in 2 Vesey, 1. In that case he said: "If there is a voluntary conveyance of real estate or chattel interest, by one not indebted at the time, though he afterwards become indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appears, that will make it void; otherwise not, but it will stand though afterwards he becomes indebted." A review of all the decisions of Lord Hardwicke will show his opinion to have been that

a voluntary conveyance to a child by a man not indebted at the time, if a real and *bona fide* conveyance, not made with a fraudulent intent, is good against subsequent creditors.

The decisions made since the time of Lord Hardwicke maintain the same principle. In *Stephens v. Olive*, 2 Bro. Ch. Rep., 90, Edward Olive, by deed, dated the 7th of May, 1774, settled his real estate on himself for life, remainder to his wife for life, with remainders over for the benefit of his children. By another deed of the same date he mortgaged the same estate to Philip Mighil, to secure the repayment of £500, with interest. On the 6th of March, 1775, he became indebted to George Stephens. This suit was brought by the executors of George Stephens to set aside the conveyance because it was voluntary and fraudulent as to creditors. The master of the rolls held "that a settlement after marriage in favor of the wife and children, by a person not indebted at the time, was good against subsequent creditors;" "and that although the settler was indebted, yet if the debt was secured by mortgage the settlement was good."

In the case of *Lush v. Wilkinson*, 5 Ves., 384, the husband conveyed leasehold estate in trust to pay, after his decease, an annuity to his wife for life, and after her decease the premises charged with the annuity for himself and his executors. A bill was brought by subsequent creditors to set aside this conveyance. The master of the rolls sustained the conveyance, and, after expressing his doubts of the right of the plaintiff to come into court without proving some antecedent debt, said, "a single debt will not do. Every man must be indebted for the common bills for his house, though he pays them every week. It must depend upon this, whether he was in insolvent circumstances at the time."

In the case of *Glaister v. Hewer*, 8 Ves., 199, where the husband, who was a trader, purchased lands, and took a conveyance to himself and wife, and afterwards became bankrupt and died, a suit was brought by the widow, against the assignees, to establish her interest. Two questions arose: '1. Whether the estate passed to the assignees under the statute of 1 James I, c. 15; and, if not, 2. Whether the conveyance to the wife was void as to creditors.

The master of the rolls decided both points in favor of the widow. Observing on the statute of the 13th of Elizabeth, he said, that the conveyance would be good, supposing it to be perfectly voluntary; "for," he added, "though it is proved that the husband was a trader at the time of the settlement, there is no evidence that he was indebted at that time; and it is quite settled that, under that statute, the party must be indebted at the time." On an appeal to the lord chancellor, this decree was reversed, because he was of opinion that the conveyance was within the statute of James, though not within that of Elizabeth.

In the case of *Battersbee v. Farrington and others*, 1 Swanst., 106, where a bill was brought to establish a voluntary settlement in favor of a wife and children, the master of the rolls said: "No doubt can be entertained on this case if the settler was not indebted at the date of the deed. A voluntary conveyance by a person not indebted is clearly good against future creditors. That constitutes the distinction between the two statutes. Fraud vitiates the transaction; but a settlement not fraudulent, by a party not indebted, is valid, though voluntary."

§ 868. *A settlement in favor of wife and children is not to be impeached by subsequent creditors because it is voluntary.*

From these cases it appears that the construction of this statute, is completely settled in England. We believe that the same construction has been maintained in the United States. A voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors, on the ground of its being voluntary.

§ 869. *The voluntary conveyance of the bulk of one's property not necessarily fraudulent as to subsequent creditors.*

We are to inquire, then, whether there are any badges of fraud attending this transaction which vitiate it. What are those badges? The appellant contends that the house and lot contained in this deed constituted the bulk of Joseph Wheaton's estate, and that the conveyance ought, on that account, to be deemed fraudulent. This fact is not clearly proved. We do not know the amount of his estate in 1807; but if it were proved, it does not follow that the conveyance must be fraudulent. If a man entirely unincumbered has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In the case of *Stephens v. Olive*, the whole real estate appears to have been settled, subject to a mortgage for a debt of £500; yet, that settlement was sustained. The proportional magnitude of the estate conveyed may awaken suspicion, and strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud. A man who makes such a conveyance necessarily impairs his credit, and, if openly done, warns those with whom he deals not to trust him too far; but this is not fraud.

§ 870. *Failure of grantor soon after making a voluntary conveyance.*

Another circumstance on which the appellant relies, is the short period which intervened between the execution of this conveyance and the failure of Joseph Wheaton. We admit that these two circumstances ought to be taken into view together, but do not think that, as this case stands, they establish a fraud.

There is no allegation in the bill, nor is there any reason to believe, that any of the debts which pressed upon Wheaton at the time of his failure were contracted before he entered into commerce in 1809, which was more than two years after the execution of the deed. It appears that, at the date of its execution, he had no view to trade. Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as distinct as if they had been a century apart. In the case of *Stephens v. Olive*, the debt was contracted in less than twelve months after the settlement was made, yet it could not overreach the settlement.

These circumstances, then, both occurred in the case of *Stephens v. Olive*, and were not considered as affecting the validity of that deed. The reasons why they should not be considered in this case, as indicating fraud, are stronger than in England. In this district every deed must be recorded in a place prescribed by law. All titles to land are placed upon the record. The person who trusts another on the faith of his real property knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case the title never was in Joseph Wheaton. His creditors, therefore, never had a right to trust him on the faith of this house and lot.

§ 871. *The existence of a disputed claim will not be sufficient to avoid a voluntary settlement.*

A circumstance much relied on by the appellant is the controversy which appears to have subsisted about that time between the post-office department and Wheaton. This circumstance may have had some influence on the transaction; but the court is not authorized to say that it had. The claim of the post-office department was not a debt. On its adjustment, Wheaton was proved to be the creditor instead of debtor. It would be going too far to say that this conveyance was fraudulent to avoid a claim made by a person who was, in truth, the debtor, where there is nothing on which to found the suspicion, but the single fact that such a claim was understood to exist.

The claim for the improvements stands on the same footing with that for the lot. They appear to have been inconsiderable, and to have been made before these debts were contracted.

Decree affirmed.

WISWELL v. JARVIS.

(District Court for Maine: 9 Federal Reporter, 84-91. 1881.)

Opinion by Fox, J.

STATEMENT OF FACTS.—This bill was filed June 22, 1880, by the assignee of Francis H. Jarvis, against the bankrupt and his wife, to set aside a conveyance of a house and lot in Castine, in this district, made by the bankrupt to his father-in-law, Alfred Hovey, on the 15th day of March, 1871, and by him conveyed to Mrs. Jarvis on the 3d day of April of the same year. (Jarvis was, on his own petition, filed August 17, 1878, adjudged a bankrupt by this court.) Said conveyances are charged to have been without consideration, and fraudulent and void, under the statutes of Elizabeth, as to existing creditors, two of whom have proved their debts in bankruptcy, viz.: C. J. Abbott, executor of estate of Jonathan Perkins, deceased, to the amount of \$931; and Andrew J. Jarvis to the amount of \$2,147.92. The value of the estate so conveyed is alleged to have been about \$5,000. It is also charged that said conveyance was fraudulent and void as to subsequent creditors, and was made with an intent to defeat the provisions of the bankrupt act.

Mrs. Jarvis, in her answer, denies all fraudulent purpose and intent, and alleges that the conveyance was made to her through the intervention of her father, by her husband, in pursuance of oft-repeated promises by him that he would settle the premises upon her for her share of the property which she had helped to accumulate; that at the time of the conveyance he was in Boston, about to proceed to sea as master mariner, and there executed the deed for the sole benefit of herself and her children, and the same was, on the 19th of July, 1871, duly recorded. In her answer she alleges that her husband was, at that time, the owner of more than \$15,000 of available property, exclusive of these premises, and that he did not then owe in all more than \$3,000. She further states that they were married December 20, 1846; that each year she received from her father large sums of money, for her own separate use and benefit, which she used from year to year for the general support of herself and family, relying entirely upon the representation of her husband "that he was the owner of \$10,000 or \$20,000 of available property, over and above all his liabilities; that he was doing a good paying business as a ship-master; and that he had made ample provisions so that if he was taken away or lost at sea

his whole property would vest in her for the use of herself and four children;" and she believes "that if the various large sums of money which were presented to her by her father had been put at interest they would have amounted to a sum about equal to, or more than, the value of said premises." She further alleges "that after this conveyance her husband offered to pay each of these creditors, Perkins and Jarvis, the full amount due them, but they each requested him to retain the money, paying them their interest, which he did up to 1876," and she believes "they had full notice of the deed to her of the premises, and assented thereto." She alleges "that in January, 1872, the bankrupt owned three-fourths of brig Mountain Eagle, of the value of more than \$6,000, and was in command of her at that time, with all his nautical instruments on board, of the value of about \$500; that this brig, with the property, was then wrecked, with only \$1,500 insurance; that he also owned one-fourth of brig Isabella Beauman, which was wrecked in 1873, and her husband thereby lost more than \$3,000; that he also invested \$2,150 in Castine Brick Company, which was run for three or four years without any dividends or income, and that in 1877, the property of the company, not being in excess of its liabilities, he surrendered up all his interest in it, and thereby sustained a cash loss of \$2,150; that in 1873 he purchased \$4,000 of Western Connecticut Railroad bonds at ninety cents on the dollar, which subsequently fell greatly in value, and were sold by him in 1877 and 1878 at fifteen to twenty cents on a dollar, thereby losing about \$3,000, making in all a loss of about \$15,000, all subsequent to the date and record of said conveyance."

The answer of Francis H. Jarvis is not so full and detailed as that of his wife. It denies all fraudulent purpose and intent in making the deed; denies that he was then insolvent; and alleges "that he was then worth and possessed of more than \$12,000, over and above all liabilities, not including this homestead estate now in question; that his wife received from her father, from year to year, large sums of money for her own use, which she used for the support of the family upon the belief that he would see that she was fully protected for the future by a transfer of the premises in question; and he believes that if all these sums had been put at interest they would have exceeded the value of the premises." He admits his indebtedness to the two creditors, as set forth in the bill, and that they are still unpaid, but he alleges "that as late as 1875 and 1876 he offered to pay each of them all their dues, but that they each informed him they preferred to hold his notes and receive their interest, which he continued to pay them up to 1876; that he always intended and believed he was fully and amply able to pay each of said parties the full amount due to them on demand until he became unable to do so on account of a loss of all the property owned by this respondent from 1872 to 1877."

§ 872. *A conveyance by a husband to his wife, in pursuance of an understanding between them that at his death she and her children should have all his estate, is voluntary and void as to existing creditors.*

In the argument in defense it is urged "that the husband became indebted to his wife for the sums she from time to time received from her father, and which were applied by her to the support of herself and children, and that this indebtedness constituted a good and valuable consideration for this conveyance to her." No such claim is made by the wife in her answer. She says the deed was made to her "in pursuance of repeated promises of her husband that he would settle the premises upon her for her share of the property, which she had helped to accumulate." This, in other words, is nothing more

than an assertion of a gift to her of the premises, or rather an agreement how he would dispose of his estate; but it is not an averment that she loaned him the sums of money she received from her father, or that she expended them for the common benefit, under a promise that he would repay her therefor, and that this deed to her was thus made in discharge of such liability to her. Taking the whole answer, all that can be gathered therefrom is that there was an understanding between her and her husband that on his death she should have all of his estate for the use of herself and children, and that when about to proceed to sea, from Boston, this transfer was made in pursuance of this agreement. Such an agreement imposed no legal liability on the husband, did not constitute him in law the debtor of his wife, and does not afford any legal support to this conveyance.

This view is fully sustained by the opinion of Lowell, J., in *In re Blandin*, 1 Low., 543, and of Hunt, J., in *Humes v. Scruggs*, 94 U. S., 22. The case, therefore, is that of a voluntary conveyance of a valuable estate by a husband to his wife, and the question is whether it can stand against an assignee in bankruptcy, representing creditors to the amount of \$3,000, whose debts were contracted prior to such conveyance. The law upon this subject is now well settled in Maine, by the decision in *French v. Holmes*, 67 Me., 186, where it was decided "that a voluntary gift by husband to his wife, if he be indebted, is *prima facie* fraudulent as to creditors." "This may be rebutted by the circumstances of the case and by proofs, and whether the gift is fraudulent or not is a question of fact, to be determined by the jury."

In *Kehr v. Smith*, 20 Wall., 35 (Dom. REL., § 589), the rule as stated by Davis, J., is "that a voluntary post-nuptial settlement will be upheld if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors." In *Kent v. Riley*, L. R., 14, Eq. Cas., 190, the marginal note to the decision of the master of the rolls is: "In the absence of actual intent to defeat, delay or hinder creditors a voluntary settlement made by a settler in embarrassed circumstances, but having property not included in the settlement, ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the time of the settlement may to a considerable amount remain unpaid."

What, then, was the bankrupt's condition at the time of this conveyance, on the 18th of March, 1871, his petition in bankruptcy not being filed till more than seven years afterwards, viz., August 17, 1878. In his answer he states the entire amount of his liabilities at that date as not exceeding \$3,000, and there is no evidence in contradiction of this amount. The bankrupt also says in his answer, "he was worth and possessed of more than \$12,000 over and above all liabilities, not including the property in question; that he intended to and would have paid all he owed if it had not been for his losses sustained from 1872 to 1877." Mrs. Jarvis states in her answer the property owned by her husband in March, 1871, and what finally became of it. First, she specifies his interest as owner of three-fourths of brig *Mountain Eagle*, of which he was master, and which, with his instruments, she values at more than \$6,000, all of which were totally lost, with an insurance of but \$1,500, making his net loss by that disaster amount to \$4,500. To disprove the alleged ownership of the husband in this brig, the complainant, at the hearing, produced from the records of the custom-house a copy of this vessel's enrollment, bearing date December 1, 1869, which recited that the bankrupt on that day had sworn

that he was the owner of but one-sixteenth of this vessel. The admission of this copy was objected to, on the ground that the paper had never been filed as testimony in the cause, and no notice had been given that it would be produced in evidence; and it was urged that, under the practice in equity in the circuit court, exhibits and documentary evidence must be filed before publication. This case, however, did not proceed under the rules and practice in equity, as established in this circuit, but by an understanding of the parties that it should be heard at the Bangor term upon such evidence as either party might then offer, and witnesses on both sides were then produced and examined orally before the court. This document, therefore, was not inadmissible upon this ground.

By chapter 82, section 100, revised statutes of Maine, "Copies of enrollments of vessels, or of any other custom-house records or documents deposited in the office of the collector of customs, attested by him or his deputy under seal of office, may be used in evidence and have the same effect as the production of the records in court, verified by the recording officer in person."

Would the original record of enrollment in this case be admissible in evidence, in contradiction of the testimony of the defendants as to the bankrupt's ownership of three-fourths of the *Mountain Eagle*? In 1 Greenleaf on Evidence, section 494, it is said: "Such a document is not of itself evidence of property, except so far as it is confirmed by some auxiliary circumstance showing it was made by the authority or assent of the person named in it, and who is sought to be charged as owner."

This document is found on the files of the custom-house, and recites that the bankrupt had taken or subscribed an oath that he was the owner of one-sixteenth of the *Mountain Eagle*; but there is nowhere in evidence any copy of such an oath, and the enrollment does not even state before whom it was taken. There is no evidence that the bankrupt ever saw or knew of the paper before it was read at the hearing; and the court is strongly inclined to hold that, under all the circumstances, it was not admissible for the object contemplated. If, however, it is received, it was not sufficient to establish the falsity of the statements of both of the respondents as to the ownership of the bankrupt in this vessel. Mrs. Jarvis, in her answer, states that he was the owner of three-fourths, and her husband, in his deposition taken August 16, 1880, also swears that in April, 1871, he owned that interest in her. His attention was not called to this enrollment; no explanation was demanded of him in relation to it; but his testimony upon this point was left as originally given by him, without intimation of what was disclosed by the custom-house records.

This enrollment was made December 1, 1869; the deed was given in April, 1871,—more than a year after,—and if the fact was conceded that in 1869 he owned but one-sixteenth, it would not be very cogent testimony to discredit two witnesses who testify that in April, 1871, he was then the owner of three-fourths, as property of this nature is constantly changing ownership. It is also a matter of some importance that there is not produced from the custom-house, copies of any conveyances of this vessel, or of her register, obtained subsequent to this enrollment, as she was, when lost, sailing on a foreign voyage under a register, or any evidence that the records and files of the custom-house do not disclose that such instruments never existed. In the opinion of the court the evidence does not disprove the ownership of the bankrupt in three-fourths of the *Mountain Eagle* in the month of April, 1871.

§ 873. *Question of evidence. Admissibility of copy of bill of sale of a vessel.*

The answer of Mrs. Jarvis and the deposition of her husband assert his ownership, at that time, of one-fourth of the brig *Isabella Beauman*. This statement the complainant would disprove by a copy, duly attested from the custom-house, of a bill of sale of the one-fourth of said brig from the bankrupt to Andrew Jackson Jarvis, dated March 8, 1867, and recorded March, 19 of the same year. This copy is also objected to. Would the record itself of this deed be admissible as evidence of ownership without any proof whatever of the execution of the original instrument?

Copies of deeds are generally inadmissible to prove their contents. In this state, "office copies of deeds of real estate are admissible in actions touching the realty, but in all other actions the general principle of the law of evidence prevails, that a party offering to prove a fact by deed must produce it and prove its contents." Per Shepley, C. J., *Hutchinson v. Chadbourne*, 35 Me., 192; *Kent v. Weld*, 2 Fairf., 459.

This copy, therefore, was inadmissible, but, if admitted, would have been wholly insufficient, executed in 1867, to establish that in 1871 the bankrupt was not then owner of one-fourth, when he and his wife had both sworn that at that date he did actually hold that interest in this brig. That he subsequently invested in the brick-yard \$2,250, which was apparently a valuable and safe investment, is not questioned. His other property was in bonds,—\$4,000 or \$5,000,—which in his deposition he says he then held, but which were subsequently, 1873, converted into Connecticut Western Railroad bonds, costing him ninety per cent., but from which he eventually realized only about twenty per cent. The testimony of John H. Jarvis was, "that about a year after the deed was made he sold some government bonds belonging to the bankrupt, and with the proceeds purchased \$6,000 of Connecticut Railroad bonds;" thus corroborating the statement of the bankrupt and his wife, and fully satisfying the mind of the court that he was the owner of \$4,000 or \$5,000 of government bonds, probably the larger sum, as with the proceeds he acquired \$6,000 of the railroad bonds at ninety per cent. That there was no actual fraud intended by this deed is demonstrated by the undisputed fact that, a number of years after its date, he offered to pay both of the creditors who have proved their claims the full amount he was then indebted to them, which they declined to receive, preferring to retain without any security his notes, and collect their interest from him. There can be but little question that these creditors, one of whom, if not both, was a resident in Castine, in the same town with the bankrupt, must have been aware of this conveyance, and their actions are strongly corroborative of the testimony that the bankrupt was then a man in good credit, of ample means to discharge all his liabilities. To one of these creditors the bankrupt says "he offered a government bond in payment at the then premium." This was the equivalent of cash, as the party could have disposed of it at any moment, and establishes that he was then the owner of such securities, and is in confirmation of the other testimony in the cause.

§ 874. *Circumstances under which a post-nuptial settlement will be sustained notwithstanding the statute of Maine, Revised Statutes, chapter 61, section 1.*

Upon all the evidence the court is well satisfied that the bankrupt, at the time of this conveyance, acted in perfect fairness towards all his creditors, without any purpose or intent to hinder, delay or defraud them in any respect; that he was owing but \$3,000, and he retained of personal property more than

fourfold that amount; that by most extraordinary misfortunes he finally lost nearly this entire sum, without fault on his part; that for at least four years the creditors could have received their full pay at any moment, the bankrupt having offered to pay them and they having refused it. Under these circumstances, while the result has proved unfortunate to these creditors, they have no good cause of complaint against the bankrupt and should not be allowed to attack this deed to his wife, which was only a reasonable and proper provision for her and her family as then situated.

The complainant invokes the provisions of chapter 61, section 1, Revised Statutes, which declares "that when property is conveyed by the husband to his wife without a valuable consideration made therefor, it may be taken as the property of the husband, to pay his debts contracted before such purchase." This provision was before the supreme court of this state for consideration in *Winslow v. Galbraith*, 50 Me., 91, and it was held "that it must not only appear that the property came to the wife from the husband, but that it was fraudulent as to creditors." The case of *French v. Holmes*, before cited, is of similar effect.

The result, therefore, is that the complainant fails to sustain his case, and the bill must be dismissed; but as the assignee is without any funds belonging to the estate, costs are not awarded against him.

HINDE'S LESSEE v. LONGWORTH.

(11 Wheaton, 199-215. 1826.)

ERROR to U. S. Circuit Court, District of Ohio.

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—The premises in question in this cause are described as in lot No. 107, in the town of Cincinnati; and it is admitted on the record that, on the 28th day of March, 1799, Thomas Doyle, Sen., was seized and in possession of this lot. Both parties derive title under him. The lessor of the plaintiff claims under a deed of the date above mentioned, from Thomas Doyle, Sen., to his son Thomas. And the defendant sets up a title under a judgment against Doyle, the elder, in favor of John Graff, entered in August, 1799. Upon the trial the validity of the deed from Doyle, the elder, to his son, was the main subject of inquiry. Three bills of exception were taken on the part of the lessor of the plaintiff, and a verdict entered by consent for the defendant, and the case is brought here by writ of error to the circuit court for the district of Ohio.

§ 875. *A certificate of acknowledgment is insufficient, unless it shows with reasonable certainty that the party in fact appeared before the officer and acknowledged the deed.*

1. The first bill of exceptions relates to the acknowledgment of the deed from Doyle, the elder, to his son. This was deemed by the court insufficient, and the deed rejected. In the second bill of exceptions, however, the counsel for the plaintiff stated again that he claimed title under the same deed mentioned in the first exception, by virtue of which Doyle, the younger, became seized in fee of the premises in question, and which had descended to the wife of the lessor of the plaintiff, to which facts he adduced proof, which was submitted to the jury, and to which proof no objection appears to have been made on the part of the defendant. What that proof was is not stated, but we must presume it to have been enough to prove the due execution of the deed,

both because it does not appear to have been objected to, and because the defendant went into evidence to show the deed was fraudulent and void, which would have been altogether irrelevant if the deed had not been sufficiently proved to be submitted to the jury. This might supersede the necessity of this court expressing any opinion upon the sufficiency of the acknowledgment of the deed; because, admitting the court below erred in rejecting it in the first instance, still, as it was afterwards, in the progress of the cause, duly proved, the judgment would not be reversed on account of that error, if this was the only question in the cause.

We notice this point only to correct what we consider a misapprehension of the plaintiff's counsel as to the practice in cases of this kind. But, as this cause must be sent back to another trial, it is deemed advisable to express an opinion upon the sufficiency of this acknowledgment, the certificate of which is as follows: "Hamilton, ss. Personally before me, Thomas Gibson, one of the justices of the court of common pleas for said county, the above-named Thomas Doyle, and ——— Doyle, his wife, who being examined separate and apart, acknowledged the foregoing deed to be her hand and seal, free act and deed, for the uses and purposes mentioned." The question is, whether this can be taken for the acknowledgment of Thomas Doyle. He only has signed the deed. His wife is not named as a party in any manner, except in the conclusion, which is as follows: "In witness whereof, the said Thomas Doyle and ———, his wife, who hereby relinquishes her right of dower in the premises, have hereto severally set their hands and affixed their seals, the day and year first above written." A seal is affixed to the deed, but no signature.

The certificate is insufficient, unless it contains enough to show, with all reasonable certainty, that in point of fact, Thomas Doyle did appear before the officer and acknowledge the deed. And this, we think, it does not show. It does not even state expressly that Thomas Doyle appeared before the officer; but if that is to be inferred, the purpose for which he appeared is not stated, so that nothing can be inferred from the mere fact of appearance. It does not set forth that he, in point of fact, did acknowledge the deed or did any one act that might by possibility be construed into an acknowledgment. The certificate does state that the wife did acknowledge the deed, which, if true, necessarily implies that she appeared before the magistrate, although that fact is not stated. The form of the certificate is adapted to the acknowledgment of the wife. It states that, being examined separate and apart, she acknowledged the deed to be her hand and seal, free act and deed. The relinquishment of dower and the affixing of the seal show that she was intended to be made a party; and if the court was at liberty to conjecture or indulge any intendment about the real fact, it would be as reasonable, if not more so, to infer that the wife did appear and make the acknowledgment certified, and by mistake omitted to sign the deed, than that the husband acknowledged it. But the certificate of acknowledgment ought not to be left in such uncertainty. It is *ex parte* proof of the deed; and it ought to appear, with all reasonable certainty, that the requisites of the law had been complied with. The deed was therefore properly rejected, in the first instance.

§ 876. *In the appellate court a party will be confined in the examination of the admissibility of evidence to the specific objection taken.*

2. The second bill of exceptions necessarily presupposes that the deed was in evidence before the jury. For it states that the defendant, in order to

prove that the deed was made with intent to defraud creditors, and, therefore, void, having read some depositions to prove that fact, offered in evidence the records of two judgments recovered against Doyle, the elder; one in favor of John Graff, on the first Tuesday in August, 1799, for upwards of \$900, and the other in favor of Edward Shoemaker, in October term, 1800, for about \$500. To the admission of which the plaintiff's counsel objected as incompetent evidence, on the ground that these were proceedings *inter alios*, to which Doyle, the younger, was in nowise a party. The objection was overruled and the evidence admitted.

It will be perceived that the objection to the evidence was specifically placed on the ground that Doyle, the younger, was not a party to the judgments. And it may well be questioned whether, when the purpose for which the evidence is offered is specifically avowed, the court will look at it in any other point of view, or inquire whether it might not be proper for some other purpose. As a general rule, we think the party ought to be confined, in examining the admissibility of evidence, to the specific objection taken to it. The attention of the court is called to the testimony in that point of view only; and, to admit an inquiry afterwards, whether the evidence might not have been admissible for some other purpose, would be sanctioning a course of practice calculated to mislead. It is unnecessary, however, in this case, to put the question on that ground, for the evidence was admissible in whatever light the objection is taken.

§ 877. *To prove a conveyance fraudulent, judgments are admissible to prove indebtedness at the time, though the grantee is not a party to them.*

The consideration expressed in the deed from Doyle, the elder, to his son is natural love and affection, and the judgments were introduced to show that the grantor was in debt at the time of giving the deed, which, as was contended, would render it void as against creditors. This was, therefore, necessarily an inquiry into matters to which the grantee in the deed was not a party. It was certainly competent for the defendant to show that the grantor was indebted at the time he made the conveyance; this was a necessary step towards establishing the fraud, and if these judgments conduced to prove that fact, they could not be shut out as incompetent evidence. The extent and effect of the evidence was matter for the jury. If the evidence ought to have been excluded, because Doyle, the younger, was not a party to the judgments, the same objection would have lain against the proof of his being in debt to others in any manner whatever; that would have been equally an inquiry into matters to which the grantee in the deed was not a party. There was, therefore, no objection to the evidence on this ground.

§ 878. — *where the judgments were rendered subsequent to the conveyance, and copies of accounts were improperly in the record thereof, but admitted in evidence without objection, the appellate court may look to them to show indebtedness at the time of conveyance.*

The judgments appear to have been entered some short time after the date of the deed, and it is said that a voluntary deed is void only as to antecedent, and not subsequent, creditors, unless made with a fraudulent intent; and this appears to be the doctrine of this court as laid down in *Sexton v. Wheaton*, 8 Wheat., 242, after a review of the leading authorities on this question. But copies of the accounts upon which the judgments were founded are spread upon the record, by which it appears that the cause of action arose before the date of

the deed. If these accounts did not properly form a part of the record, according to the course and practice of the court where the judgments were entered, a specific objection should have been made to their being received in evidence, which would have led to the inquiry whether they properly formed a part of the record; but, as the question is now presented to this court, we cannot say that these accounts are to be stricken out of the record. They may be looked to for the purpose of showing that Doyle, the elder, was in debt at the date of the deed; but, whether to an extent which would avoid the deed, must depend on circumstances which are not to be inquired into by this court. There was no error, therefore, in the admission of this evidence.

3. The third exception arises on the rejection of certain depositions offered in evidence on the part of the plaintiff. The introductory part of the bill of exceptions sets out "that after the admission of the evidence aforesaid (the judgment records), and in order to repel the presumption of fraud in Doyle, the elder, and that he had an intention to defraud creditors by making the said deed, but to prove that Doyle, the younger, was the creditor of his father, the evidence was offered."

The concluding part of the bill of exceptions alleges, that the depositions were offered to rebut the evidence of fraud in fact, and the evidence of a fraudulent intent in the grantor, Doyle, the elder. But the court declared their opinion to be, that the last-mentioned evidence, offered for rebutting the charge of fraud, was inadmissible, and rejected the whole of the said evidence so offered.

Looking, then, as we must, to the whole bill of exceptions, to collect its true meaning and import, we must understand the evidence to have been offered for the double purpose of showing that Doyle, the younger, was a creditor of his father, and that by reason thereof, although the consideration in the deed purported to be natural love and affection, it could not be considered as given with intention to defraud creditors; and, also, to rebut the evidence of fraud in fact, and to show the character and situation of Doyle, the elder, in point of property, at the time he executed the deed in question.

If the testimony offered was admissible for either of the purposes above stated, the court erred in rejecting it. That the evidence was proper for the latter purpose cannot be questioned. The charge against the grantor was, that he was guilty of fraud in fact in making the deed to his son; that it was done for the express purpose of defrauding his creditors; and it was proper evidence, therefore, to rebut this allegation, to show that the grantor had the means of paying his debts independent of the property conveyed to his son. Whether the evidence would have made out that fact to the satisfaction of the jury, is not for this court to inquire. If it conduced to make out that fact, it should have been submitted to the consideration of the jury.

§ 879. *Validity of gift from parent to child.*

A deed from a parent to a child, for the consideration of love and affection, is not absolutely void as against creditors. It may be so under certain circumstances; but the mere fact of being in debt to a small amount, would not make the deed fraudulent, if it could be shown that the grantor was in prosperous circumstances, and unembarrassed, and that the gift to the child was a reasonable provision according to his state and condition in life, and leaving enough for the payment of the debts of the grantor. The want of a valuable consideration may be a badge of fraud, but it is only presumptive and not conclusive evidence of it, and may be met and rebutted by evidence on the other side.

§ 880. *Where a deed is founded upon the consideration of love and affection, a valuable consideration cannot be shown, but a previous indebtedness of the grantor to the grantee may be shown in rebuttal to repel a presumption of fraud.*

The evidence offered to show that Doyle, the elder, was indebted to his son to an amount equal to the value of the property conveyed to him, was declared also to be for the purpose of repelling the presumption of fraud in fact, and to show that there could have been no such intention to defraud his creditors, by putting his property out of their reach, without receiving any real and adequate consideration for it. Doyle, the elder, might have sold the land to his son, or to a stranger, for a valuable consideration, and given a good title for the same, although his debts might have been double in amount to the value of his property, unless his creditors had acquired a lien upon it. It would have been no fraud in judgment of law against his creditors, for him to have paid one, and left the others unpaid. Had the evidence been offered for the purpose of showing that the deed was given for a valuable consideration, and in satisfaction of the debt due from the father to the son, and not for the consideration of love and affection, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a valuable for a good consideration, and a violation of the well settled rule of law, that parol evidence is inadmissible to annul, or substantially vary, a written agreement.

But that was not the object for which the evidence was offered, or the effect it was intended it should have. It could not, in any respect, vary or alter the deed, or give to it a different construction or operation between the parties to it. The defendant had attempted to invalidate the deed by going into proof of circumstances out of the instrument itself, and unconnected with it, and which circumstances it was contended showed fraudulent intention in the grantor, in conveying the lot in question to his son. And the evidence of the father's being indebted to the son was to meet and repel the presumption of fraud which was attempted to be raised against the deed by reason of such extrinsic circumstances. The evidence which has been admitted to show the fraud, and that which was offered to rebut it, related to collateral and independent facts unconnected with the deed, and could not, therefore, in any manner vary or alter its terms.

The third exception was accordingly well taken. The judgment of the court below must, therefore, be reversed and the cause remanded, with directions to issue a *venire de novo*.

HOPKIRK v. RANDOLPH.

(Circuit Court for Virginia: 2 Marshall, 182-155. 1824.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—In the year 1790, the defendant, Randolph Harrison, intermarried with the defendant, Mary, daughter of Thomas Randolph, deceased, who was then in possession of a maid-servant, a negro girl, and a riding-horse, which had been given her some years before by her father, who was, at the time of the gift and of the intermarriage, possessed of a considerable estate. This property was, upon the intermarriage, retained by the donee, and has ever since remained in possession of Randolph Harrison. In the autumn of the year 1793, Thomas Randolph and his three sons, Archibald Cary, Isham, and Thomas, agreed on a division of his estate, and property to a large

amount was conveyed to each of the sons, in consideration of love and natural affection, of certain specific debts, and also of bonds for £250, payable by each of them to their sister, Mary Harrison.

In the year 1795, John Bowman, styling himself surviving partner of Spiers, Bowman & Co., instituted a suit in this court against Thomas Randolph, and in May, 1796, obtained a judgment by confession for the debt in the declaration mentioned, to be discharged by the payment of \$1,532.46, with interest at the rate of five per cent. per annum, from the 1st day of September, 1775, till paid, with costs. Execution on this judgment was stayed, and the judgment was to be discharged in equal instalments of one, two, and three years. Archibald Cary Randolph, who transacted his father's business, made the agreement for the confession in his father's name, and engaged to pay the judgment according to its terms. To obtain his undertaking for the payment of the judgment appears to have been the principal motive with the plaintiff's agent for suspending execution.

On the 25th of June, 1800, a *fiery facias* was issued, which was returned "no effects." Archibald Cary Randolph had wasted and misapplied the estate and crops of his father.

In 1800 or 1801, Thomas Randolph departed this life intestate, and in the year 1803 James Hopkirk, stating himself to be the surviving partner of Spiers, Bowman & Co., filed his bill in this court, making Archibald Cary Randolph, administrator of Thomas Randolph, deceased, and the said Archibald Cary Randolph, Isham Randolph, and Thomas Randolph, and Randolph Harrison, and Mary, his wife, children and distributees of Thomas Randolph, deceased, defendants thereto. The bill alleges that the estate of Thomas Randolph was considerable; that the deeds to his sons are fraudulent; that his children are in possession of property which ought to satisfy his debt, and prays a decree against them in such proportion as the court may direct, or such other decree as may be adapted to his case.

Several accounts have been taken, and in the progress of the cause it appears that the estate of Thomas Randolph, senior, is wasted, and that all his sons are notoriously insolvent. The plaintiff claims the whole debt from his son-in-law, Randolph Harrison, or so much thereof as can be satisfied out of the property he has received with his wife.

On the hearing the court was of the opinion that the personal representative of John Bowman ought to be a party, whereupon the bill was amended, and John Williams, administrator, etc., of John Bowman, deceased, was made a defendant, and his answer was filed, admitting the right of the plaintiff to the debt.

§ 881. *Time granted by a creditor to a debtor will not affect the liability of a fraudulent grantee.*

The defendant rests his defense on two grounds: First, He contends that receiving a judgment with a stay of execution, with a stipulation that Archibald Cary Randolph would pay the debt, changes its character, and amounts to a waiver of his claim upon the property in the hands of Randolph Harrison. Secondly, That the gifts to Randolph Harrison are not within the statute of frauds. 1. The judgment is against Thomas Randolph, senior, and appears by the record to have been confessed by his attorney; this was probably under the instructions of Archibald Cary Randolph; but Archibald Cary Randolph acted as his agent, and it is to be presumed, from all the circumstances, with full power. The judgment could not merge in the agreement

with Archibald Cary Randolph, and was indeed a part of that agreement; it was not understood that Thomas Randolph was to be discharged, and Archibald Cary Randolph substituted in his place; but that time was to be given to Thomas Randolph, in consideration of the collateral security furnished by the undertaking of Archibald Cary Randolph to pay the debt. But the defendant insists that the plaintiff, by disabling himself from proceeding against Thomas Randolph, has discharged Randolph Harrison, upon the principle that the same act would have discharged a security of Thomas Randolph.

The two cases do not, in the opinion of the court, stand on the same reason. The creditor who gives time to his debtor hinders the security from proceeding himself against the debtor to recover the money he may have paid. But had Mr. Harrison paid this debt, he could not have recovered it from Thomas Randolph. A volunteer who loses the property given him, from defect of title, has no legal recourse against the donor at any time, unless there be an express warranty. I am, then, of opinion that the stay of execution and the transactions with Archibald Cary Randolph, although the debt might certainly have been satisfied, had the creditor proceeded in the usual manner, constitute no bar to the present suit. They aggravate the hardship of the defendant's case, but do not constitute a defense at law, or in this court.

§ 882. *What constitutes a fraudulent conveyance.*

2. I proceed, then, to the inquiry, how far the property which came to the possession of Randolph Harrison is liable to the creditors of Thomas Randolph. The words of the statute are, "every gift, etc., had or made and contrived of malice, fraud, covin, collusion or guile, to the intent and purpose to delay, hinder or defraud creditors of their just and lawful actions, etc., shall from henceforth be deemed and taken (only, etc.), to be clearly and utterly void." Were this statute now for the first time to be expounded, the court would find much difficulty in construing it as directed against voluntary gifts or conveyances, merely because they were voluntary. The language of the act comprehends such as are made of malice, fraud, covin, collusion, or guile, with intent or purpose to delay, hinder, or defraud creditors. This intent or purpose, would be supposed to constitute the contaminating principle, which would infect and vitiate the gift or conveyance, and would be required to bring the particular case within the act.

§ 883. *Gifts without consideration. Evidence. Onus probandi.*

But as this intent is concealed within the bosom of the actors, it would be the duty of the court to infer it from the character of the transaction, and as the equity of the creditors is generally stronger than that of mere volunteers, the court ought to lean to the side of the creditor, and to consider every gift or voluntary conveyance as coming within the statute, the fairness of which was not conclusively proved. Even independent of the statute, gifts or voluntary conveyances which obviously defeated the claim of a creditor, would be considered as fraudulent, so far as regarded him. The donee, therefore, would always be required to prove the fairness of his title. If he be not a purchaser for a valuable consideration, it would be incumbent on him to show a case, not only without taint, but free from suspicion. If the circumstances of the gift be such that, according to any reasonable probability, it might originate in any impure motive, or might in fact prove injurious to creditors, by withdrawing a subject to which they had just pretensions, the fair construction of the act would comprehend it.

§ 884. *Advancements to children by parent, as to existing creditors.*

But a construction which should, under all circumstances, comprehend every gift, merely because it was voluntary, might derange the ordinary course of society, and produce much greater injustice than it would prevent. A man, for example, of great opulence, owing some debts, feels himself bound to advance his children, when they leave him to act for themselves, and to perform their own parts on the great theater of the world. His own feelings and public opinion would equally reproach him should he withhold from them those aids which his circumstances and their education and station in life would seem to require. A reasonable advancement under such circumstances, so far from being considered as collusive, or made with an intent to defraud creditors, would be obviously a provision required by justice and the common sense of mankind. If, after a long lapse of time, the child having acquired credit in virtue of the estate in his possession, and apparently his own, should, as well as his parent, become insolvent, all would admit that the equity of his creditors would be stronger than the equity of the creditors of his father. But should he not become insolvent, but should settle in life, marry in the visible possession of property given to him in good faith, as a reasonable provision made by an opulent parent, whose circumstances were not only unsuspected, but were in truth perfectly sound, the subsequent failure of that parent, at a distant period of time, could not reasonably be connected with that advancement, so as to impress upon it the stamp of fraud. No fraudulent intent, no intent to delay, or in any manner to injure creditors, could be inferred. The consequence could not be apprehended from the act, and therefore the act could not be considered as constructively fraudulent. It would seem to be a fair disposition of property, a fair exercise of the power of ownership, and not, I think, within the statute of frauds, were that statute now first to be applied to such a case.

§ 885. *Gift void as to creditors whose claims existed at the time the gift was made.*

But the statute has been long in force, and numerous decisions have been made upon it, both in England and in this country. Those decisions are admitted to bind this court. They determine that a voluntary gift is void as to creditors whose debts existed at the time the gift was made. This is the general principle, and as a general principle, it is believed to be unquestionably a sound one. Untrammelled by precedents, this court would, at this time and in this case, establish it. But the difference between a general principle and one which is universal in its application, which is so inflexible as to permit no case to be withdrawn from it by any circumstances, however strong, which would make this act equivalent to an act annulling all gifts or voluntary conveyances made by a person indebted at the time, however large his fortune, and however inconsiderable his debts or his gift, must be admitted by all. The extent of the principle, then, established by these decisions, must be ascertained by a review of the decisions themselves, of the terms in which they have been expressed, and of the circumstances to which those terms have been applied.

It has been truly observed that some shades of difference appear in the cases on this subject. Some judges have shown a disposition to press the principle farther than others, and have expressed themselves in terms more or less favorable to the creditor or donee.

Questions of this sort have been most common in chancery, but as courts of

law have concurrent jurisdiction, and as they have received the same construction in both courts, it may be proper to notice the opinions that have been expressed by an eminent judge in a common law court. In the case of *Cadogan v. Kennett*, Cowper, 434, Lord Mansfield said: "These statutes (the stat. of the 13th and 27th Eliz.) cannot receive too liberal a construction, or be too much extended in the suppression of fraud. The statute of 13th Elizabeth, chapter 5, which relates to frauds against creditors, directs 'that no act whatever, done to defraud a creditor, shall be of any effect against such creditor or creditors;' but then, such a construction is not to be made in support of creditors as will make third persons sufferers. Therefore, the statute does not militate against any transaction, *bona fide*, and where there is no imagination of fraud. And so is the common law."

In the case of *Doe v. Routledge*, Cowp., 710, the same judge says: "A custom has prevailed, and leant extremely, to consider voluntary settlements fraudulent against creditors. But if the circumstances of the transaction show it was not fraudulent at the time, it is not within the meaning of the statutes, though no money was paid." In the same case he afterwards says: "One great circumstance, which should always be attended to in these transactions, is, whether the person was indebted at the time he made the settlement. If he was, it is a strong badge of fraud." Page 711.

The impression made by these declarations of Lord Mansfield is, that every gift made by a person indebted at the time, is liable to great and serious objection, and is, to use his own expression, a strong badge of fraud, but is not necessarily, and under all possible circumstances, absolutely fraudulent. No English chancellor has leaned more to the creditors, in questions arising on these statutes, than Lord Hardwicke.

In the case of *Russell v. Hammond*, 1 Atk., 13, Lord Hardwicke said: "A great deal has been said on this head, but it depends on circumstances, and every case varies in that respect. There are many opinions that every voluntary settlement is not fraudulent; what the judges mean is, that a settlement being voluntary, is not, for that reason, fraudulent, but an evidence of fraud only. Though I have hardly known one case, where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent."

This strong expression of opinion against voluntary settlements, made by a person indebted at the time, was used in a case where the relative value of the subject settled to the estate, and debts of the settler is not, indeed, stated, but where there is reason to believe that it was considerable. It was made, too, in a case where the settlement was in part supported, because it was made on a valuable consideration, and in part declared void, because it was made for the benefit of the settler himself.

§ 886. — *inconsiderable value of the gift a material circumstance.*

Trivial gifts, made without any view to creditors, with intentions obviously fair and proper, do not seem, from his language, to have been on the mind of the judge. It is observable, too, that he does not lay down the principle as being universal, but says, "he has hardly known one case where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent."

In *Taylor v. Jones*, 2 Atk., 600, the master of the rolls said: "I look upon it as being a standing rule as to creditors for a valuable consideration, that it" (a voluntary settlement after marriage) "is always looked upon as fraudulent,

and within the 13th Elizabeth, chapter 5." This expression is certainly a very comprehensive one; but it is applied expressly to a family settlement, not to an inconsiderable gift, and is used in a case in which the settler reserved to himself an interest for his life.

In the case of *Lord Townshend v. Windham*, 2 Ves. Sen., 11, the chancellor said: "But I know no case on the 13th Elizabeth, where a man, indebted at the time, makes a mere voluntary conveyance to a child without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." This language is undoubtedly very strong, but it is used in a case in which the father had, by deed, in pursuance of a general power, appointed money to be raised for the benefit of his daughter. The case was, in substance, this: Mr. Windham, being seized for life of a large estate, remainder to his nephew in tail, covenanted that his nephew should take the profits during his life, on his permitting any person whom Mr. Windham should appoint, by deed or will, to take the profits for the same length of time after the estate should come to the nephew. The testator, by deed, appointed that his daughter should take these profits, and it being determined that they were part of the general assets, the chancellor declared them liable to the claims of creditors. This language, therefore, is applied to a conveyance which is to take effect after the death of the testator. It may well be doubted whether the nephew could have been compelled to relinquish the profits received, had the conveyance to him been purely voluntary.

In the case of *Kidney v. Cousmaker*, 12 Ves., 136, the general doctrine, that a voluntary settlement is void as to creditors, is again recognized; but that, too, was a settlement affecting a considerable portion of the property of the settler. The books are full of cases in which the principle is acted on as one perfectly settled; but in all of them, so far as my researches have gone, there has been a conveyance of property to a considerable amount — some settlement of a thing still existing — or some bond or contract to be complied with in future. The case of *Partridge and wife v. Goss*, Amb., 596, cited by the defendant, is a case of a gift of money; but that case is obviously founded on the actual fraudulent intent of the giver.

The suit was brought by the legatees of Edward Godfrey, against his executors, for an account of the personal estate of the testator, and to have a legacy of £ 6,000 secured. An account was directed in 1736, and Joseph Sewell, one of the executors, was reported to be largely indebted. He was, in 1745, committed to the Fleet prison, for not complying with an order of court directing him to pay into the bank £ 3,000, part of the money in his hands, where he remained till 1750, when he died insolvent. The plaintiffs brought a supplementary bill against his children, four daughters, who had been advanced by Sewell in his life-time. Two of the daughters were married, and the bill was dismissed at the hearing as to them, because the money they had received was given as marriage portions. The two remaining daughters were single, and stated in their answers, each of them, that she had received £ 500, in December, 1743, as a free gift for her maintenance and subsistence in the world. The chancellor took time to consider whether this money should be refunded. He says: "It struck me at first as a hardship to make the children refund, especially as such a gift could not be considered as a trust for the giver; but, on consideration, I think no man has such a power over his own property to dispose of it so as to defeat his creditors, unless for consideration. It is the motive of the giver, not the knowledge of the acceptor, that is to weigh.

The statute extends to all cases except where there is good consideration, and *bona fide*; blood has been held not to be a good consideration. I have no doubt but that this voluntary gift proceeded from affection getting the better of justice." "It was done secretly and *pendente lite*." His lordship was asked, for the information of the bar, who thought he had laid down the position too broadly, whether he did not mean to confine it to the circumstances of the case? That, otherwise, a parent could not make any gift whatever, of ever so small value, to his child, without its being liable to be taken away in favor of creditors; to which he said: "that the fraudulent intent is to be collected from the magnitude and value of the gift." The idea of the bar, that the chancellor had laid down the position too broadly, must have been founded on the words; "I think no man has such a power over his own property to dispose of it so as to defeat his creditors, unless for consideration." "The statute extends to all cases except where there is good consideration, and *bona fide*." These words, it was supposed by the gentlemen of the bar, would extend to any present whatever, of ever so small a value, a parent might make to his child. His lordship confines their application to gifts of magnitude and value. In the case itself, the gifts were of very great value, compared with the property of the giver, and were made under circumstances which exposed them, in an eminent degree, to the charge of being made for the purpose of defrauding creditors.

§ 887. *Infancy of grantee a material circumstance in fraudulent voluntary settlements.*

The case of *Chamberlayne v. Temple*, decided in the court of appeals (of Virginia, 2 Rand., 384) is a case where a parent, much indebted at the time, disposed of a considerable portion of his property among his children, and afterwards died insolvent. It is true that he retained enough to pay his debts, and that his insolvency was produced by misfortunes and accident; but the property conveyed away was very considerable, and the most valuable part of that which he retained consisted of vessels, and of the slaves who worked them. A circumstance too, which is, I think, entitled to great consideration in that case, is that the children were infants, residing with their father, so that the slaves given still remained in his possession. The gifts were not made to advance his children in the world, and it is difficult to conceive any motive for making them at the time, other than a desire to secure them for his children from the claims of his creditors. That case is a construction by the highest tribunal of our country of a statute of this state, and undoubtedly complete authority as far as it goes; but it does not, I think, go at all beyond the English decisions. I should not, I think, even before the case of *Chamberlayne v. Temple*, have hesitated to have determined such a conveyance to be fraudulent under our statute. It was a voluntary conveyance of a very large portion of the donor's estate, made by a person in embarrassed circumstances, to infants who were not at the time in need of any immediate provision, and who were not in a situation to take the property out of his possession.

In the case of *Sexton v. Wheaton*, 8 Wheat., 229 (§§ 865-71, *supra*), the supreme court of the United States has said: "That in construing the statute of the 13th Elizabeth, the courts have considered every conveyance, not made on consideration deemed valuable in law, as void against previous creditors." This is a general proposition concerning the extent of the English decisions, not a decision of the court itself, declaring that every gift, however trivial, is at any distance of time, and under any circumstances, to be avoided by a

creditor. The term "conveyance" indicates property of considerable value, as respects the situation of the parties, since it is chiefly in such cases that voluntary donations of personal chattels assume the form of conveyance. The general proposition was all which could be in the mind of the court, since the case was one of a subsequent purchaser, and did not lead to any minute investigation of the distinctions which might possibly exist in cases of gifts made by persons indebted at the time. As a general proposition, it is unquestionably true. No voluntary conveyance of property has been sustained against creditors whose debts existed at the time, but no gift of such inconsiderable value as to come under the denomination of a present, made under circumstances entirely free from suspicion, has ever, so far as I am informed, been hunted up by a creditor, and claimed as a part of the donor's estate.

§ 888. *Slave waiting-maid and a riding-horse held inconsiderable gifts, when.*

I will now proceed to a particular consideration of the several items which constitute the subject of the present controversy. The first is, the gifts made by Thomas Randolph to his daughter, prior to her intermarriage with Randolph Harrison, which, on the marriage in 1790, were taken into the possession of her husband as her property. These were two negro girls, one of them an attendant on her person, and a riding-horse.

Thomas Randolph was a gentleman of ample fortune, not embarrassed in his circumstances, nor so much indebted as to create any suspicion of difficulty in the payment of his debts. The idea cannot be admitted for a moment, that any apprehension concerning his creditors was, in any manner, connected with the motives to this gift. That of the waiting-maid and that of the riding-horse, especially, are usual in this country, and come strictly, when made by a parent of unquestionable solidity, within that class of gifts which are denominated presents. They do not much differ from wedding-clothes, if rather more expensive than usual, from jewels, or an instrument of music, given by a man whose circumstances justified the gift. I have never known a case in which such gifts, so made, have been called into question. These gifts come, I think, completely within that class of presents, which, according to the case reported by Ambler (p. 596, see *supra*), ought to be excepted from the general rule in favor of creditors. The gift of the other girl is not, I think, so perfectly clear; but I find great difficulty in separating it from the waiting-maid, both having been given with intentions perfectly fair, and both having passed together to the husband at the time of the marriage, and having remained in his possession ever since.

This case bears no resemblance to that of *Temple v. Chamberlayne*. If it did, I should not hesitate to follow the opinion of the court of appeals. But the distinction between them is too obvious to require that I should contrast them. In the case of *Jacks v. Tunno*, decided in South Carolina (3 Desaus., 1), a trader, supposed to be in good circumstances at the time, though considerably in debt, purchased a house and lot, which was conveyed to the plaintiffs, his infant daughters. A few years afterwards he became bankrupt, and this bill was brought by the donees to restrain the defendants, who are not stated to be, but I presume were, the assignees of the bankrupt, from selling the property. The injunction was made perpetual; and, in giving his opinion, Chancellor Rutledge said: "Suppose, for instance, a person in this state being indebted, though to a considerable amount, is possessed of a large estate in houses in the city, gives a small part of that property to his child or children; or one,

similarly circumstanced and indebted, possessed of a considerable estate in land and negroes, gives a few negroes and some land to his children, and either the accident of fire in the city, or the death of his negroes, should reduce his estate so considerably as to occasion his insolvency—would this court, under such circumstances, merely because the person was largely indebted at the time of the gift, consider such gift as fraudulent, and set it aside, because creditors were interested? I should apprehend not.”

In the case of *Salmon v. Bennet*, 1 Conn., 525, the court says, “where there is no actual fraudulent *intent*, and a voluntary conveyance is made to a child in consideration of love and affection, if the grantor is in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift is a reasonable provision for the child, according to his estate and condition in life, comprehending but a small portion of his estate, leaving ample funds, unincumbered, for the payment of the grantor’s debts, then such conveyance will be valid against creditors existing at the time.” These cases are cited, not as having the authority which the decisions of our court of appeals would have in this court, but as containing a great deal of good sense, and being entitled to great respect.

§ 889. *Effect of a subsequent marriage of a female donee upon the validity of a voluntary settlement.*

If the two girls and this riding-horse are to be considered as given before the marriage so as to have become ostensibly the property of the young lady to whom they were given, there would be some difficulty, the perfect fairness of the gift being shown, in setting aside the rights of the husband. In the *East India Company v. Clavell*, Prec. in Chancery, 377, Sir Edward Lyttleton, being appointed by the East India Company president at Bengal, entered into articles of agreement on the 16th of January, 1698, for the faithful execution of the trust; and also gave his bond, binding his heirs in the penalty of £2,000, conditioned for the performance of the covenant. Afterwards, on the 21st of the same month, he made a settlement on his daughter of £5,000, to be raised out of land, and sailed for the East Indies. Some time after the departure of Sir Edward, Mr. Clavell made an application to the young lady in the way of marriage, and she placed the settlement in his hands. Being advised that it was valid, the marriage took effect, some time after which Mrs. Clavell died without issue. Mr. Clavell administered on her estate, and brought his bill to have the money raised as directed by the settlement. Sir Edward Lyttleton had embezzled the effects of the company to the amount of £26,000, and they claimed this money, the settlement being voluntary.

The counsel for Mr. Clavell contended that if the settlement was voluntary in its creation, yet being the motive and inducement to Mr. Clavell to marry her, this had now made it valuable. The lord chancellor thought the settlement a reasonable provision, without color of fraud. The articles did not bind the real estate, and the bond bound it only to the extent of the penalty. He directed the amount of the settlement, except as to the £2,000, the penalty of the bond, to be paid to Mr. Clavell.

There is some difficulty in ascertaining the principle of this case. Most probably the decision turned upon the point that the debt to the East India Company could not affect the subject out of which the £5,000 were to be raised. Yet, in argument, the circumstance that the settlement might have influenced her marriage was considered important. I cite it because it was mentioned in a subsequent case as deserving consideration on that account.

In *George v. Milbank*, 9 Ves., 190, the case was this: In July, 1797, Sir Ralph Milbank directed by deed poll that £500 should be raised immediately after his decease, out of certain trust premises, for the benefit of his natural son, George Milbank, and died in January, 1798. In February, 1798, George Milbank, in consideration of £400, assigned this money to Frederick Glenton and Thomas Peacock, subject to redemption on the payment of £400 pounds with interest. The bill was brought by a specialty creditor of Sir Ralph Milbank, to subject this fund to his debt. The case was decided, as it respected the £400, in favor of Glenton and Peacock, because their equity, being to the specific article, was superior to that of the general creditors. In the argument of the case, the case of the East India Company and Clavell was cited from Bacon's Abridgment. The lord chancellor said: "If the doctrine is rightly collected from the authorities, it imports all this: that if a man is indebted and makes a provision for his child by a pure voluntary settlement, and that child afterwards marries, the circumstance of its leading to the marriage makes the settlement good against creditors, though it would have been bad if no marriage had taken place. I doubt whether it will not be found in the circumstances of that case, that the child was not a pure volunteer. If it can be supported as here stated, it goes a great way to decide this case; for though this is the case of a stranger, it makes no difference between a voluntary settlement, made good by a subsequent marriage, and one made good by a subsequent advance of money."

Undoubtedly neither of these cases establishes the principle that a subsequent marriage will make a voluntary settlement good, and yet the chancellor treats that point as if such subsequent marriage was not without its weight.

§ 890. *What is a gift in consideration of marriage.*

If the gift was made at the time of the marriage, the claim of the husband will not be weakened by that circumstance. A reasonable gift made contemporaneously with a marriage, and accompanied with a delivery of possession, has strong claims to being considered as a gift in consideration of the marriage. Where the circumstances of the party exclude the idea of any interference on the part of creditors, it is not usual to convey by deed property which passes by delivery, nor to use the solemnity of delivery expressly in consideration of marriage, although that may be the real consideration. I do not, however, place this case on that ground. I think a customary and inconsiderable gift from a parent to a child, which may properly be denominated a present, and which is free from all suspicion of an intention to defraud or injure creditors, cannot, if by subsequent mismanagement the estate of the parent be wasted, be considered as a fraudulent gift at common law or under the statute. There was also a negro girl sent on the birth of Mrs. Harrison's first child. But this girl was sent as a present to the child.

§ 891. *Bonds to daughter, executed in pursuance of the settlement of an estate by a father among his children, a voluntary settlement.*

In 1793 Thomas Randolph divided the greater part of his estate among his sons, stipulating that each of them should pay certain debts, and should execute a bond to Randolph Harrison for £250. Randolph Harrison took no part in this arrangement, but afterwards parted with the bonds to persons and for a sum not mentioned in the proceedings.

The estates given by Thomas Randolph to his children were of much greater

value than the debts or money they were directed to pay, and no provision was made for the debt due to Spiers, Bowman & Co. Where a conveyance is made to children of property to a large amount charged with debts bearing no proportion to its value, the children cannot be considered as purchasers of the whole, but must take the clear surplus value of the property as volunteers. With respect to this debt for which no provision was made, such voluntary conveyance, according to all the cases, must be considered as fraudulent. But the property thus conveyed is wasted and is beyond the reach of the creditor. How are the bonds given to the sons to be considered?

This question is not without its difficulties. They were given by the sons in part payment for the property conveyed to them by their father, not to their father, but directly to Randolph Harrison. I have felt some doubt whether such bonds were within the statute, but upon the best consideration I can give the subject, the opinion I have formed is that as they are in fact the gift of the father to his daughter, they are in substance equivalent to a charge upon the property conveyed to the sons, which charge would be as liable to creditors as the property itself. I therefore consider Mr. Harrison as liable for these bonds, but liable only for the amount actually received on them. Had they never been paid, it cannot be pretended that he would be accountable for their amount to the creditors. If it cannot, then he will, I think, be at liberty to show what was the amount actually received.

§ 892. *Bond given to son-in-law.*

The subject which remains to be considered is the bond given to Mr. Harrison by Mr. Randolph himself. Supposing this to be an obligation which bound Mr. Randolph to the payment of the money, the question is, whether Randolph Harrison is liable for the money actually received upon it? I think the cases of *Stiles v. The Attorney General*, 2 Atk., 152; *Gilham v. Loche*, 9 Ves., 613; and *Berry, Ex parte*, 19 Ves., 218, decide this question in the negative. They decide that satisfaction by bond, and, I think, by payment of what is due on a voluntary bond or conveyance, is not to be considered as a voluntary act within the statute.

If, then, this bond is to be considered as binding in its terms, I do not think Randolph Harrison accountable for the amount received upon it. If it is not binding, it is nothing, and Randolph Harrison can only be charged with the amount actually paid by Thomas Randolph, of which there is no evidence before the court. It is, however, a subject into which an inquiry would be useless, because the bonds given by the three sons would, on any probable estimate of their value, exceed the amount of the debt due the plaintiff.

According to the former course of this court, founded on what was supposed to be the course of the state courts, Randolph Harrison would be accountable only for such proportion of the debts of Thomas Randolph, as the property received by him bore to the property received by the sons. But that principle is completely overturned by the case of *Temple v. Chamberlayne*, and I conceive it as now settled, that the whole sum is liable to the claims of creditors. If it be, then the decree must be, that the defendant pay to the plaintiff the sum of \$3,064.92, to be discharged by the payment of \$1,532.46, the debt in the declaration mentioned, that being the amount of the judgment rendered in this court against Thomas Randolph in favor of John Bowman, as surviving partner of Spiers, Bowman & Co., in May, 1796.

REARGUMENT.

§ 893. *Voluntary settlements; when money is to be refunded by a child.*

Opinion by MARSHALL, C. J.

A reargument of this case having been granted at the request of the counsel for Randolph Harrison, it has been reconsidered by the court.

The argument has turned chiefly on two points: 1. That the whole estate conveyed to the sons is chargeable with this debt. 2. That a gift of money by a parent to a child, not really made with a fraudulent intent, is not constructively fraudulent under the statute.

1. That the whole debt should be paid by the sons, were they now solvent, and before the court, will be really admitted; but two of them are dead insolvent, and the third, who is now alive, is admitted to be insolvent. The creditor can receive nothing from that source. It is insisted that the land is liable in the hands of the purchasers. Of this I am not confident; but were it to be admitted that a person who holds by purchase from a volunteer takes the property subject to the creditors of the original donor, I should still be of opinion that the creditor would not be compellable to proceed against such purchaser, and I should also think that no decree could be made against him, in aid of a volunteer who was able to pay the debt.

2. It is true, that few cases are to be found in the books, in which a child has been decreed to refund money actually received from a parent. From the nature of the transaction, such gifts would not frequently be the subject of inquiry. Where they are inconsiderable in amount, they are seldom made the subject of inquiry; and, were they even looked into, would, perhaps, not be deemed fraudulent; and where large advances are made, they most generally consist of money in the funds, or charged on lands; but in the case of *Partidge v. Goss*, reported in *Ambler*, a gift of money to a child was declared fraudulent as against creditors, and the chancellor founded his opinion on the magnitude and value of the gift. That case was, it is true, tainted with circumstances leading strongly to the opinion that the gift was made for the purpose of providing for his family at the expense of a creditor, but the chancellor places his decree chiefly on the magnitude of the gift; the fraud was inferred, in a great degree, from that circumstance. In the case at bar, the gift to Randolph Harrison forms a part of a more considerable transaction, and cannot easily be separated from it. That transaction was the division of the estate of Thomas Randolph among all his children; though only a small portion was allotted to Randolph Harrison, that small part must, I think, partake of the character of the whole transaction. It would be very difficult to relieve this whole family arrangement entirely from the taint of being made, at any rate, without sufficient regard to the claim of a creditor not provided for. It has been said at the bar, that there was a general promise on the part of the sons to pay any debts which might appear; but there is no proof of such promise; and had any debt, not mentioned in the conveyances, formed a part of the consideration, a stipulation to that effect ought to have been inserted. It has been said, with some probability, that this debt was forgotten; but however satisfactory this excuse may be in an inquiry into the morality of the arrangement, it would be dangerous to admit it in an inquiry into its legality.

The cases of *Gilham v. Locke*, 9 Ves., 612, and *Berry, Ex parte*, 19 Ves., 218, from which it is inferred, that money paid in discharge of a voluntary bond is

not within the statute, rather support the opinion, I think, that money given in the first instance, not under the obligation of such bond, would be within the statute. The validity of such payment would not, I think, have been placed on the obligation which a voluntary bond creates between the parties, if the advance of the money, independent of such prior obligation, had been considered as beyond the reach of the statute.

This case is one of extreme hardship, which ought not to be carried beyond express authority; but I think myself bound to adhere to the decree in favor of the plaintiff.

BACKHOUSE v. JETT.

(Circuit Court for Virginia: 1 Marshall, 500-517. 1821.)

STATEMENT OF FACTS.—The bill in this case attacks as fraudulent a deed of gift made by Thomas Jett, deceased, to his son, William Storke Jett, of certain lands and slaves. The defendant, the donee, is also administrator *de bonis non* of the estate of Thomas Jett.

Opinion by MARSHALL, C. J.

The principal controversy between the parties respects a number of slaves, comprised in a deed of gift made in his lifetime by Thomas Jett, the original debtor, to the defendant, his son, for his establishment in life. This deed, being voluntary, is said to be fraudulent as to creditors, and the plaintiff claims the slaves and their hire, from the death of the donor. The defendant contends, that he is liable only for the slaves now alive, for the price of such as have been sold, and for interest and hires, if at all, only from the filing of the bill, in which the claim is made. The commissioner has charged the administrator with the value of all these slaves, and with interest on this sum. Several exceptions have been made to this item of the account, and the instructions of the court, for regulating the conduct of the commissioner, have been required.

The plaintiff contends: 1st. That these slaves were assets in the hands of the administrator. 2d. That a person holding under a voluntary deed is liable for profits.

If the first point be decided in favor of the plaintiff, it will determine the question, for it has never been doubted that an administrator is liable for the profits which have been made on the assets in his hands.

§ 894. *Whether slaves, the gift of the owner in his lifetime, are assets.*

Are slaves, then, which are given by the owner in his lifetime, assets in the hands of his representative, if required for the payment of debts? If this was a case of the first impression, it would be decided by the words of the act of our state legislature, which makes such deeds of gift void against those only who may have been injured by them. As between the parties, they are to all intents and purposes valid. William Storke Jett, so far as respected any claim to be set up by Thomas Jett, was the owner of these slaves; and if this be true, they could not be assets in the hands of the representatives of Thomas Jett. But our statute is in a great degree copied from that of England, and so far as it is copied, Virginia is supposed to have adopted, with the statute, the settled English construction of it. It is therefore proper to examine the English cases on this point.

The counsel for the plaintiff relies much on Roberts on Frauds, vol. II, pages

592-3. Roberts says: "But, wherever a man makes a fraudulent gift of his goods and chattels, and dies indebted, the rule, upon the statute of Elizabeth, ch. 5, has always been to construe the gift as utterly void against all his creditors, and the debtor to have died in full possession, with respect to *their* claims, so that the effects are just as much assets in the hands of the personal representatives, as to creditors, as if no such attempt to aliene them had been made."

It is admitted that Roberts lays down the rule in broad and explicit terms. But very little attention to what immediately follows will be sufficient to show that his expressions are very unguarded; and that if his proposition is true in any case, it is only in the case of the donor's retaining possession. This was the point determined in *Bethel v. Stanhope*, Cro. Eliz., 810.

In *Bethel v. Stanhope* the donor died in possession, and the defendant had intermeddled with the goods, so as to become executor in his own wrong, before administration was granted to him. After administration granted, he delivered the goods to the donee, who was the daughter of the donor. The court determined: 1st. That the defendant might be sued as executor, and 2d. That the goods which had been in his possession were assets and remained such, notwithstanding the delivery to the donee.

In addition to the very essential fact, that the donor in this case died in possession of the goods, there was a clause in the deed, that it should be void upon the payment of 20s., and the jury expressly find and that it was made by covin, to defraud his creditors. As covin implies participation in the actual fraud on the part of the donee, it is presumed that she could not have recovered these goods in a suit against the donor, or his administrator. He was therefore in possession of the goods which he might lawfully retain, and which were assets in his hands for the payment of debts. He could no more divest himself of these assets or of his liability for them to creditors by delivering them to a donee, not having a legal right to demand them, than by delivering them to a legatee.

Roberts adds: "To give substantial effect to this construction, the voluntary donee is considered as liable to be charged as executor *de son tort*, if he take possession of the goods after the decease of the donor."

Now, to me it seems difficult to reconcile this determination with the idea that these goods are assets in the hands of the rightful executor. If any other person take them from the possession of the executor, he is a trespasser, and not an executor *de son tort*, unless he claims to take them as executor, or does other acts of an executor. This is expressly determined in *Read's Case*, 3 Coke, 33. It seems to me, that charging the donee, in this case, as executor *de son tort*, when another person would not be so charged for the same act, instead of proving that they are assets in the hands of the rightful executor, goes far to prove the contrary. *Read's case* contains another principle which is decisive on the general question, where the possession has been parted with by the donor. The court says: "When the defendant takes the goods before the rightful executor hath taken upon him or proved the will, he may be charged as executor of his own wrong, for the rightful executor shall not be charged but with the goods which come to his hands after he takes upon him the charge of the will."

Now, if the executor shall not be charged with goods of which the testator died possessed, until they are reduced to actual possession, he shall not, *a fortiori*, be charged with goods of which the testator did not die possessed, but which he had given away in his lifetime. But to return to Roberts. He says,

that where the goods are taken by the donee, after administration granted to another, he may be charged as executor *de son tort*; "and this," he adds, "seems to be a rule much in favor of the rightful executor and administrator, who cannot excuse himself upon the statute of Elizabeth, from delivering up the subject of his testator's or intestate's fraudulent gift to the donee, if he demand it."

Now, this proposition appears to me to be in direct opposition to that before laid down by the same author. If, under the statute, the executor is obliged to surrender the thing given to the donee, even where the donor dies in possession and the thing is in his hands, he is not afterwards chargeable with the same property as assets, and, *a fortiori*, he cannot be charged with it, if it never came to his hands, but was delivered to the donee in the lifetime of the testator.

This last doctrine of Mr. Roberts is completely sustained by the case in Cr. Jac., 271. In that case the donor died in possession, and the donee sued the administrator, who pleaded that the gift was fraudulent, and that his testator was indebted, and did not leave other assets sufficient to pay his debts. The plaintiff demurred and the court gave judgment in his favor. This case seems to me to be entirely decisive of the whole question. If the administrator could not maintain his own possession against the donee, it is very clear that he could not defeat the possession of the donee; and if he could not, it is equally clear, that the law cannot consider the goods as assets in his hands.

Mr. Stanard also quoted 1 Mad., 218, and 2 Term R., 587. But Maddox goes no further than to say that the goods "shall still be considered as a part of the donor's estate for the benefit of his creditors;" that is, as I understand him, they shall be so considered in the hands of the donee; and the case in 2 Term Rep. only determines that the donee may be considered as executor *de son tort*. I think, then, it is very clear that, according to the English cases, as well as on the words of the statute, these slaves are no assets.

§ 895. *Liability of donee to creditors in case of a gift from parent to child.*

2d. This leads to the inquiry into the extent of the liability of the donee. It is not denied that this is a case free from any charge of covin. There is no fraud in fact or bad faith on the part of the donee. I think there was none on the part of the donor, for the case presents no reason for supposing that the deed was made in contemplation of insolvency, or with a view to defraud creditors. It is made two years before the death of the testator, and before the date of his will, and it is not pretended that he was at the time in bad health. He does not appear to have been pressed by creditors, nor does the administration account exhibit debts of which he might be particularly apprehensive. There are no judgments, or even bonds; there is nothing to induce a suspicion that he was not in good credit or that he doubted his ability to pay any claim which might be brought against him. In this situation he gives half his estate to his only son for his establishment in life. The policy of the law very properly declares this gift void as to creditors, but looking at the probable views of the parties at the time, there appears to be no moral turpitude in it. In such a case is the donee responsible for more than the slaves themselves, including their issue now in existence and their profits from the time they were claimed by creditors, and for the money actually received for those which have been sold and for interest on that money from the same time? Is he responsible for profits which accrued before the creditor made his demand?

There is some difficulty in this question, considered merely on principle. The donee has title against all the world except against creditors. He has a title defeasible by creditors only. It is good against the donor and his executors. Where a person having no title holds the property of another, the profits belong to that other; but in this case the slaves are not the property of the creditors. They have a claim upon them for satisfaction of their debts, but no title to them. Profits in the hands of an executor are liable for debts, because they form a part of the estate of the testator, and the executor receives them as trustee for that estate. But the donee is not a trustee for the estate of the testator; and it is not clear that he is a trustee for the creditors, since he has always held the property in his own right. It is by no means clear upon principle where the title is not to the thing itself, but to have it sold in satisfaction of a debt, that this title can extend to the profits previously made of that thing by a *bona fide* possessor.

It might be expected that these questions had frequently arisen under a statute passed in the reign of Elizabeth, and had been long settled. But I have been able to find no case in which it has arisen; and I am the more inclined to think it never has been made, because the gentlemen concerned in this cause would, I think, have found the case had it existed. In *Patridge v. Goss*, Amb., 596, a gift of money to daughters was declared void and directed to be refunded, but no claim appears to have been made for interest.

Viner, in his first volume, page 186, pl. 9, lays down the broad and general principle that a *bona fide* possessor receives the profits as his own. But I should be much better satisfied could I see the case itself and the reasoning on which the decision was made. In the absence of decisions in cases of personal property, those which have been made respecting the profits of real estate have been resorted to on both sides, and gentlemen, reasoning from analogy, have applied the law in such cases to voluntary gifts of chattels. It has been affirmed and denied that heirs, devisees, and all persons holding real estates as volunteers, are accountable to creditors for profits.

The case of *Davies v. Top*, 1 Br. Ch., 524, has been relied on as showing that the heir is accountable for profits. The report of that case is remarkably confused and unsatisfactory. John Top died in April, 1778. The bill was brought for an account and application of the personal estate, not specially bequeathed, to the payment of debts; and in case the personal estate should not be sufficient, to have the deficiency raised by sale or mortgage of the real estate. The cause was heard at the rolls in February, 1780, when it was directed that the real estate should be sold to make up any deficiency in the personal estate; and it was declared that if the real estate should not be sufficient, the rents and profits should be applied to make up the deficiency.

There are several parts of this decree, as stated, which appear to me to be very extraordinary; but I shall not notice them because they do not apply to the question before the court, though they certainly bring the whole case into some doubt. But the decree, so far as it respects rents and profits, is expressed in general terms, not declaring whether the rents and profits shall be computed from the death of the testator, or from the filing of the bill. In the particular case it could not have been of much consequence, for the cause was heard at the rolls, in less than two years after the death of the testator, which leaves it probable that no profits accrued between the death of the testator and the filing of the bill.

It does not appear, certainly, from the opinion of the chancellor, whether

this case was affirmed or reversed, and in his opinion, not a syllable is said on that part of it which respects profits. The principal question, that on which the parties were desirous of obtaining the opinion of the court, appears to have been, whether after-purchased lands which descended to the heir, or specific legacies and lands, specifically devised, but charged with debts and legacies, should be first liable for those debts. The complexion of the case gives some reason for the opinion that the question of profits was, in fact, of no importance, and was not raised in the bill. This case, I think, leaves that question where it was found.

The cases in 2 Atkyns are so obscurely reported as to give no decisive information on the subject. In *Sims v. Urry*, 2 Ch. Ca., 225, the chancellor decreed profits only from the time of pronouncing the decree. Baron Weston's case, as cited in 1 Vern., 174, was this: Baron Weston brought debt on a bond against the heir, but for three descents the heir continued an infant, so that the parol demurred. The guardian received the profits of the estate and converted them to her own use. The baron brought an action against her, as administratrix of the children, but did not succeed. In the principal case the counsel admitted that profits could not be demanded during minority.

In *Waters v. Ebral*, 2 Vern., 606, it was determined, that a guardian was not compellable to apply the profits of a ward's estate to the payment of bond debts.

In the case of *Chambers and others v. Harvest and others*, Moseley, 124, the question was, whether the heirs should account for profits from the time of filing the bill. In 6 Ves., 93, *Pulteney v. Warren*, the chancellor says: "Where there has been an adverse possession, and upon an application to this court, upon grounds of equitable relief, the plaintiff appears entitled to an account of rents and profits, if there has been a mere adverse possession, without fraud or concealment, or an adverse possession of some instrument, without which the plaintiff could not proceed, the court has said, the account shall be taken only from the filing of the bill, for it is his own fault not to file it sooner."

In 7 Ves., 541, *Pettward v. Prescott*, the amount of rents and profits was restrained to the time of filing the bill. These two cases from Vesey are not cases where the heir is made liable for the debt of the ancestor. They are cases of title, which is much stronger. Even in them, the account has been restrained, where there was nothing to prevent the plaintiff from having proceeded to the time of filing the bill. In the case of *Shettleworth v. Neville*, 1 Term R., 454, which was an action of debt against the heir Ashhurst says: "Till the possession is recovered against him (the heir), he is entitled to the rents and profits; and he is entitled to receive them till judgment is given against him." 1 Durn. & E., 457.

At common law, the heir who had aliened before action brought might plead that he had nothing by descent at the time of suing out the writ or filing the bill. Had the profits been assets, this plea could not have been maintained. The profits, therefore, were not assets. The statute of the 3d and 4th of William & Mary, which has rendered the heir in cases of alienation liable for the value of the land, does not make him liable for the profits, or for interest on the money. It is to be fairly presumed that the statute has adopted the rule of the court of chancery.

Upon the best consideration I can give to the cases, I am well satisfied, that chancery does not make an heir responsible for profits accrued before the filing of the bill, and I think the analogy between real and personal estate, in this

respect, is a strong one. This question was well considered in *Munford's case*, and decided against the claim to profits. I regret that the opinion then given has been mislaid. (See *Alston v. Munford*, 1 Marsh., 266, and note on page 285.)

The plaintiff's counsel has relied on a case reported in 5 Mun., 492 (*Baird v. Bland*). In the construction of a state statute, the courts of the Union have uniformly adopted the rule of decision given by the state courts. If, therefore, the court of appeals had decided, that under our statute of frauds, a donee was responsible for profits, I should have followed the precedent, however erroneous I might have thought it. But the case to which the plaintiff has referred is not a case under the statute. It is not the case of a creditor, but of a person having title to the slave recovered.

I think the defendant, William Storke Jett, is responsible for the slaves now alive, at their present value, or for the slaves themselves; and for profits from the filing of the amended bill which claims them; and for the money actually received for those which have been sold, with interest thereon, from the same time. And the report is to be made up in conformity with this opinion.

§ 896. In general.—To bring a case within the statute of 18th Elizabeth, chapter 5, the conveyance must be voluntary: it must be made by the owner of the land if land be conveyed; he must be indebted at the time; and the conveyance must be made with intent to hinder, delay, and defraud creditors. In general, the intent will be presumed from the fact of indebtedness. Where these circumstances concur the conveyance is void as well in respect to subsequent creditors as prior ones. *Gilmore v. North American Land Co.*, * Pet., C. C., 460.

§ 897. Under the statutes and decisions of New York, as well as under the decisions of the supreme court of the United States, an intent to defraud subsequent creditors is sufficient to avoid a conveyance, if it was either voluntary or not made in good faith. It was so held where a surety in a stipulation given on the release of property seized for forfeiture in violation of the internal revenue laws, immediately upon the rendition of a decree of forfeiture, and before the rendering of the judgment upon the stipulation, conveyed his property to a person who afterwards, without consideration, conveyed it back to his wife. *United States v. Stiner*, * 8 Blatch., 544.

§ 898. Neither love and affection, nor a gift, can support a deed fraudulently given, though a money consideration be named in it. *Walcott v. Almy*, * 6 McL., 23.

§ 899. A person, in embarrassed circumstances and unable to pay his debts, made a conveyance to his wife's sister, upon the pretense that he was indebted to the estate of the grantee's deceased husband, but really for the purpose of reserving the land from creditors. This was known to the grantee. Later the grantee conveyed the land to the wife of the grantor upon a consideration furnished by the grantor himself, and the latter collected the rents of the property without accounting for the same. The conveyances were held to be fraudulent and void as to creditors. *Ibid.*

§ 900. A person heavily in debt, and against whom suits were pending, made a conveyance to his brother for a consideration considerably below the true value of the premises, the vendor remaining in possession and occupying the property after the conveyance in the same manner as before, leasing the buildings and collecting the rent in his own name, and not accounting to the vendee. The vendee exercised no acts of ownership or management of the property, and these circumstances were unexplained. The debtor and his brother gave no evidence as to the payment of the purchase money, relying exclusively on the effect of their answers as evidence. It was held, under the circumstances, that the conveyance was a fraud upon creditors and void. *Callan v. Statham*, * 23 How., 477.

§ 901. An intent to defraud creditors by a voluntary conveyance may be collected from the circumstances, and need not be shown by direct and positive proof. *Burdick v. Gill*, * 2 McC., 486.

§ 902. Without deciding whether a voluntary conveyance, made with intent to defraud subsequent creditors, is void unless such creditors are actually injured thereby, it is held that if a person, about to contract debts, makes a voluntary conveyance with the actual intent to deprive his future creditors of the means of enforcing their debts, and this purpose is accomplished, such subsequent creditors are injured and defrauded. *Ibid.*

§ 903. A voluntary conveyance was sustained in this case where the grantor, though in-

debted at the time, was abundantly solvent. *Providence Savings Bank v. Huntington*,* 10 Fed. R., 871.

§ 904. If, at the time of making a voluntary conveyance, the grantor is much indebted, or is embarrassed, the burden is upon him to explain the transaction, if questioned by existing creditors. *Pratt v. Curtis*,* 2 Low., 87.

§ 905. It seems that in case of a voluntary conveyance, if insolvency is clearly shown, the intent to defraud existing creditors follows as a matter of law, while if it is not clearly shown, the inquiry is whether a prudent man, having a just regard to the rights of his creditors, would have permitted himself to do the act. *Ibid.*

§ 906. A purchaser for a valuable consideration, with notice of a prior voluntary conveyance, is protected by the statute of Elizabeth. *Ridgeway v. Underwood*,* 4 Wash., 129.

§ 907. One who derives his title under a judgment and execution against the grantor in a voluntary deed, and a conveyance by the sheriff, is not a purchaser within the meaning of the statute of 27th Elizabeth. But he is nevertheless protected by the statute of 18th Elizabeth, because he stands in the place of the creditor under whose judgment and execution he purchased. *Ibid.*

§ 908. A voluntary deed by a person indebted at the time, to any amount, is fraudulent and void as to existing creditors, merely upon the ground that he was so indebted. But as to subsequent creditors, the deed is not void for that reason; there must be other circumstances from which fraud can legally be inferred. *Ibid.*

§ 909. Under the statute of 13th Elizabeth, which is in force in the District of Columbia, a voluntary conveyance is void as to existing creditors. But such a conveyance is not void as to subsequent creditors, unless there is intentional fraud contemplated by the grantor in the creation of future debts. It is a well recognized exception to the former rule, that where a person is indebted in a small amount, and is doing a prosperous business, and is not embarrassed in his circumstances, he may make a voluntary conveyance in favor of a wife and children, and it cannot be impeached for want of consideration. *Offutt v. King*,* 1 MacArth., 312.

§ 910. It is only when one makes a voluntary conveyance in good faith, with no intent to defraud creditors, that it will be upheld by proof that, when he made it, he retained an ample estate to pay all of his debts. *Beecher v. Clark*,* 12 Blatch., 257.

§ 911. The fact that a voluntary conveyance is left unrecorded for a long time may be considered, with other circumstances, as evidence of fraud. *Ibid.*

§ 912. A voluntary conveyance of an equity of redemption is good, as between the parties, and will entitle the assignee to redeem. The mortgagee cannot raise the objection. *Randall v. Phillips*, 3 Mason, 378.

§ 913. A conveyance which is not only voluntary, but which is also animated by a positive intention to defraud existing creditors, is void, not only as to these, but as to subsequent creditors as well. *Wilcoxon v. Morgan*,* 2 Colo. T'y, 473.

§ 914. A voluntary conveyance is void as to subsequent purchasers for a valuable consideration, even with notice. *Robinson v. Cathcart*, 2 Cr. C. C., 590.

§ 915. A voluntary conveyance is held by the courts of England to be absolutely void, under the statute of 27th Elizabeth, against a subsequent purchaser, even if he purchased with notice. But our courts in construing this statute hold that the subsequent sale is only presumptive evidence of fraud. *Cathcart v. Robinson*, 5 Pet., 264.

§ 916. By the statute of 27th Elizabeth, a voluntary settlement, however free from actual fraud, is fraudulent and void against subsequent purchasers for valuable consideration, even where the purchase has been made with notice of the prior settlement; and the rule is the same both at law and in equity. *Robinson v. Cathcart*, 3 Cr. C. C., 377.

§ 917. A voluntary deed, without consideration, passes the title subject to the rights of the creditors. *Atwater v. Seely*, 1 McC., 264.

§ 918. A voluntary conveyance is not fraudulent merely because there is some existing indebtedness. Such a deed is void only when made by a person in such embarrassed circumstances as not to leave ample margin in favor of existing creditors. *Smith v. Kehr*, 2 Dill., 50.

§ 919. A voluntary conveyance, when there are no existing creditors, may be void as to subsequent creditors, if it be shown by facts and circumstances that the deed was made with actual intent to defraud subsequent creditors. *Ibid.*

§ 920. Transactions between husband and wife.—Any conveyance executed by a husband in favor of wife or children, after marriage, which rests wholly on the moral duty of a husband to provide for his wife and issue, is voluntary and void as against purchasers, by force of the act of Elizabeth. *Robinson v. Cathcart*, 2 Cr. C. C., 590.

§ 921. A gift by an insolvent husband to his wife is presumptively fraudulent. And an insolvent husband ought not to be permitted to put his property beyond the reach of his creditors by investing it in improvements on his wife's estate. But where he lives with his family on the property of the wife, he may, notwithstanding his creditors, make sufficient expendi-

tures to make it a habitable shelter for his family. But such expenditures must not be more than are absolutely necessary and proper. *Dick v. Hamilton*,* *Deady*, 322.

§ 922. Under the statute of 13th Elizabeth, as adopted and construed in Massachusetts, a voluntary conveyance to a wife or child is not fraudulent *per se*; but the question is one of fact in each case whether fraud was intended. Such a deed, made by one who is considerably indebted, is *prima facie* fraudulent, and the burden is on him to explain it. This he may do by showing that his intentions were innocent and that he had abundant means, besides the property conveyed, to pay all of his debts. If the deed was not in fraud of existing creditors, the burden is on subsequent creditors to show a fraud on them. *Pratt v. Curtis*,* 2 Low., 87.

§ 923. A voluntary conveyance by a man to his wife will be presumed to have been made with intent to defraud subsequent creditors, where it was soon followed by a fraudulent disposition of the remainder of his property to defraud his creditors. *Burdick v. Gill*, 2 McC., 486.

§ 924. A *bona fide* gift or settlement by a husband to or upon his wife, while he is not in debt, is valid as against subsequent creditors. But when he procures a conveyance to be made to her upon a consideration moving from himself, and the inference, from the fact that he retains possession and treats the property as his own, and the failure to record the deed, and other facts, is that the transaction is a device to put the property beyond the reach of creditors existing and subsequent, and that the wife takes as trustee for him, a court of equity will disregard such device and subject the property to the claims of the husband's creditors, arising at any time during the existence of the trust or continuance of the device, as fully as though it stood in his own name. *United States v. Griswold*,* 7 Saw., 811.

§ 925. A conveyance by a husband to his wife in fraud of his existing creditors, not shown to have been made in contemplation of entering a hazardous business or contracting new indebtedness, is binding on the grantor and those claiming under him, and valid as against subsequent creditors who become such with full knowledge of the facts. *In re May*,* 2 Fed. R., 845.

§ 926. A conveyance from a husband to his wife to defraud his creditors does not create her a trustee for his benefit. *Ibid*.

§ 927. While real or personal property conveyed by a husband to his wife in fraud of his creditors may be pursued and subjected to the payment of his debts after it has been identified in her hands, or in the hands of voluntary grantees or purchasers with notice, the pursuit of the property cannot be abandoned, and a judgment *in personam* for its value taken against the wife, or against her executors. It is the same whether the suit is at law or in equity. *Phipps v. Sedgwick*,* 5 Otto, 3.

§ 928. If a husband gives his obligations for a large amount for the building of a house as a gift to his wife, and afterwards takes money from the firm of which he is a member to pay those individual debts, at a time when the business of the firm cannot stand it, the transaction must be treated as of the date when the money is so withdrawn, and its honesty tested by the condition of the business at that time. *Ibid*.

§ 928a. A voluntary settlement in favor of a wife cannot be impeached by subsequent creditors merely because it was voluntary. *Sparkman v. Place*,* 5 Ben., 184.

§ 928b. A voluntary settlement upon his wife, by a person in prosperous circumstances, of an amount not unreasonable in proportion to his wealth, where there is no intention thereby to defraud existing creditors, or subsequent creditors, by divesting himself of his property and embarking in a new and hazardous business, cannot be avoided as a fraud upon creditors, although the settler shortly afterwards fails. And the decision in *Spirett v. Willows* (3 De Gex., Jones and Smith, 293), as explained by subsequent cases in the English courts, did not change the settled view held in England and the United States prior to that case, as to the proper construction of the statute of 13th Elizabeth. *Ibid*.

§ 928c. Place, being in the year 1865 in prosperous circumstances, and a member of a prosperous firm, in which his share was more than \$227,000, determined to make a settlement of a house and lot upon his wife. He thereupon purchased a lot and made contracts with various persons to do various parts of the work and furnish the materials therefor, payments for the work and materials to be made as the work progressed. The house and lot and furniture cost about \$95,000. During the year 1866, and after April or May in that year, the firm sustained some losses; but its losses were not ascertained until December 31, 1866, when they amounted up to that time to about \$175,000. By that time the labor and materials which went into the house had been, all of them, substantially put into it as between the settler and settlee, and the furniture had been procured. The firm did not fail until November, 1867; although by May, 1867, there was reason to think that it would become insolvent. After this latter date some \$12,000 was paid out on the property. There was no evidence of any intent on the part of Place to defraud his existing creditors, or to divest himself of his property and embark in hazardous business and defraud subsequent creditors. It was held that the settlement was a

proper one, reasonable in amount in proportion to the wealth of Place, and that it could not be set aside as made to defraud creditors. *Ibid.* Reversed, *Sedgwick v. Place*, 12 Blatch., 174; *Phipps v. Sedgwick*, 95 U. S., 3. See §§ 927, 928, 945, 946.

§ 929. A conveyance to a married woman in consideration of her promissory note is a gift to her, the note being void. And where the conveyance is not made by the husband, and he has no interest in the property or the consideration for the conveyance, the conveyance cannot be considered as made with intent to deceive or defraud his creditors. But if such note is paid by money borrowed on the joint note of the husband and wife, the consideration moves from the husband, and the conveyance is in fraud of his creditors if he is insolvent at the time. This will not be so, however, if this latter note is finally paid out of property of the wife, mortgaged to secure it. *Dick v. Hamilton*,* *Deady*, 322.

§ 930. The statute of frauds of Oregon in favor of creditors is substantially a copy of the statute of 13th Elizabeth, chapter 5, and under this statute, the English and American courts hold that a voluntary conveyance to a wife or child by a husband or father, not indebted at the time, is valid as against subsequent creditors, unless it affirmatively appears that it was made with intent to defraud and deceive them. *Ibid.*

§ 931. Subsequent insolvency will not render fraudulent a voluntary conveyance to a wife by a husband not indebted at the time, where the husband did not at the time contemplate such insolvency, or even engaging in the business which caused his insolvency, where a reasonable and fair motive is shown for the conveyance, and where the conveyance was put on record immediately after its execution. *Ibid.*

§ 932. Where a man, owing more than three times as much as he had the means to pay, while he and his wife both knew the fact, conveyed to his wife property valued at from \$8,000 to \$12,000, in consideration of her waiving a right of dower worth only about \$400 at best, and really almost worthless and of doubtful existence in law, the inadequacy of consideration was held to be so gross as to shock the conscience, and to prove the transaction to be fraudulent. This conclusion was held to be strengthened by the fact that at the same time he conveyed substantially all his other property to a near relative. *Wilson v. Jordan*,* 3 Woods, 642.

§ 933. If one makes a voluntary conveyance to his wife by conveyances through another, knowing that he is insolvent, and that what he is giving will be needed for the payment of his debts, and intends thereby to secure to himself a future provision and support from property justly belonging to his creditors, the fact that the wife receives the conveyance in ignorance of these facts will not make it a valid one. *Beecher v. Clark*,* 12 Blatch., 257.

§ 934. A man living in the city of New York, and necessarily subject to great expenses, engage in a business which he knows to be in an embarrassed condition, and not in harmony with his partner, owing debts to the amount of \$30,000 and owning property worth about \$217,000, conveys to his wife, by a voluntary deed, property worth \$132,000, and does not record it until about a year and a half later, on the day of his failure; and between these two dates conveys by unrecorded deeds to his children, and his agent in trust for himself, lands worth \$60,000, thus leaving himself only about \$25,000 to pay his debts with. The result is that his wife and children hold this valuable property without having paid anything for it, and his creditors are unprovided for. It is held, under the circumstances, that all of these deeds must be considered as part of a scheme on the part of this man to secure and set apart for the benefit of himself property justly belonging to his creditors, and necessary for the payment of his debts, and hence fraudulent and void as against such creditors. *Ibid.*

§ 935. If a wife sells lands belonging to her, the proceeds immediately become the property of the husband by operation of the common law; and if she uses such proceeds in the purchase of other lands, taking a conveyance to herself, the consideration is deemed to move from the husband, and the conveyance is considered to be a voluntary one as to the creditors of the husband. *Dick v. Hamilton*,* *Deady*, 322.

§ 936. An insolvent husband cannot give property to his wife, but he may give her his personal services upon her estate, and her estate will not be made chargeable therefor to his creditors. *Ibid.*

§ 937. When one engaged or about to engage in any business has the means to meet its usual exigencies, and devotes such means in good faith to the business, and has besides other means which he chooses to settle upon any object of his bounty, unlooked-for disasters, subsequently occurring, will not affect the validity of the settlement, because they afford no ground for the imputation of unfairness. But where there are heavy subsisting liabilities, doubtful solvency, a large settlement made upon the wife at the outset of the business, and failure and insolvency to a large amount shortly follow, it is impossible to avoid the conviction that there was a deliberate plan to provide for the settler and his family in any event, and throw the burden of the losses that might occur upon the creditors. *Trust Co. v. Sedgwick*, 7 Otto, 304.

§ 938. Subsequent creditors of the husband can have no claim upon the property of the wife on account of improvements placed upon it by him, unless it is proved that the money was

bestowed upon the wife with intent to defraud and deceive such creditors. *Dick v. Hamilton*,* Deady, 322.

§ 939. If a husband in a state of absolute bankruptcy conveys to his wife property worth fifteen or twenty thousand dollars, with no present consideration passing, but with a recital of past indebtedness to her to less than one-fifth of its value, the transaction is fraudulent and void as to creditors. *Humes v. Scruggs*, 4 Otto, 22.

§ 940. A settlement by a husband of a portion of his property upon his wife is valid when it is done without impairing the existing claims of creditors. *Jones v. Clifton*, 11 Otto, 225.

§ 941. The power of revocation and appointment to other uses, reserved to the husband in a deed of settlement by him upon his wife, does not render the settlement invalid, nor does it impute bad faith in the transaction. *Ibid*.

§ 942. Where a man and his wife executed articles of separation, under which he gave to the trustee for her benefit \$2,000 in cash and notes for \$5,000 secured by his real estate, and in consideration for which she released her claim for maintenance and dower, and agreed not to contract any debts on his account; and they subsequently executed another agreement, expressed to be a "complete condonation," by which they agreed to live together again, and to rescind all the stipulations of the articles of separation except so much of them as created a separate estate for her benefit, it was held that the deed securing the notes was thus rendered purely voluntary, and that it could not stand as against existing creditors. *Smith v. Kehr*, 2 Dill., 50; S. C., 20 Wall., 31.

§ 943. A settlement of lands by a husband upon his wife is not void if the rights of existing creditors are not violated. *Clark v. Killian*, 13 Otto, 766.

§ 944. A post-nuptial settlement of \$7,000 by a husband upon his wife, which leaves him, including all his property, but \$9,132 to meet debts amounting to \$9,306, is fraudulent as to creditors. *Kehr v. Smith*, 20 Wall., 31.

§ 945. In determining whether a gift of property by a man to his wife is in fraud of creditors, the nature of the business he is engaged in and expects to engage in, and the society and style in which he lives and expects to live, and its necessary expenses, must be taken into consideration. *Sedgwick v. Place*, 12 Blatch., 163. See §§ 927, 928.

§ 946. If a man buys property and conveys it to his wife, and afterwards from time to time makes various expenditures in improving it, the whole is to be taken as one transaction, and the original conveyance will be tainted with fraud, if the subsequent improvements are made in fraud of creditors. *Ibid*.

§ 947. Where a purchase and gift of property by a man to his wife was attacked as fraudulent as to creditors, the question was held to be whether in buying the property and making the future payments and improvements on it he intended to defraud his creditors, existing or future; whether his pecuniary affairs were in such a state that he had good reason to believe, and did believe, that he could present as gift to his wife this amount of property, and still be able to pay the debts due and to become due in the business in which he was engaged and that which he contemplated pursuing; and whether he did so believe and had good reason to so believe, during the time he was making the payments. *Ibid*.

§ 948. Large gifts to his wife by a man who is doing a losing business are fraudulent as to creditors. *Ibid*.

§ 949. Though a voluntary conveyance by a man to his wife be fraudulent as to creditors, a subsequent mortgage of the land by the wife, signed also by the husband, to one making a loan and accepting the mortgage in good faith and without any knowledge of the weakness of the wife's title, is valid. But it is otherwise as to a mortgagee with notice. *Ibid*.

§ 950. At the time of a marriage the wife owned certain slaves and land. The husband agreed to invest an equal amount in land for her use and place the title in her name. The husband's business was prosperous and continued so, but he subsequently sold out and received as part of the consideration the two lots in controversy in this case which he had conveyed to his wife. In respect to one lot, the consideration appearing to be about the value of the wife's land and slaves, the conveyance was upheld as against the assignee in bankruptcy; but as regarded the other, it was held that as the husband was entitled to the wife's personal property, her consent to his collecting her money was not a valuable consideration, and the conveyance was set aside. *Lee v. Hollister*,* 5 Fed. R., 752.

§ 951. In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do supervene. *Smith v. Vodges*, 2 Otto, 183.

§ 952. A voluntary settlement by a married man upon his wife and children, though *bona fide*, is void as against subsequent purchasers from the husband, though the vendee may have had some notice of the settlement. *Robinson v. Cathcart*, 3 Cr. C. C., 382.

§ 953. A post-nuptial settlement out of proportion to the means of the husband, and which

seriously impairs his ability to respond to the demands of his creditors, is constructively fraudulent. *Kehr v. Smith*, 20 Wall., 31.

§ 954. Ante-nuptial settlement.—To make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have knowledge of, the intended fraud. *Wilson v. Prewett*, 3 Woods, 631.

§ 955. Marriage is a consideration of the highest value to support a settlement, and the parties to such a contract are deemed, in the highest sense, to be purchasers for a valuable consideration. But if the settlement is not made *bona fide*, the consideration will not make it valid. *Ibid.*

§ 956. Notice of a fraudulent intent on the part of a party making a marriage settlement may be inferred from facts and circumstances. If the amount of property settled is extravagant or grossly out of proportion to the station and circumstances of the husband, this itself is a sufficient notice to the wife of the intended fraud. *Ibid.*

§ 957. To ascertain whether the intent of a person in making an ante-nuptial settlement is fraudulent, fraudulent transfers to others, at or about the time of, the settlement, may be considered. *Ibid.*

§ 958. To make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. And fraud may be imputable to the parties, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and carrying the design, after such notice, into execution. *Magniac v. Thompson*, 7 Pet., 348.

§ 959. By a marriage settlement the wife becomes a creditor of the husband; and among creditors equally meritorious a debtor may prefer one to another, though the preferred creditor is his wife. *Ibid.*

§ 960. A settlement in consideration of an intended marriage is upon a valuable consideration within the meaning of the statute of Elizabeth, and is valid as against creditors, unless fraudulent on both sides. *Magniac v. Thompson*, 1 Bald., 344.

§ 961. The furnishing of a house, in pursuance of valid marriage articles, is not *per se* fraudulent as to creditors, unless so extravagant as to indicate a fraudulent purpose. *Ibid.*; S. C., 7 Pet., 348.

§ 962. The delivery of notes, in pursuance of a valid marriage settlement, is not a fraud upon creditors, even if done on the eve of confessing a judgment, nor if done with a fraudulent intent on the part of the debtor, if accepted in good faith by the trustee for the wife. *Ibid.*

§ 963. Where one owing \$90,000, and having \$50,000 worth of property to pay it with, made a settlement, in consideration of marriage, upon his intended wife, including about \$33,000, and also other property worth about \$18,000, which was to be held in trust for some preferred creditors, this being all of his property except six or seven hundred dollars of personalty and three thousand six hundred and eighty acres of land which was worth \$2 per acre, and which he had previously conveyed; and the intended wife, knowing his embarrassed condition, had refused to marry him unless such settlement was made; and this settlement left \$70,000 of debts unprovided for, it was held to be void as a fraud upon creditors. *Wilson v. Prewett*, 3 Woods, 631.

§ 964. Actual knowledge by an intended wife of the fraudulent intent on the part of her intended husband in making a settlement upon her is not necessary. If she has knowledge of facts sufficient to excite the suspicions of a prudent woman, and to put her on inquiry, this is equivalent to actual knowledge, in contemplation of law. *Ibid.*

§ 965. Creditors whose *bona fide* debts are provided for by a marriage settlement, which is fraudulent as to other creditors and void, can take no benefit from it, though they had no knowledge of the fraud. *Ibid.*

§ 966. The fourth section of the statute of Virginia, of December 13, 1793, declaring that all conveyances of lands, marriage settlements of lands, slaves, or other personal property, deeds of trust and mortgages, shall be void as to all creditors and subsequent purchasers, unless acknowledged and recorded within a certain time; but that the same, as between the parties and their heirs, shall nevertheless be valid and binding, must be so construed as to limit its operation to the creditors of, and the subsequent purchasers from, the grantor. This statute does not therefore render void, as against the creditors of the husband, a settlement in contemplation of marriage by the intended wife upon herself and the intended husband, of slaves, during the lives of the parties, with remainder to the heirs of the wife, when such settlement is not recorded as provided; although an absolute title to the slaves would have vested in the husband upon his marriage if no such settlement had been made. (Johnson, J., dissents on the ground that the case is an exception to the general rule of construction laid down by a majority of the court.) *Pierce v. Turner*,* 5 Cr., 154.

§ 967. A gift by a father to his child, if appropriate and suitable to the condition of the parties, is good as against creditors. But if the gift is an unsuitable one, and one which the circumstances of the father will not justify, it is fraudulent and void as to creditors. *In re Grant*, 2 Story, 312.

§ 968. Unless fraud is intended by a voluntary conveyance from a father to his children, it is not void or voidable as to subsequent creditors, if he is free from debt at the time. There is no presumption of constructive fraud by such a settlement, as there may be if debts exist at the time, and the settlement impairs the rights of creditors. The gift will be upheld if it be reasonable and not disproportionate to the father's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors. A fraudulent intent must be clearly shown; but if the amount of property thus conveyed impairs the means of the grantor so as to hinder and delay his creditors, it is void. If an honest motive can be imputed to the donor equally as well as a corrupt one, the former should be preferred. *Herring v. Richards*,* 1 McC., 570.

§ 969. A man engaged in a fairly prosperous business, in which his interest was worth \$3,000, and owning real estate besides worth \$8,000, subject to an incumbrance of only \$500, conveyed to his children a farm for the expressed consideration of \$200. The conveyance was voluntary, but was openly made and immediately put of record. The farm was one which he had bought for \$2,000, and paid \$200 down, the rest being secured by his notes. These notes were not paid by the father out of his estate, but by his wife out of her own money and out of the proceeds from the farm. During the year following that in which this conveyance was made, the grantor lost heavily, and, about three years from its date, became bankrupt. It was held that the conveyance was not fraudulent and void as to subsequent creditors. *Ibid*.

§ 970. If a voluntary conveyance of a farm by a father to his children is made in good faith and while the grantor is solvent and free from debt, it is valid and must stand, although the grantor subsequently make gifts to his children in fraud of creditors by paying notes which he had given for the purchase money when he acquired the land himself. The remedy in such a case is not by bill to set aside the original conveyance, but by proper proceedings to recover the property subsequently transferred. *Ibid*.

§ 971. A., with intent to defraud his creditors, conveyed land to B. The latter, with full notice of the fraud, conveyed to C., the son of A. C. paid to B. a sum of money on the conveyance. The conveyance was set aside as fraudulent, and the court, being satisfied that the money paid by C. was the money of A., decreed that B. account for it to the creditors of A. *Odenheimer v. Hanson*,* 4 McL., 437.

§ 972. If a father, though in embarrassed circumstances, in payment of a just debt to his infant son, procures a deed to be made to him, it is not fraudulent. *Hinde v. Vattier*, 1 McL., 110.

§ 973. Where a man supposed to be rich, owning property worth \$60,000, whose debts did not exceed \$14,000, and whose indorsements were about \$20,000, agreed to convey to his son-in-law, for the wife of the latter, a house worth about \$2,500, upon consideration that the son-in-law would make certain improvements, it was held that the contract was upon a valuable consideration, and that it was not fraudulent as to creditors. *King v. Thompson*, 9 Pet., 204.

§ 974. The fact that at the time of a conveyance it is contemplated that the grantee shall convey to the son of the grantor, and this is subsequently done, does not of itself create a fraud, though it might be deemed a corroborative circumstance if there were marked badges of fraud. *Phettiplace v. Sayles*, 4 Mason, 312 (§§ 560-65).

§ 975. A voluntary settlement in favor of an illegitimate child, by a father who is solvent, without an intent to commit a fraud, is valid; the fact that a conveyance is voluntary is not of itself sufficient to impair its validity. *Anonymous*,* 1 Wallace, Jr., 112.

§ 976. The child's being illegitimate is not an objection to the validity of the settlement. *Ibid*.

IV. RESERVATION OF AN INTEREST.

SUMMARY—*Doctrine in federal courts*, § 977.—*Conveyance in trust to sell for benefit of both parties*, § 978.

§ 977. The federal courts, under the statutes of Elizabeth, hold as a matter of legal presumption that a deed made by a debtor, which on its face conveys absolutely, but out of which he reserves to himself some interest or benefit, is fraudulent and void; and as the law makes the presumption, the court must determine, as a matter of legal construction, when the presumption is rebutted. But where the local law provides that the question of fraudulent in-

tent shall be deemed a question of fact and not of law, the federal courts follow such rule. *Howe Machine Co. v. Claybourn*, §§ 979-81.

978. It is held in Wisconsin, under a statute upon the subject of fraudulent conveyances substantially the same as that of 13th Elizabeth, chapter 5, that a conveyance of property in trust to dispose of it for the best interests of both parties, and convert the same into money, is fraudulent and void as against creditors. But such a conveyance, without the trust to sell for the interest of both parties, is unquestionably valid. *Sumner v. Hicks*, § 983.

[NOTE.— See §§ 983-987.]

HOWE MACHINE COMPANY v. CLAYBOURN.

(Circuit Court for Michigan: 6 Federal Reporter, 438-442. 1881.)

Opinion by WITHEY, J.

STATEMENT OF FACTS.— Defendant, Thomas K. Claybourn, became surety in a bond for one Abel to the plaintiff, in 1873, for \$3,000. In March, 1879, complainant obtained judgment on the bond against the makers, issued execution, and levied, May 8, 1879, upon one hundred and sixty acres of land as Claybourn's. In December, 1877, this property was conveyed by Thomas K. to his son, Wilson A. Claybourn, by warranty deed, for the expressed consideration of \$4,000. On the same day the latter executed a bond to Thomas K. and Ann Claybourn, his wife, in the penalty of \$6,000, for their support during their lives. The condition recited that a conveyance of land had been made under an agreement by Wilson A. to support his father and mother. The wife of Thomas K. did not join in the conveyance. The lands constituted the farm of the grantor on which he resided. Graham is made a defendant as mortgagee, Wilson A. having executed to him a mortgage on the farm, March 1, 1878, to secure payment of \$1,600, money borrowed.

The bill in this case is filed in aid of the execution, and to have the deed to Wilson A. declared void as against the creditors of Thomas K. Claybourn. The proofs show that at the time of the conveyance the personal property on the farm belonging to Thomas K. was also conveyed; and that the transfers and bond for support were in pursuance of a verbal agreement between the father and son, by which the son, in addition to supporting his father and mother, was to pay certain of the father's debts, including \$1,817 of indebtedness to himself, which he was to and did surrender. Thomas K. was insolvent at the time of the conveyance to Wilson A., but the latter had no knowledge of that fact, and did not know of the liability of Thomas K. to complainant upon Abel's bond. If there had been no such indebtedness to complainant, Thomas K. had property more than sufficient to pay all of his liabilities.

The forty acres on which Thomas K. Claybourn and his wife resided, worth \$1,500, was exempt as a homestead, and as the deed was not executed by the wife of Thomas K., it was void as to such homestead. The amount of Thomas K.'s debts which Wilson A. was to pay, including those owing to himself, amounted to about \$4,000, of which he paid about \$2,800 prior to any notice of the existence of complainant's claim, and since then he has paid nearly all the balance.

It is manifest that Thomas K. reserved a secret benefit to himself when he conveyed his property to his son. The deed stated the consideration received to be \$4,000; but a further consideration not expressed was the support which the grantor and wife were to receive from the grantee,—a benefit reserved to the grantor, and not disclosed by the conveyance. The value of the real estate described in the deed of conveyance was \$6,400, and of the personal

property \$160. There is, however, no testimony, save the transaction itself, tending to show that the son knew anything of any indebtedness against his father other than such as the son agreed to pay. Wilson A. Claybourn testifies that he knew nothing of and had not heard of his father being surety for Abel in the bond to complainant. Complainant is entitled to reach the interest secretly reserved by Thomas K. out of the property transferred, but it does not follow that the conveyance is void in favor of creditors under the statutes of this state.

§ 979. *Construction of statutes — Michigan Compiled Laws, sections 4716, 4717. Fraudulent intent, a question of fact.*

Section 4716, Compiled Laws of Michigan, declares that the question of fraudulent intent shall be deemed a question of fact and not of law. Section 4717 provides that the statute, declaring every conveyance made with intent to hinder, delay or defraud creditors or other person void, shall not be construed to impair the title of a purchaser for a valuable consideration, unless it shall appear that he had previous notice of the fraudulent intent of his grantor, etc. The statutes of fraud of Elizabeth have been generally construed in substantial harmony with the last provision, but quite differently from the import of the first-mentioned provision, which is not contained in the older statutes of fraud. The federal courts, under the statutes of Elizabeth, hold as a matter of legal presumption that a deed made by a debtor, which, on its face conveys absolutely, but out of which he reserves to himself some interest or benefit, is fraudulent and void; and, as the law makes the presumption, the court must determine, as a matter of legal construction, when the presumption is rebutted. *Hamilton v. Russell*, 1 Cranch, 309, 316.

§ 980. *Effect of reservation of benefit to the grantor in a deed.*

Under the Michigan statute the question whether a conveyance is made with intent to defraud creditors is, in the first instance, a question of fact; and if a *prima facie* case, or one which raises a presumption of fraud, is made out, the question whether it is rebutted is also a question of fact. This case presents a question of the validity or invalidity of a deed of conveyance governed and controlled by the laws of the state. In a trial at law, the jury, and not the court, would have to deal with the question of fraud. Sitting in equity, the court performs the duties of court and jury. It cannot be held in this case, as in *Lukins v. Aird*, 6 Wall., 78, relied upon by complainant's solicitor, that for a debtor to sell his land, convey it by deed without reservations, and yet secretly reserve to himself a benefit, is fraudulent as a conclusion of law, without reference to whether, as a matter of fact, the grantor and grantee intended to defraud creditors. It is the broad language of the court applied to any such conveyance made by a debtor in failing circumstances, without qualification, which I do not accept or apply in this case. According to the language employed by Mr. Justice Davis it would make no difference that the grantee purchased without notice of his grantor's failing circumstances, or even that he was indebted. It has been held by that court that a conveyance will not be set aside without the element of bad faith in both the grantor and grantee. *Clements v. Moore*, 6 Wall., 312 (§§ 553-57, *supra*); *Astor v. Wells*, 4 Wheat., 466.

On the part of the grantor there can be no difficulty in finding his intention to have been fraudulent, either as a conclusion of law or fact in making the conveyance. But it is difficult from the whole proofs to fix upon the grantee any want of good faith, or an intent to hinder, delay or defraud creditors.

Provision was made to pay all debts of Thomas K. of which his son had any knowledge. The fact that the value of the property transferred, or supposed to be transferred, was \$2,400 in excess of the consideration stated in the deed, tends to throw suspicion on the good faith of the grantee, but taken alone or in connection with the other facts, it is not proof of fraud. So also the reservation by the grantor of benefits by the bond for support may be a badge of fraud; and conveying all the grantor's property is another fact that awakens suspicion; but none or all of them are necessarily evidence of fraud on the part of the grantee. If he takes title in the belief that the grantor is not indebted or has by the transaction provided for the payment of all his debts, and has no good reason to believe otherwise, no ground is seen upon which to find fraudulent intent on the part of grantee.

§ 981. *Bona fide purchaser without notice, not affected by fraud of his grantor.*

The criterion by which to reach a conclusion is whether the purpose of the grantee was to aid the grantor in perpetrating a fraud upon his creditors. Did he buy recklessly or with guilty knowledge, or which is the same thing, with such knowledge as would put a prudent man upon inquiry? *Clements v. Moore, supra*. The actual secret intent of the grantor, however bad, cannot affect a *bona fide* purchaser without notice. *Astor v. Wells, supra*; *Hollister v. Loud*, 2 Mich., 313.

The grantor was not reputed to be insolvent. There is nothing in the proofs to show that he was put on inquiry, and all debts were understood to be arranged, and, therefore, there can be no presumption, either of law or fact, that on the grantee's part the purchase was with a fraudulent intent. I cannot, therefore, set aside the conveyance, but the land may be charged with the value of the benefit reserved by Thomas K. The statutory homestead of the value of not more than \$1,500, did not pass to Wilson A., for the reason already stated. The title to the residue of the land did vest in him, subject to dower rights. But so much of the purchase price of the land as was reserved for the support of Thomas K. and his wife, and not paid or satisfied, can be reached by complainant in this suit. In his behalf, as a creditor at the time of the transfer of the property, equity will declare a lien upon the land, subject to Graham's prior mortgage lien. The case will be referred to a master to state and report what portion of the purchase price reserved for the benefit of Thomas K. and his wife remains unpaid, and on the coming in of the report, complainant will be entitled to a final decree fixing the sum and declaring the lien, with authority to sell, etc.

SUMNER v. HICKS.

(2 Black, 532-535. 1862.)

APPEAL from U. S. District Court, District of Wisconsin.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—This is a suit in equity, having for its object to set aside two assignments made by the defendants, Henry Hicks and Asa Hicks, to their co-defendant Forbes. The appellants are the complainants in the bill. They have recovered judgments at law against Henry and Asa Hicks, upon which executions have been returned unsatisfied. The first assignment was executed on the 4th of January, 1858. The conveyance of the property is followed in the instrument by this provision: "In trust, nevertheless, and to

and for the following uses, interests and purposes, that is to say, that the said party of the second part shall take possession of all and singular the lands, tenements and hereditaments, property and effects hereby assigned, and *sell and dispose of the same upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned*, and convert the same into money."

The second assignment bears date on the 6th of May, 1858. It is declared "to be made and entered into for the express purpose of correcting and explaining the true intent and meaning of a like indenture made and executed between the same parties on the 4th day of January, A. D., 1858, and which said last-described instrument as corrected shall read as follows:" Then follows the body of the instrument, which is the same with that of the prior assignment, except that in the clause authorizing the assignee to sell and dispose of the assigned property, the words "upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned" are omitted.

§ 982. *An assignment, void as against creditors because of its terms, can be corrected by a second assignment free from that defect, no lien having intervened.*

The first assignment was executed only by the assignors. The second recites that it is between Henry Hicks and Asa Hicks, of the first part, and Forbes, of the second part; and it is executed by all the parties. The statute of Wisconsin upon the subject of fraudulent conveyances is substantially the same with that of the 13th of Elizabeth, chapter 5. The supreme court of the state has held that such a provision as that referred to in the first assignment renders the instrument fraudulent and void as against creditors. *Keep v. Sanderson*, 12 Wis., 362.

In cases like this, involving the construction of a state statute, this court is governed by the judgment of the highest judicial authority of the state. *Leffingwell v. Warren*, decided at this term. This ruling of the supreme court of Wisconsin is sustained by numerous adjudications in other states. 2 Seld., 510; 6 Seld., 691; 17 N. Y., 21; 21 N. Y., 168; 2 Duer, 533; 24 Ill., 257; 11 Md., 173. There are conflicting authorities upon the subject of great weight. 6 O. S., 620; 7 Paige, 272; 11 Barb., 198; 4 Sandf., S. C., 252. See also the dissenting opinion of Brown, justice, in *Benedick v. Post et al.*, 12 Barb., 168. The question, as an original one, is not before us, and we express no opinion upon it.

The statute of Elizabeth was declaratory of the common law. In the absence of such legislation the common law would have accomplished the same results. *Twyne's Case*, 3 Coke, 80; S. C., 1 Smith's L. C., 1; *Codagan v. Kennet*, Cowp., 434; *Wheaton v. Sexton*, 1 Amer. L. C., 68; 1 Cranch, 316; 1 Binney, 514, 523; 4 McCord, 295.

It is not claimed that when the second assignment was executed, any creditor had acquired a lien upon the property covered by it. That assignment is free from the vice which was fatal to its predecessor, and is valid. 11 Ill., 503; 16 Pick., 247; 28 Vt., 150; 2 Ed. C. R., 239. This proposition is so clear upon reason and authority that it would be a waste of time to discuss it. None of the authorities relied upon by the counsel for the appellant are in conflict with this decision. In one of them the assignee did not join in the execution of the second instrument, and it did not appear that he had ever assented to it. In the others, creditors had interposed, and intervening rights had attached to the property. "It is a settled principle that a deed voluntary

or even fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*." 4 Kent's Com., 559; 1 John. C. R., 136; 15 John. R., 571; 2 Edwards C. R., 289; 1 Sid., 133; Amer. L. C., 82.

The court below dismissed the bill. We think there is no error in the decree, and it is affirmed with costs.

§ 982. In general.—When a person, whose property exceeds in value all that he owes, with a view to the payment of his debts, and to secure to himself a maintenance in the future, conveys that property to another, on an agreement that the grantee shall pay all that the grantor owes, and support him during the residue of his days, such a conveyance is not *per se* fraudulent and void as against creditors. *In re Cornwall*, 9 Blatch., 114.

§ 984. A conveyance, absolute in form but accompanied by a separate agreement that the grantee is to hold upon trusts which are for the benefit of the grantor, and controllable and countermandable by him at his will, is fraudulent and void as to prior purchasers from him or creditors of him. And the grantee in such conveyance will be compelled in equity to release his title under it to a prior mortgagee of the grantor, of whose mortgage he took with notice, and also be enjoined from setting up said title against such mortgagee. *Burbank v. Hammond*, 8 Sumn., 429.

§ 985. Under the statute of Missouri enacting that "no mortgage or deed of trust of personal property shall be valid as against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or *cestui que trust*," unless the instrument be acknowledged and recorded, an unrecorded vendor's lien is void as to creditors of or purchasers from the vendee, where the possession is delivered to and retained by the latter. *Heryford v. Davis*,* 12 Otto, 235.

§ 986. A manufacturer of cars hired two cars to a railroad company, for the space of four months, to be used on its road, and received from the company three promissory notes to hold as collateral security and to collect the same at maturity and to hold the proceeds for the safe custody and return of the cars when demanded. The company was given the right to purchase the cars at any time within the four months, upon the payment of a certain sum. But until such payment was made, the company, it was provided, should have no title or interest in the cars except as to their use for hire. No price for the hire was mentioned or alluded to; and the sum at which the company was given a right to purchase was exactly the amount of the promissory notes taken to secure the return of the cars. These notes all fell due within the four months. They were to be collected by the manufacturer at maturity, and thus it was contemplated that before the end of the four months the manufacturer should have in hand in cash the full price of the cars. No part of the money was to be returned to the company in any event, not even if the cars should be returned. On the contrary it was expressly stipulated that if the manufacturer should elect to take the cars into his own possession, which he reserved a right to do in case of default in the payment of the notes, the property should be sold, and so much of the proceeds as should be necessary to make up the amount remaining unpaid on the notes should be retained by the manufacturer, and the surplus paid over to the railroad company. It was held that the transaction was not a bailment for hire, or a conditional sale, but a sale by which the ownership of the cars passed to the railroad company, the manufacturer retaining a lien for the consideration; and that, as the contract was not recorded, the lien retained by the vendor was, under the statutes of Missouri against secret liens, fraudulent and void as against the creditors of the railroad company. *Ibid.* (MR. JUSTICE BRADLEY dissented, holding that the transaction was a conditional sale, and valid.)

§ 987. The laws of Illinois will not permit the owner of property to sell it, either absolutely or conditionally, and still continue in possession of it. If he desires to create an interest in it in another, to whom it is delivered, and at the same time preserve his lien on it, he must comply with the recording acts. Otherwise the lien retained by him is constructively fraudulent as to the creditors of the purchaser holding the possession. Under this state of the law it is held that, in a sale on condition that the price shall be paid in regular instalments, a right of rescission reserved on the part of the vendor, in case of default of payment of any of the instalments, is fraudulent and void as to the creditors of the purchaser if the latter is given possession and the lien is not recorded; and that it is immaterial that the conveyance purports to be a lease, and the sums stipulated to be paid are called rent, the title to pass on the payment of the last instalment, where this form is used to cover the real transaction. *Hervey v. Rhode Island Locomotive Works*,* 3 Otto, 664.

V. CONDITIONAL SALES.

SUMMARY — *At common law; in Arkansas, §§ 988, 989.*

§ 988. Conditional sales are valid at common law, and their validity was not affected by the provision of the English statute of frauds. Nor are they within the recording acts of Arkansas. It was held in that state in this case that a conditional sale, where the possession was given to the vendee but the title was to remain in the vendor till the price was paid, was good as against a creditor of the vendee who was such at the time he received the possession, or a subsequent *bona fide* purchaser from the vendee without notice of the title of the original vendor, the latter having been guilty of no fraud or laches in asserting his rights. *Blackwell v. Walker*, §§ 990-93.

§ 989. Under the statute of frauds of Arkansas, providing that "where any goods or chattels shall be pretended to have been loaned to any person with whom, or those claiming under him, possession shall have remained for the space of five years without demand made and pursued by due process of law on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of any use of property by way of condition, reservation or remainder in another, the same shall be taken as to all creditors and purchasers of the persons so remaining in possession to be void," unless recorded (if this statute is applicable to conditional sales), the possession of the vendees under the conditional sale must continue five years, in order to bring a case within the statute. *Ibid.*

[NOTES.— See §§ 994, 995.]

BLACKWELL, THOMPSON & CO. v. WALKER BROS. & CO.—DEAL v. HICHT.

(Circuit Court for Arkansas: 2 McCrary, 33-39; 5 Federal Reporter, 419; 11 Reporter, 418. 1890.)

STATEMENT OF FACTS.— There were two cases of conditional sales. In the first, chattels were sold upon a verbal contract that the title should remain in the vendor until the purchase money should be paid. The defendants were creditors of the vendee and had levied an execution on the property.

The second case differed from the first in that there was a written contract and in the fact that the vendee himself sold the property to defendant, who bought it in good faith. The vendor brought an action of replevin.

§ 990. *Conditional sales, valid at common law and not affected by the recording statutes of Arkansas.*

Opinion by CALDWELL, J.

Conditional sales were valid by the common law, and their validity was not affected by the provisions of the English statute of frauds, nor are they within the recording acts of this state. In the case of a chattel mortgage the property and possession of the chattel, in this state, is in the mortgagor, and neither the property nor the possession is changed by the mortgage, but the mortgagee acquires, in the language of the statute, "a lien on the mortgaged property from the time the same is" filed for record. *Gantt's Dig.*, sec. 4288.

In a conditional sale the property in the chattel is separated from the possession, the property remaining in the vendor and the possession only passing to the vendee. The same thing happens upon the loan, hire or other like bailment of chattels; in all such cases the right of property in the thing bailed remains in the bailor and the actual possession passes to the bailee. If one loan or hire his horse to his neighbor, he does not have to reduce the contract for the bailment to writing and have it signed, acknowledged and recorded in order to prevent the bailee from making an effectual sale of the horse, or his creditors from seizing it on execution for his debts.

The possession of personal property is undoubtedly presumptive evidence of title; but it is also a general rule that a vendor in possession of such property can impart no better title to it than he himself possessed. There are some ex-

ceptions to this rule, but the case of a vendee in possession of chattels, not to be consumed in their use, under a conditional contract of sale like these we are considering, is not one of them. One of the earliest cases in this country on the subject of conditional sales was *Hussey v. Thornton*, 4 Mass., 405. In that case the contest was between the vendor and an attaching creditor of the vendee whose debt was contracted *prior* to the conditional sale. The court held the conditional sale valid against the attaching creditor, but in the course of the opinion in the case, Parsons, C. J., said:

"Had the demands of these attaching creditors originated while the goods were in the possession of Tood and Worthly (the conditional vendees), so that it might be fairly presumed that a false credit was given them, or had they sold them *bona fide* for a valuable consideration, our opinion would have been otherwise." This expression of opinion was not necessary to a decision of the case before the court, and afterwards when a case did arise making it necessary to decide whether such sales were valid against creditors whose debts were contracted while the vendee was in possession of the property under such conditional purchase, the *dictum* in *Hussey v. Thornton* was disapproved, and Parker, C. J., who delivered the opinion of the court, said:

"If the transaction is fraudulent, the vendor setting up a condition to the sale, yet suffering the vendee to be in possession, exercising full rights over the property, with the intent and purpose of enabling him to obtain credit on the strength of the property, he will not be able to avail himself of such condition, but the sale will be held to be absolute in regard to creditors. But if *bona fide*, and the object of the condition was merely security to the vendor, he shall not lose his property because some creditor of the vendee supposed it to belong to him." *Ayer v. Bartlett*, 6 Pick., 71.

Later cases in the same state affirm the law as laid down in *Ayer v. Bartlett*, and it seems to be the settled doctrine of the courts in this country. *Armington v. Houston*, 38 Vt., 448; *Bigelow v. Huntly*, 8 Vt., 151; *Buckmaster v. Smith*, 22 Vt., 203; *Chaffee v. Sherman*, 26 Vt., 237; *Bradley v. Arnold*, 16 Vt., 382; *Paris v. Vail*, 18 Vt., 277; *Barrett v. Pritchard*, 2 Pick., 512; S. C., 3 Am. Dec., 449 and note; *Martin v. Baldwin*, 17 Mass., 686; *Merril v. Rinker*, 1 Bald., 528 (§§ 15-18, *supra*); *Blood v. Palmer*, 11 Me., 414; *Miller v. Bascom*, 28 Mo., 352; *Rogers Locomotive Works v. Lewis*, 4 Dill., 267; S. C., 3 Cent. L. J., 784; and it seems to be equally well settled that the vendor who has been guilty of no laches in asserting his right to the property may recover it from a *bona fide* purchaser from the vendee. *Coggill v. Hartford R. Co.*, 3 Gray, 545; *Ballard v. Burgett*, 40 N. Y., 314; *Bigelow v. Huntly*, 8 Vt., 151; *Sargent v. Metcalf*, 5 Gray (Mass.), 506; *Hurt v. Carpenter*, 24 Conn., 427; *Parmelee v. Catherwood*, 36 Mo., 479; *Griffin v. Pugh*, 44 Mo., 326; *Little v. Page*, *id.*, 412; *Benner v. Puffer*, 114 Mass., 378; *Thomas v. Winters*, 12 Ind., 383; *Dunbar v. Rowles*, 28 Ind., 328; *Bailey v. Harris*, 8 Ia., 333.

§ 991. *The vendor of a chattel sold upon condition can lose his rights only by his own fraud or laches.*

In this state the settled rule of the common law, that a purchaser of a chattel acquires no better title than his vendor possessed, has not been changed by statute in its application to conditional sales; and creditors and purchasers of the conditional vendee acquire no right to the property as against the vendor, who has been guilty of no fraud and no laches in asserting his rights. If the property had been of a kind which would have been consumed in its use, a different question would be presented.

§ 992. *Construction of the statute of frauds of Arkansas. Unrecorded conditional sales are not affected by it unless the possession has continued for five years.*

Counsel for defendants insist that conditional sales not reduced to writing and acknowledged and recorded are void against purchasers and creditors of the vendee under the statute of frauds of this state. Sec. 2957, Gantt's Digest. This section of the statute of frauds of this state originated in Virginia at an early day. Though applicable to all goods and chattels, it is said to have had its origin in a practice connected with slave property. It had come to be common for slave owners to transfer the mere possession and use of some portion of their slaves to members of their families, particularly to daughters upon their marriage, by way of loan or upon some verbal agreement or understanding whereby the property in the slaves did not pass with the possession.

The possession thus acquired was often continued for many years under circumstances calculated to mislead persons dealing with the party in possession, and the object of the statute was to make the apparent ownership arising from such possession, whatever the nature of the bailment or trust might be, actual and effectual against the real owner, in favor of creditors and purchasers of one who had so remained in possession for a period of five years.

The section was adopted in Kentucky in 1796, and in the revision of the statutes of that state in 1852, conditional sales were in terms brought within its operation. It was adopted by the territories of Missouri and Arkansas and by each of those states, and Illinois and Texas. As originally adopted by Kentucky and the territories of Missouri and Arkansas, and by the state of Missouri in her first code of laws, it reads as follows: "Where any goods or chattels shall be pretended to have been loaned to any person with whom or those claiming under him possession shall have remained for the space of five years without demand made and pursued by due process of law on the part of the pretended lender; or where any reservation or limitation shall be pretended to have been made of any use of property by way of condition, reservation or remainder [or otherwise in goods or chattels, the possession whereof shall have so remained in another *as aforesaid*], the same shall be taken as to all creditors and purchasers of the persons *so remaining in possession* to be void, and that the absolute property is with the possession, unless such loan, reservation or limitation of the use or property were declared by will or deed in writing proved or acknowledged and recorded as required by this chapter."

In the Revised Statutes of this state the clause in brackets is omitted except the words "in another." Whatever the design of this omission may have been — if indeed it was designed, and not a clerical misprision — it is still clear that the words "*so remaining in possession*" in the latter part of the section, refer to the "possession . . . for the space of five years" previously mentioned. If this be not so, then these words have nothing to rest on and are meaningless. But they are not meaningless; they perform an important office, and make the five years possession qualify the whole section.

In the revision of the statutes of Missouri in 1835, the words "*as aforesaid*," italicized in the clause in brackets, were omitted. And in *Miller v. Bascom*, 28 Mo., 352, it was insisted that a verbal conditional sale of chattels was a "reservation or remainder" in favor of a vendor and void as against the creditors and purchasers of the vendee without reference to the period of his possession. But the court held otherwise, and declared the act, notwithstanding

the omission of these words, had no operation in such cases unless the possession of the chattels had continued in the vendee for five years. And everywhere and always it has been held that the possession in all the cases of bailment, trust, condition or reservation embraced by the section, must have been continued for five years before the owner's rights are affected.

§ 993. *Punctuation; effect in construing statutes.*

In the enrolled act there is a comma after the word "lender" and not a semicolon, as in the printed statute. Punctuation marks are no part of the English language and cannot be admitted to control the proper sense of the words used. But they are sometimes used in such a way as to lead to a misinterpretation of a statute on a casual reading, and such is the tendency of the erroneous punctuation in this section.

Conceding, but not deciding, that this section embraces conditional sales, still the defense based on it must fail because the possession of the vendees, under the conditional sales in these cases, was less than a year.

§ 994. The conditional sales, which may be regarded valid without a change of possession, have reference to conveyances upon a condition other than the repayment of money. The Schooner Romp, Olc., 196.

§ 995. An agreement, either in writing or by parol, made at the time of a sale of real estate, that the seller may repurchase the estate at a future time by paying a sum equal to the original price, is not fraudulent in itself. Phettiplace v. Sayles, 4 Mason, 312 (§§ 560-65).

VI. NOTICE TO VENDEE.

SUMMARY — *Full consideration will not protect purchaser with notice, § 996.—Purchase with knowledge of facts and circumstances; inquiry of vendor, § 997.—Actual knowledge not necessary to avoid sale, § 998.*

§ 996. A full consideration paid in cash will not protect a purchaser who has notice, actual or constructive, that the vendor is selling to hinder and delay his creditors. Singer v. Jacobs, §§ 999-1002.

§ 997. When one purchases with knowledge of such facts and circumstances as to put a reasonable man upon inquiry as to the purpose of the vendor, that obligation is not satisfied by an inquiry addressed to the vendor himself, who has every motive for concealing the truth, when better and reliable sources of information are open to him. *Ibid.*

§ 998. To avoid a sale on the ground that it was made with an intent to defraud creditors, it is not necessary that the purchaser should have had actual knowledge of the fraudulent intent of the vendor. It is sufficient if he had constructive notice. If the facts and circumstances within the knowledge of the purchaser are such as fairly to induce the belief that he either knew of the fraudulent purpose of the vendor, or, having good reason to suspect it, purposely refused to make inquiry, and remained wilfully ignorant, it is sufficient to avoid the sale. *Ibid.*

[NOTES.—See §§ 1003-1016.]

SINGER, BAER & CO. v. JACOBS.

(Circuit Court for Arkansas: 8 McCrary, 638-644; 11 Federal Reporter, 559-563. 1882.)

STATEMENT OF FACTS.—Jacobs, having bought a stock of goods, chiefly on credit, sold by retail as many of them as he could, and being pressed by his creditors, made a sale of the remainder to Thompson at fifty cents on the dollar of their cost. This was done under very suspicious circumstances (detailed in the opinion of the court), which tended to implicate Thompson in the fraud. Plaintiff levied an attachment on the goods, which were claimed by Thompson.

Opinion by CALDWELL, J.

It is not contested that on the part of the defendant Jacobs the sale of the goods was a premeditated and scandalous fraud upon his creditors. The general

rules of law applicable to the controversy between the interpleader and the creditors of Jacobs are well settled. To avoid the sale it is not required that the purchaser should have had actual knowledge of the fraudulent purpose of the vendor. It is sufficient if he had constructive notice. The law relating to constructive notice in cases of fraud is well summarized by Mr. Bigelow in his treatise on Fraud (pages 288-9):

"If facts are brought to the knowledge of a party which would put him as a man of common sagacity upon inquiry, he is bound to inquire, and if he neglects to do so he will be chargeable with notice of what he might have learned upon examination. . . .

"If, however, there be no fraudulent turning away from knowledge which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent or wilful blindness, is all that can be imputed to a purchaser of property, the doctrine of constructive notice will not apply to him."

§ 999. *A purchaser of an entire stock of goods from a dealer out of the usual course of trade will not be protected if he has notice, actual or constructive, of the fraud of the vendor against his creditors.*

An actual agreement or conspiracy between Jacobs and Thompson that the latter would aid the former to defraud his creditors does not have to be shown. It is sufficient to avoid the sale if the facts and circumstances within the knowledge of Thompson are such as fairly to induce the belief that he either knew of the fraudulent purpose of Jacobs, or, having good reason to suspect it, he purposely refused to make inquiry and remained wilfully ignorant. A full consideration paid in cash will not protect a purchaser who has notice, actual or constructive, that the vendor is selling to hinder and delay his creditors; and the reason is, that by aiding the debtor to convert his visible and bulky property, which cannot readily be concealed from creditors, into money, which it is easy to put beyond their reach, he knowingly assists the debtor to carry out his fraudulent purpose. *Clements v. Moore*, 6 Wall., 299, 311 (§§ 553-57, *supra*).

§ 1000. *A vendee, to be protected, must be an innocent purchaser, without notice of facts sufficient to put him upon inquiry.*

It is not enough that a vendee is a purchaser for value; he must also be an innocent purchaser. The facts and circumstances within the knowledge of the interpleader were clearly sufficient to put him upon inquiry; and it is equally clear that such inquiry, directed to sources of information easily accessible and to which any prudent man would have appealed, would have disclosed Jacobs' fraudulent purpose.

§ 1001. *Circumstances that amount to constructive notice of fraud.*

Some of the leading facts within the knowledge of the interpleader before he purchased are, that he had known Jacobs for many years, and knew his general reputation for honesty was bad, and that he was not punctual in the payment of his debts; that the value of all the property and means that Jacobs possessed before he purchased the goods, and which could have been used in their purchase, did not exceed one-half of the value of the goods purchased; that it was unusual for country merchants to buy exclusively for cash; that no change had occurred in Jacobs' condition in any way between the date of his purchase of the goods and their sale to the interpleader; that the indictment against Jacobs was found months before he purchased the goods, and that the pretense that he must sell his entire stock at a great sacrifice for cash in hand

to enable him to fee counsel to defend him in that case, was obviously false; that he was selling the stock for one-half of its cost in the height of the business season and less than ninety days after its purchase, and about the time debts contracted in its purchase would be maturing; that the interpleader, though a merchant in the same town, did not contemplate removing the goods to his own store, but expected to make money out of the purchase by selling them at public auction; that the same method of disposing of the goods was open to Jacobs, and there was no reason why he should not resort to it if he owed no debts and was honest; that Jacobs had not advertised in any mode his desire to sell his goods and that he had probably not disclosed his purpose to do so to any other person. The interpleader knew these facts, and the mind cannot resist the conclusion that if he did not actually know of Jacobs' fraudulent purpose, it was because he was wilfully blind and fraudulently turned away from evidence of the facts.

It is quite evident the interpleader mistook the law and supposed an actual lien on the goods was the only impediment to his acquiring a good title at any price for which Jacobs was willing to sell, and that bare knowledge on his part that Jacobs was making the sale to defraud his creditors would not affect him. The statement of the interpleader that he supposed the goods were paid for is unsupported by any facts upon which to found such belief. It is not perceived why he should exhibit such excessive credulity on this point and fail to give any effect to facts and circumstances tending so powerfully to establish the opposite conclusion. Such facility of belief, it has been well said, invites fraud and may justly be suspected of being its accomplice.

The law deals with the vendee and his acts upon the presumption that he is a man of ordinary intelligence, and he cannot evade responsibility by affecting to believe that which no man of ordinary intelligence, under the circumstances, would believe. He consulted an attorney, but upon what state of facts is not disclosed. Why consult an attorney if he felt no apprehension? Why was it necessary to consult an attorney before making this purchase more than any other? When locked up in the storehouse after night, with Jacobs and the clerks, why should he pay \$1,000 on the purchase before they had begun to take the invoice if he did not apprehend danger from some sudden action of Jacobs' creditors, whose agents were then in the town, and which fact he probably knew or suspected? If this was not his motive, then he must have been prompted by an utter want of confidence in Jacobs' veracity and business engagements. Whether the act was induced by one or the other of these motives, it is inconsistent with his present attitude in the case. He began early to fortify himself to support a purchase, out of which he expected to make money, but in making which he realized he was incurring some peril. If the sale and invoice of the goods had taken place in the ordinary manner, and during business hours, the fraud would have been detected and exposed at once by Jacobs' creditors, who were on the ground watching him. He does not say that Jacobs denied owing debts; he seems not to have pressed that point. But if he had done so, and Jacobs had answered, as he doubtless would, that he owed no debts, he could not, on the proof in this case, have sheltered himself behind such an answer.

§ 1002. *What inquiry must be made when the facts are sufficient to put a reasonable man upon inquiry.*

When the facts and circumstances are such as to put a reasonable man upon inquiry, that obligation is not satisfied by an inquiry addressed to the chief

actor in the suspected fraud, who has every motive for concealing the truth, when better and reliable sources of information are open to him. He had access to the original invoices, which disclosed the terms on which Jacobs purchased the goods; and if he had discounted the bills for cash they would, according to mercantile usage, have shown that fact. It is not probable any merchant would purchase and pay for a large stock of goods without having some written evidence of the fact. These reliable sources of information which lay on the counter before him, the interpleader refused to look upon. He purchased the goods out of the ordinary course of business for less than they were worth; the sale was consummated and invoice made in secret, after night, and in great haste, and under circumstances tending to show an active participation in the fraudulent purpose of Jacobs. But whether he was guilty of active participation in the fraud or not, he certainly "did buy recklessly, with guilty knowledge, or, which is the same thing, with such knowledge as would put a prudent man upon inquiry." *Howe Machine Co. v. Claybourn*, 6 Fed. R., 438 (§§ 979-81, *supra*); *Clements v. Moore*, *supra*.

§ 1003. Rights of Vendee.—To make a conveyance upon a valuable consideration void as against creditors, under the statute of 18th Elizabeth, both parties must concur in the fraud. *Magniac v. Thompson*, 1 Bald., 844.

§ 1004. Under the statutes of Elizabeth, as well as by the positive provision of the statutes of Michigan, a conveyance made with intent to defraud creditors on the part of the debtor, is not void unless the purchaser also participates in the fraud, where he pays a valuable consideration. The test is, did he participate in the fraud, or buy recklessly or with guilty knowledge or with such knowledge as would put a reasonable man upon inquiry? But where part of the consideration of the conveyance was certain secret benefits reserved to the vendor, the land to the value of such benefits may be reached by the creditors of the debtor. *Howe Machine Co. v. Claybourn*, 6 Fed. R., 438 (§§ 979-81).

§ 1005. A fraudulent intent of a grantor will not affect the title of a purchaser for a valuable consideration without notice of such intent. *United States v. Griswold*, 7 Saw., 296.

§ 1006. Where a conveyance has been made in fraud of creditors, and there has been a delivery of the property and full payment made in good faith, the right of the purchaser will not be interfered with. But if the purchaser has notice of the fraud before getting possession and making payment, the creditor may intervene and the contract will be set aside. *Parrish v. Danford*, 1 Bond, 845.

§ 1007. A sale may be void for fraud though the buyer pays the full value of the property bought, as where his purpose is to aid the seller in defrauding his creditors, or where he buys recklessly with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what has been paid; but when the proceeding is in chancery, the jurisdiction is more flexible and tolerant. An insolvent debtor made a conveyance to hinder and delay a creditor, to a purchaser who knew these facts. The sale was openly made; there was an immediate change of possession; and the price agreed to be paid was fully as much as the goods were worth. Three of the notes given by the purchaser in payment were misapplied by the debtor, instead of using them for the payment of his debts. It was held under the circumstances that the purchaser having enabled the debtor to divert so much of his property from the payment of his debts should be held liable in equity for the amount of the three notes so misapplied, with interest from the date of the sale, a court of equity having power to deal according to its own ideas of right and justice in such a case. *Clements v. Moore*, 6 Wall., 299 (§§ 553-57).

§ 1008. Under the law of Ohio, a purchaser in good faith, for a valuable consideration and without notice, obtains a valid title, although the conveyance is made to defraud creditors. *Astor v. Wells*, 4 Wheat., 466.

§ 1009. The bankrupt law having made a sale by a debtor out of the ordinary course of business presumptively fraudulent, it is the duty of one purchasing the entire stock of a retail dealer to investigate his condition and his motives for such sale. He must show that the sale was honestly made, or that upon vigilant inquiry no reason appeared to doubt its honesty. It is not enough to show that he did not know that the debtor's intentions were to defraud his creditors. *Main v. Glen*, 7 Biss., 86.

§ 1010. Purchaser from fraudulent vendee.—The purchaser from a fraudulent vendee, who intentionally shuts his eyes to the truth, and has such information and notice as makes it his

duty to inquire further, the whole truth being discoverable by the slightest effort, is affected with the consequences of the fraud. *Harrell v. Beall*, 17 Wall., 590.

§ 1011. A *bona fide* purchaser from a grantee in a deed made to defraud creditors, even though his purchase in writing does not amount to a formal conveyance, is protected in his purchase, except only as to the unpaid purchase money. *Dowell v. Applegate*, 7 Saw., 232.

§ 1012. Purchasers from the fraudulent grantee in a conveyance made to defraud creditors, who do not purchase for a valuable consideration and without notice, are liable to the same equities as the original grantee would have been if he had not conveyed. *Dexter v. Smith*,* 2 Mason., 303.

§ 1013. Under the statutes of 13th and 27th Elizabeth, a *bona fide* purchaser for a valuable consideration, without notice, shall hold the estate notwithstanding he claims through a grantee to whom the estate has been conveyed in fraud of subsequent purchasers from or creditors of the first grantor. The rule laid down by Chancellor Kent, in *Roberts v. Anderson*, that this doctrine does not apply where there has been a conveyance to defraud creditors, is not sustained. *Bean v. Smith*, 2 Mason, 252 (§§ 524-32).

§ 1014. Circumstances amounting to mere suspicion of fraud are not deemed notice. And where an inference of notice is to affect an innocent purchaser from a *feme covert*, it must appear that the inquiry suggested would have, if fairly pursued, resulted in the discovery of the defect, where the title of the wife does not come through a conveyance from her husband, and is in form perfect, although impeachable by his creditors on the ground that the price was paid by him. *Simms v. Morse*, 4 Hughes 579 (§§ 859-61).

§ 1015. One who, with notice of the prior fraud, purchases from the grantee in a fraudulent conveyance, takes the title subject to all the infirmities with which it is affected in the hands of his grantor. *Wilcoxon v. Morgan*,* 2 Colo. Ty, 478.

§ 1016. A purchaser from the grantee in a fraudulent conveyance was held chargeable with knowledge of the fraud, where the original grantor had remained in possession after his conveyance and had assisted in negotiating the second conveyance, where the purchaser was for a time a co-tenant and partner of the original grantor, free of rent, where it was agreed that a part of the purchase money should be applied to the payment of the original grantor's debts, and where the purchaser was informed that his grantor was acting for another in making the sale. *Ibid.*

VII. JUDGMENT CREDITORS.

SUMMARY — *Lien of judgment on property previously conveyed*, § 1017.

§ 1017. Where a statute makes a judgment a lien upon the real estate of the debtor from the time of the docketing of the same, and limits this lien to the property belonging to the debtor at the time of docketing, such lien does not attach to property which the debtor has previously conveyed in fraud of creditors, notwithstanding the statute, like the statute of Elizabeth, declares such a conveyance to be void. Notwithstanding the strong language used in the statute, the conveyance is valid as between the parties and passes the estate, being voidable only at the election of the creditor, who must institute proceedings to set it aside or to defeat its operation. *In re Estes*, §§ 1018-23.

[NOTES.— See 1024-1027.]

IN RE ESTES & CARTER.

(District Court for Oregon: 6 Sawyer, 459-471. 1890.)

STATEMENT OF FACTS.—Petition filed by the assignee of the bankrupt firm of Estes & Co., for an order of court directing him to apply the proceeds of the individual estate of Estes to the payment of the individual debts of the latter, free from any supposed lien of judgments obtained against the firm by its creditors. The material facts are as follows: On May 4, 1876, Estes, who was then insolvent, was the owner of a lot of ground which he conveyed to one Cole, subject to a mortgage thereon of \$20,000, with intent to defraud his creditors. This conveyance was afterwards, in December, 1879, set aside as fraudulent on petition of the assignee, and the property sold, free from all liens, except the mortgage aforesaid, for \$7,600.

Opinion by DEADY, J.

Counsel for the judgment creditors insist that the judgments given against Estes, whether jointly with Carter or alone, were a lien upon the property conveyed by the former to Cole, notwithstanding such conveyance, and the lien now exists against the proceeds thereof in the hands of the assignee. The argument in support of this proposition assumes that notwithstanding the previous conveyance to Cole, the property as to these judgment creditors, at the date of the entry and docket of their judgments, still belonged to Estes, and therefore it became and was subject to the lien of said judgments; and upon the correctness of this assumption the case turns.

On the other hand, counsel for the assignee contend that at the date of the judgments in question, Estes having already conveyed the premises to Cole by a deed valid and operative as between the parties thereto, had no interest in the premises; that they in no sense belonged to him, and therefore the liens of said judgments could not affect or include them.

§ 1018. *Lien of judgment does not attach to property previously conveyed in fraud of creditors.*

The Or. Civ. Code, section 266, provides, that "from the date of the docketing of a judgment, . . . such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon." By sections 273 and 279, it is further provided, that an execution against property may be levied upon "the real property belonging to him [the judgment debtor] on the day when the judgment was docketed in the county or at any time hereafter;" and "all property or right or interest therein of the judgment debtor," not specially exempted, "shall be liable to an execution."

Section 51 of chapter 6, relating to conveyances, which is substantially a copy of chapter 5 of 13 Elizabeth, provides, among other things, that every conveyance of any estate in lands, "made with the intent to hinder, delay or defraud creditors of their lawful . . . demands, . . . as against the person so hindered, delayed or defrauded, shall be void." (Gen. L., p. 523.)

§ 1019. — *authorities cited and commented upon.*

To show that a judgment is a lien upon land previously conveyed in fraud of creditors, counsel cite *Bump on Fraud. Conv.*, 465; *Pratt v. Wheeler*, 6 Gray, 522; *Scully v. Kearns*, 14 La. Ann., 436; *Eastman v. Schettler*, 13 Wis., 362; *Jacoby's Appeal*, 67 Penn., 434; *Manhattan Co. v. Evertson*, 5 Paige Ch., 465; *Smith v. Ingles*, 2 Or., 43.

In *Pratt v. Wheeler*, *supra*, the point in controversy was not decided. That case only determines that a deed in fraud of creditors is void as against the attachment of any of such creditors. The deed being void as to creditors, it is merely a question of procedure whether a creditor shall attack it in equity by a bill to set it aside, or by process at law, as an attachment or execution against the property covered by it. In Massachusetts, the courts did not possess equity jurisdiction until a late date, and the proceeding by attachment or execution, to assert the right of a creditor against the property of a debtor, covered by a fraudulent conveyance, became and is common.

But whether the mere lien of a judgment which results from the docketing of the same can be used or have the effect of process by means of which a creditor can assert his right against a fraudulent conveyance is another and very different question. All this and more may be said of the case of *Scully v.*

Kearns, *supra*. This was a case of a "simulated" or sham sale of personal property in fraud of creditors, and the court only held that the judgment creditor of the pretended vendor was not bound to proceed specially to have the sale set aside, but might treat it so far void and levy upon the property as that of the judgment debtor.

Eastman v. Schettler, *supra*, does contain a *dictum* to the effect that a judgment obtained against a debtor who has already conveyed his property in fraud of his creditors is, notwithstanding such conveyance, a lien thereon, but the only point decided in the case was that the purchaser of such property at a sale upon such judgment succeeded to the right of the judgment creditor, and might therefore assail such conveyance in the same manner as such creditor.

In *Jacoby's Appeal*, *supra*, there was a contest between two judgment creditors for the proceeds of property sold upon the process of the junior of them, the same having been conveyed prior to the judgments by the judgment debtor in fraud of his creditors. The court, upon the authority of Hoffman's Appeal, 8 Wright, 95, in which it was said that it was "the estate of the debtor which was sold at the sheriff's sale, and therefore the liens upon it which attached after the fraudulent grant must be paid in their order," gave the proceeds to the prior judgment creditor.

In *Manhattan Co. v. Evertson*, *supra*, it was held, that as between the mortgagee in a mortgage to secure a previous debt executed by the grantee in a fraudulent conveyance, and the judgment creditors of the grantor in such conveyance, the lien of the latter should prevail. The citation from *Bump on Fraudulent Conveyances* is fully to the effect that in such cases in contemplation of law, title remains in the debtor, and that judgments against him become liens upon such property precisely as if no transfer had been made. But this statement of the law is based, among others, upon the foregoing cases, and it is clear that with the exception of the last two, they do not support the text.

In addition to these authorities, I find that Judge Hoffman, *In re Beadle*, 5 Saw., 351, has held in favor of the lien under circumstances similar to those in this case. The syllabus of the case states the facts and the ruling sufficiently. It is: "Where an insolvent made an assignment to trustees with intent to hinder and delay his creditors, which assignment was by this court subsequently adjudged void, and trustees conveyed the property to the assignee in bankruptcy: *Held*, that the latter took the property subject to the liens of creditors who had recovered and docketed judgments subsequently to the fraudulent conveyance and before the commencement of the bankruptcy proceedings."

In the course of the opinion of the court, this question is asked: "Could the judgment creditors, by docketing their judgments against the grantor, acquire a lien on the land without previously bringing their bill in equity to set aside the fraudulent conveyance?" and the answer given is: "This question must be settled by the law of this state; and it appears to have been settled ever since the case of *Hager v. Shindler*, 29 Cal., 47, that a conveyance of this description may be treated by the judgment creditor as absolutely void *ab initio*, and as if non-existent."

But it does not appear that any question concerning the operation or effect of the lien of a judgment arose or was decided in *Hager v. Shindler*. That was a case where the purchaser of real property, at a sheriff's sale, upon an exe-

cution to enforce a judgment against one who had, prior to the judgment, conveyed the premises in question in fraud of his creditors, brought a suit to annul such conveyance as a cloud upon his title, and the court held that the suit could be maintained. Nothing was claimed under or by virtue of the lien of the judgment. Indeed, the statement of the ruling in *Ilager v. Shindler* by the court in *In re Beadle* shows this. It is: "In that case it was held that the purchaser of land at a sheriff's sale may maintain a bill to set aside and annul, as a cloud upon the title, a deed of the land given before the judgment by the judgment debtor without consideration and to defraud creditors."

And the subsequent cases of *Ferris v. Irving*, 28 Cal., 646, and *Stewart v. Thompson*, 23 id., 263, referred to by the court, and particularly the concurring opinion of Judge Sawyer in the latter case, are only to the same effect, that the conveyance is void as to the creditor who may attack it and divest the grantee of his right under it by a sale upon an execution against the grantor in favor of such creditor.

To justify this conclusion it was not necessary that there should be any judgment lien in the case, or even that the judgment should ever have been docketed. The seizure and sale upon the execution was a direct and legal assertion of the creditor's right to treat the conveyance as void, and the conveyance by the sheriff to the purchaser invested the latter with the title to the premises, and these California cases only decide that the purchaser, as such, and as the successor in right of the judgment creditor, could maintain a suit to set aside the fraudulent conveyance as a cloud upon this title without first bringing ejectment for the possession.

On the other hand, in *Miller v. Sherry*, 2 Wall., 248 (Equity, §§ 1827-31), which was a controversy concerning the title to real property between parties claiming under two judgments given against the debtor after he had conveyed the premises in fraud of his creditors, and the subsequent proceedings in equity to subject the premises to the satisfaction of said judgments, the court held that the proceedings in equity on the part of the senior judgment creditor were insufficient to affect the title, and decided in favor of the party claiming under the proceedings on the creditor's bill of the junior judgment creditor.

In delivering the opinion of the court, Mr. Justice Swayne says, that after the conveyance, the legal title was in the grantee thereof, until divested by the decree on the creditor's bill; and as if it was too plain for argument, assumes and states that the judgments were not a lien upon the premises. Speaking of the senior judgment, he says: "It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law."

§ 1020. *A conveyance by a grantor, though fraudulent as to creditors, is binding upon him, so that there is no estate, either legal or equitable, remaining in him, upon which a judgment lien could attach.*

In *Rappleye v. International Bank*, 9 Rep., 469, decided in the supreme court of Illinois, February 4, 1880, a trust deed made to defraud creditors was avoided at the suit of the defendant, which thereupon claimed and obtained a priority in the payment of its judgment from the proceeds of the land thus conveyed by the debtor. The court held, in the language of the syllabus, that "a conveyance, fraudulent as to creditors, is binding on the grantor, so that there is no estate, legal or equitable, remaining in him, on which a judgment lien could attach. The lien only attaches on the avoiding

of the deed by the creditor, so that he who thus avoids the deed has the prior lien."

§ 1021. *The lien of a judgment does not extend to an equity or an equitable title.*

In *Smith v. Ingles*, 2 Or., 44, it was held that the lien of a judgment does not extend to an equity or an equitable title. The case was this: Ingles purchased real property, and for the purpose of defrauding his creditors took the conveyance to his minor children. Burns, a judgment creditor of Ingles, sold the property upon an execution, as the property of the latter, and became the purchaser thereof. Subsequent to the entry and docketing of this judgment, Ingles mortgaged the premises to Smith, and after the sale Smith brought suit to enforce the lien of his mortgage, making Burns a party. The court held that the lien of Burns' judgment did not affect the property.

As the law of the state is the law of this case, it is claimed that the ruling in *Ingles v. Smith* is the decision of this question in favor of the assignee. The case is not clear in some points, but upon authority, the transaction was not a conveyance by the debtor in fraud of his creditors, within the statute, and therefore void, but a purchase by Ingles in the name of others, with a fraudulent intent. This being so, as to the creditors, equity would hold the grantees in the conveyance to be the trustees of a resulting trust in favor of Ingles, and subject the trust estate to the payment of his debts. Bump on F. C., 287; *Guthrie v. Gardner*, 19 Wend., 415.

In this view of the matter the case is scarcely in point. The legal estate was never in Ingles, and the case only decides that the lien of the judgment against him did not affect his resulting trust or equity in the premises. But in the case under consideration, *Estes*, at the date of docketing these judgments, had the legal estate in the premises or nothing. In the language of the court, in *Rappleye v. International Bank*, *supra*, "it is a mistaken notion, that after the making of a fraudulent conveyance as to creditors, there remains in the fraudulent grantor an equitable estate in the land conveyed. If this were so, he could sell and convey to another such estate."

It is also claimed that the statute limiting the lien of a judgment in *Burns v. Ingles*, was more restricted than the present. But I think they are substantially the same. The former (Gen. L. 1853-54, p. 100) declared that "such lien shall extend to all the real property of the judgment debtor, owned by him at the time of docketing the judgment." etc. From the present one there is only omitted the tautology, "owned by him," the expression, "property of the judgment debtor," being considered the full equivalent thereof.

So stand the authorities, *pro* and *con.*, upon this subject. Of those which are controlling in this court, the one from the supreme court of this state (*Smith v. Ingles*) decides that the lien of a judgment does not extend to an equity, while the other one from the supreme court of the United States (*Miller v. Sherry*) decides that such lien does not attach at all in the case of a previous conveyance in fraud of creditors.

§ 1022. *The lien of a judgment in Oregon is limited to the property belonging to the debtor at the time of the docketing; and cannot be made to extend to property previously granted to another, though in fraud of creditors.*

In my own opinion, the lien of a judgment which is limited by law to the property of or belonging to the judgment debtor at the time of the docketing, is not, nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by deed valid

and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee. And a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Or. Gen. L., p. 523; *Bean v. Smith*, 2 Mason, 272 (§§ 524-32, *supra*); *Rappleye v. International Bank*, *supra*.

Such a conveyance is not, as has been sometimes supposed, "utterly void," but is only so in a qualified sense. Practically, it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then, not as against a *bona fide* purchaser. *Bean v. Smith*, *supra*, 274; *Wood v. Mann*, 1 Sum., 509; *Bump on F. C.*, 451. The operation of the lien of a judgment, being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed, by which a creditor may attack a conveyance, fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy, or any other act directed against the specific property. It is the creature of the statute, and cannot have effect beyond it. *In re Boyd*, 4 Saw., 268-270. By that, its operation and effect are restrained to the property then owned by the debtor. But the conveyance from *Estes* to *Cole* deprived the former of all interest in this property. No judgment against *Estes*, nor any act of his, could reach it or affect it.

Therefore, when the judgments of these joint creditors were obtained and docketed, the property did not belong to him, and was not for that reason within the operation of their liens. On the contrary, it belonged to *Cole*, qualified by the right of the creditors in the manner and time prescribed by law, to subject it to the payment of their debts. In the suit against *Cole* to set aside this fraudulent conveyance, the assignee represented the creditors. *Bradshaw v. Klein*, 2 Biss., 20.

§ 1023. *The proceeds of sale of the individual property of a partner are individual assets, and must be first applied to the payment of the individual debts of such partner.*

It is also claimed by the assignee that the fund obtained by that suit—the proceeds arising from the sale of the property—is equitable assets, and should be distributed equally among the creditors, citing *Silk v. Prime*, and notes, 2 Lead. Cas. Eq., 82; *Benton v. Le Roy*, 4 Johns. Ch., 551. But this distribution was subject to any specific legal lien or priority that might exist in favor of any creditor. *Purdy v. Doyle*, 1 Paige Ch., 558; *Codwise v. Gelston*, 10 Johns., 522. In this last case, Chancellor Kent says: "If a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail themselves of it, the rule of equity then is, that they shall be paid *in pari passu*, or upon a footing of equality. But when the law gives priority, equity will not destroy it, and especially where legal assets are created by statute, they remain so, though the creditors be obliged to go into equity for assistance."

But it is not necessary to invoke the doctrine of equity in this case, as the bankrupt act preserves all legal liens, and furnishes a certain and just rule for the distribution of the assets of a partnership and the members thereof. R. S., secs. 5075, 5121. By this rule the property of the partnership is to be first applied to the payment of partnership debts, and the property of each member thereof to the payment of his individual debts. Whether the proper ap-

plication of this rule would exclude the lien of a judgment obtained against the members of the firm for a partnership debt, from the property of the individual partner, as contended by counsel for the assignee, it is not necessary now to consider.

Having arrived at the conclusion that none of the judgments in this case was a lien upon the property in question, the proceeds of the sale are individual assets, and under the bankrupt act, must be first applied to the payment of Estes' individual debts; and it is so ordered. (a)

§ 1024. In general.—The relief awarded to judgment creditors in equity against fraudulent conveyances is founded upon the fraud attempted against a lien already attached to the land, or because of the assignment with fraudulent intent to prevent the lien from attaching; and equity consequently gives the full remedy which could have been obtained through the lien by execution, but without referring the matter to the action or process of a court of law. For having acquired jurisdiction because of the fraud, chancery will apply the property, fraudulently conveyed, to the satisfaction of the prosecuting creditor, pursuant to its own methods of proceeding. Its action upon the fraudulent grantor or assignee is only to the extent of supplying a remedy to the suitor creditor; as to all other parties, the assignment remains as if no proceedings had been taken. *McCalmont v. Lawrence*,* 1 Blatch., 232.

§ 1025. Chancery has jurisdiction on a bill filed by a judgment creditor for relief against a conveyance of land by his debtor, made with intent to defeat the judgment lien, or to hinder or delay satisfaction of the judgment, whether execution has been issued thereon or not. *Ibid.*

§ 1026. In California, a conveyance in fraud of creditors may be treated by a judgment creditor as a nullity; and by docketing his judgment he acquires a lien on the property fraudulently conveyed, the title as to him being regarded as remaining in the debtor. *In re Beadle*, 5 Saw., 351.

§ 1027. Oregon.—It seems that section 268 of the civil code of Oregon, making a conveyance void as against the lien of a judgment unless recorded within five days after its execution, does not produce this effect unless the lien is acquired in good faith, and without notice of such prior unrecorded conveyance. *United States v. Griswold*,* 7 Saw., 311.

VIII. RELIEF.

[Creditors' Bills, see EQUITY.]

§ 1028. Jurisdiction.—The courts of the United States have jurisdiction of a bill in equity by creditors to set aside a fraudulent conveyance by their debtor, independently of whether such equity jurisdiction could be sustained in the state courts. *Pratt v. Curtis*,* 2 Low., 87. As to Creditors' Bills, see EQUITY.

§ 1029. The circuit court of the United States has, under the judiciary act of 1789, jurisdiction of a creditor's bill by the United States, to subject to the payment of a judgment, property fraudulently conveyed by the debtor, where the matter in dispute is of the requisite amount. *United States v. Stiner*,* 8 Blatch., 544.

§ 1030. It cannot be objected to the jurisdiction of a circuit court of the United States over a suit between citizens of different states to set aside a conveyance as fraudulent as to the plaintiff as a judgment creditor, that the plaintiff is the assignee of a chose in action which could not have been recovered in said court if no assignment had been made, although the chose in action upon which the plaintiff's judgment was originally recovered might not, before the assignment of it to the plaintiff, have been recoverable in the circuit court of the United States in which the suit is brought. *Bean v. Smith*, 2 Mason, 252 (§§ 524-32).

§ 1031. The circuit court of the United States, as a court of equity, has jurisdiction of a bill by a judgment creditor to set aside a conveyance by the judgment debtor in fraud of creditors; and for this there is no adequate and complete remedy at law. That the state courts might afford the plaintiff some sort of remedy at law is no objection to the jurisdiction. *Ibid.*

§ 1032. Burden of proof.—In a proceeding to set aside a conveyance as fraudulent, where the facts disclosed create a strong doubt as to the integrity of the transaction, it throws upon the defendants the burden of explaining, where facts are within their knowledge. *Clements v. Moore*, 6 Wall., 299 (§§ 553-57).

§ 1033. When creditor's bill will lie.—The general rule is that a creditor cannot proceed to set aside a conveyance of real estate, either for actual or constructive fraud, unless he has

(a) Affirmed on appeal to the circuit court. *In re Estes*,* 5 Fed. R., 60; 6 Saw., 469.

a lien thereon, or has reduced his claim to judgment, and the fraudulent conveyance is an obstacle to a sale on execution. But this rule does not apply to a suit for such a purpose by the assignee in bankruptcy of the grantor. *Barker v. Barker*, 2 Woods, 87 (§§ 854-58). See *EQUITTY*.

§ 1034. As between the parties.—A fraudulent conveyance, though void as to creditors and purchasers, is valid as between the grantee and grantor and their heirs and representatives. *Lenox v. Notrebe, Hemp.*, 251.

§ 1035. If a deed is made to defraud creditors, a court of equity will leave the parties to it where it finds them, and will not grant them relief in respect to it. *Kinney v. Consolidated Virginia M. Co.*, 4 Saw., 882.

§ 1036. As between the parties to a fraud, a court of equity will not interfere. But the court will interpose in behalf of creditors, and for their benefit, to reach property which has been fraudulently covered, and unjustly withheld from them. *Odenheimer v. Hanson*,* 4 McL., 487.

§ 1037. Measure of relief.—If a conveyance is made with intent to defraud a creditor, such creditor is entitled to whatever remedy by judgment, execution, and the sale of property, he would have enjoyed if no such conveyance had been made. *Burdick v. Gill*,* 2 McC., 486.

§ 1038. The statute of limitations runs in favor of an innocent grantee who enters and holds possession under a fraudulent conveyance made to him. *Gregg v. Sayre*, 8 Pet., 244.

§ 1039. Parties.—In a suit by a judgment creditor to set aside as fraudulent and void a conveyance of land by the judgment debtor, the latter is a proper party, and his citizenship must be made to appear in such a manner that the court can take jurisdiction as to him. *Gay-lords v. Kelshaw*, 1 Wall., 81.

§ 1040. Creditor's bill—Validity of judgment.—On a bill by a judgment creditor to set aside a conveyance by the judgment debtor as fraudulent and void, the validity of the judgment cannot be questioned. *Mattingly v. Nye*, 8 Wall., 370 (§§ 862-63).

§ 1041. Following proceeds.—The proceeds of property conveyed to the wife in fraud of the creditors of her husband can be followed up for the benefit of such creditors. *Sedgwick v. Place*, 12 Blatch., 163.

§ 1042. Under prayer for general relief.—On a bill filed in aid of an execution levied, alleged fraudulent conveyances may be held void under the prayer for general relief, and a receiver may be appointed to sell the property. *Cleveland v. Railroad Co.*,* 7 Am. L. Reg. (O. S.), 541.

§ 1043. A personal judgment cannot be taken against a wife or her executors, at the suit of her husband's assignee in bankruptcy, for the value of property conveyed to her by him in fraud of his creditors. *Trust Co. v. Sedgwick*, 7 Otto, 804.

§ 1044. Injunction and receiver.—Upon a return unsatisfied of an execution in equity under a decree adjudging the defendant guilty of defrauding his creditors, the creditor is entitled, upon a bill filed with appropriate allegations, to an injunction, the appointment of a receiver, and an assignment from the debtor, if it appears that he is fraudulently disposing of and secreting his property to avoid the payment of the decree. *Shainwald v. Lewis*, 7 Saw., 148.

§ 1045. Return nulla bona.—In a proceeding by creditors to set aside a conveyance by their debtor as fraudulent, the court will not go back of the marshal's return declaring that the defendant has no personal property. *United States v. Lotridge*,* 1 McL., 246.

§ 1046. An assignee in bankruptcy may as a general rule maintain a suit to set aside any conveyance by the bankrupt in fraud of creditors. *Pratt v. Curtis*,* 2 Low., 87.

§ 1047. Default of debtor.—In a suit by a creditor to subject property held by the wife of the debtor to the payment of his debts, upon the ground that it is held by her in fraud of his creditors, the default of the debtor in not answering is not to be taken as evidence against the wife. *Dick v. Hamilton*,* Deady, 322.

§ 1048. Consideration of claim.—A court of equity may look into the consideration of a judgment creditor's claim in order to moderate it, where he comes in to set aside a fraudulent conveyance by his debtor. *Bean v. Smith*, 2 Mason, 252 (§§ 524-32).

§ 1049. Court may order reconveyance.—It is competent for chancery to order the assignee of real estate fraudulently conveyed to him to reconvey it to the assignor in order that execution may act upon it, or to order him to convey it to the proper officer of the court, or otherwise, so as best to effect its appropriation in satisfaction of the judgment debt. An order directing the assignee and the assignor to join with the officer of the court in executing conveyances to purchasers under a sale directed by the court, is appropriate and valid. Such a title is full and perfect for all the interests the assignee and the judgment debtor had in the lands transferred by the assignment, and is discharged of all right of redemption by him or other judgment creditors. A purchaser at such a sale cannot therefore refuse to complete his purchase on the ground that there are other judgment creditors who did not join in the action, and may be compelled to complete his purchase, or pay the difference on a resale. *McCalmont v. Lawrence*,* 1 Blatch., 232.

§ 1050. A judgment against an administrator is evidence against a fraudulent grantee of the intestate debtor, on a bill in equity charging fraud in the administrator and the grantee. *McLaughlin v. Bank of Potomac*, * 7 How., 220.

§ 1051. Pleading.—A bill in equity against an administrator and his surety to subject the lands of the intestate to the payment of his debts, charging such surety as a fraudulent grantee of the intestate of these lands, is sufficient without a direct averment of the exhaustion of the personal assets, where it alleges a waste of the personal estate, and that the claim cannot be made on that account, if, at the hearing, the fraud is substantiated, and the personal assets are proved to be wasted or insufficient. *Ibid.*

§ 1052. Diligence of creditors.—The creditor who first institutes a suit in chancery to avoid a fraudulent conveyance is entitled to relief, without regard to other creditors standing in the same right, but who have not made themselves joint parties with him. *McCalmont v. Lawrence*, * 1 Blatch., 232.

§ 1053. A receiver appointed under the New York practice, in proceedings supplementary to execution, is not, by virtue of his appointment, vested with the title to property which the debtor has conveyed in fraud of creditors. Such fraudulent transfers are no more absolutely void as against such receiver than against the judgment creditors themselves. They are voidable only when assailed at the election of the creditor or receiver, in an action brought to set them aside. If bankruptcy proceedings intervene before he brings such an action, his right to bring it is cut off. *Olney v. Tanner*, * 10 Fed. R., 101.

FRAUDS AND PERJURIES.

See CONTRACTS, VIII.

FRAUDULENT CONVEYANCES.

See FRAUD. Under the Bankrupt Law, see DEBTOR AND CREDITOR, p. 626.

FREIGHT.

See CARRIERS; INSURANCE; MARITIME LAW.

FRENCH GRANTS.

See LAND.

FUGITIVE SLAVE LAW.

See SLAVERY.

FUGITIVES FROM JUSTICE.

See CRIMES, XXXV.

FURTHER PROOF.

In Prize Cases, see WAR.

GAMING AND LOTTERIES.

[See CONTRACTS, §§ 589-596, 700-749, 1096. Also consult indexes to CONSTITUTION AND LAWS and CRIMES.]

SUMMARY — *Lotteries*, § 1.— *Wagers; valid at common law*, § 2.— *Wager on the result of an election, void*, §§ 3-5.

§ 1. A scheme for selling town lots, by which every purchaser of a ticket becomes the owner of a lot which he draws by chance, and has in addition the chance of drawing a valuable prize, is a lottery. *United States v. Olney*, §§ 6-8.

§ 2. The general rule is that a fair wager may be recovered at common law. There are exceptions to the rule. *Fleming v. Foy*, §§ 9, 10.

§ 3. A wager on the result of a presidential election is void, though neither of the parties was qualified to vote at the election. If either of the parties was qualified to vote, it is clearly settled that the wager would not be enforced in a court of law. *Denney v. Elkins*, §§ 11-13.

§ 4. A note made between two residents of the District of Columbia, on a wager that Andrew Jackson would not obtain the electoral vote of the state of Kentucky for president of the United States, was held void. *Ibid.*

§ 5. It is suggested, also, that such a contract might be held void on the ground that it tends to draw into question, in a judicial tribunal, the validity of the election of the chief magistrate of the nation, and to require the production of evidence which it might be inconvenient, if not improper, for the government to furnish. *Ibid.*

[NOTES.— See §§ 14-36.]

UNITED STATES v. OLNEY.

(District Court for Oregon: 1 Abbott, 275-284; Deady, 465. 1868.)

The facts appear sufficiently in the opinion.

Opinion by DEADY, J.

This action is brought to recover the sum of \$100, alleged to be due the United States from the defendant as a special tax for engaging in the business of lottery dealer. It was commenced October 17, 1867, and tried by the court without the intervention of a jury on November 13 thereafter, and has since been continued from term to term for deliberation and advisement. The law imposing this tax is found in subdivision 6 of section 79 of the Internal Revenue act of June 30, 1864, as amended by the act of July 13, 1866, 14 Stat. at L., 116, which reads as follows:

"Lottery ticket dealers shall pay \$100. Every person, association, firm, or corporation which shall make, sell, or offer to sell lottery tickets or fractional parts thereof, or any token, certificate or device representing or intending to represent a lottery ticket, or any fractional part thereof, or any policy of numbers in any lottery, or shall manage any lottery, or prepare schemes of lotteries, or superintend the drawing of any lottery, *shall be deemed a lottery ticket dealer.*"

§ 6. *Meaning of the word "lottery."*

The statute imposes a tax upon a dealer in lottery tickets and also declares who shall be deemed such dealer, but it does not define or limit the signification of the word *lottery*. A person, to be liable as a dealer in lottery tickets, must in some of the modes or instances mentioned in the statute be engaged in the preparation, conduct, or management of a *lottery*, so that the liability of the defendant turns upon the question, What is a lottery? The answer to this question must be found in the meaning of the word as established by usage and authority. I assume, with the argument for the defendant, that the legal and popular meaning of the term coincides, and that it is used in the statute according to its primary and general acceptance. Indeed, I am not aware that the word has any technical or peculiar significance.

The word "lottery" is defined and used as follows by lexicographers and writers:

"A distribution of prizes and blanks by chance; a game of hazard in which small sums are ventured for the chance of obtaining a larger value either in money or other articles." Worcester's Dic.

"A disposition of prizes by lot or chance." Webster's Dic.

"A scheme for the distribution of prizes by chance." Bouvier's Dic.

"A kind of game of hazard, wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate." Rees. Cyclopædia.

"A sort of gaming contract by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks." American Cyclopædia.

"That the chance of gain is naturally over-valued, we may learn from the universal success of lotteries." Smith's Wealth of Nations, b. 1, c. 10.

All these authorities agree that where there is a distribution of prizes — something valuable — by chance or lot, that this constitutes a lottery. But the definitions from Worcester and the American Cyclopædia are the most complete. From each of these it expressly appears that a valuable consideration must be given for *the chance* to draw the prize.

§ 7. *A scheme to sell town lots by tickets on which the holder would have the chance of drawing a prize is a lottery, although such purchaser would also receive a lot of land.*

Tried by this standard, it is manifest that the scheme prepared and carried out by the defendant for the sale and distribution of these town lots was a lottery. True, the purchasers of tickets or shares were in any event to get something — at the least a lot, for the purposes of this scheme *estimated* to be worth \$50. But it is not probable that any one would have purchased a ticket if it was certain that he would have received nothing in return but one of these so-called fifty dollar lots. If the first three hundred lots could have been sold for \$50 each on account of their market value, certainly the defendant would not have been improvident enough to put the other three hundred prize parcels into market at the same price, while their actual value was from \$100 to \$5,000 each. This is neither reasonable nor probable.

The *chance* of obtaining \$5,000 for \$50 was the enticing object which the scheme held up to the public as an inducement to purchase the shares, and this "chance of gain," upon which depends "the universal success of lotteries," was to be determined by lot. This scheme has all the attributes and elements of a lottery. It is a distribution by lot of a certain number of prizes among twice the number of persons; and that, too, of prizes very unequal in value. The certificate of purchase issued by the defendant to each purchaser is a ticket which entitled the holder to the chance of drawing a prize of from two to one hundred times the value of the price of the ticket. It is evident that the first three hundred lots could not have been sold by any ordinary method at \$50 each, *if at all*. This is also probably true of many of the prize parcels. Whatever may have been their intrinsic or future value, the evident aim of the scheme was to sell them for more than their market value, and this was to be accomplished by an appeal to the universal passion for playing at games of chance. The purchase of the ticket and the payment of \$50 was made for the *chance* of obtaining one of the prize parcels, represented to be worth many times that sum.

This was a lottery according to the common acceptance of the word. It

was a lottery within the definitions in the dictionaries. It matters not, even if the purchaser was to receive the *full value* of his money in any event. As a matter of fact, the money was paid for the chance of the prize also, and would not have been paid without this inducement. The sale of the ticket by the defendant gave the purchaser this chance to obtain something more than he paid for. This was dealing in lottery tickets within the purview of the revenue act.

The argument of the defendant assumes that the purchasers of the property bought six hundred parcels in common, and after thus becoming the owners of the same, adopted this method of distributing or dividing it among themselves. If persons *already* owning family plate, pictures, or other property, not susceptible of division, or even equal division, choose to distribute by an appeal to lot what has thus come to them *before* they had any scheme of so distributing it, they are not within the definition of a lottery, nor liable to this special tax. They have not given a valuable consideration for *the chance* of obtaining something of much greater value — a prize.

The argument of the defendant is ingenious and plausible, but it is based upon an incorrect assumption. It ignores the fact — the mainspring of the whole transaction — that the tickets were sold and purchased for the avowed purpose of giving to each of the purchasers *a chance* to obtain a prize parcel by means of this subsequent allotment. The division by lot was not an after-thought of the purchasers, but a prominent part of the original scheme of sale and distribution as prepared by defendant. No purchaser bought any particular lot or parcel, or any undivided interest in the whole property. Each purchaser bought the right to have, by allotment, one of the three hundred lots, estimated to be worth \$50 each, and the chance of obtaining instead of such lot one of the three hundred prize parcels, represented to be worth from \$100 to \$5,000. The chance of obtaining one of these prizes, and even the most valuable one, rather than the fifty-dollar lot, induced the purchaser to buy, and enabled the defendant to sell, the certificate of purchase. Indeed, the sale of the first three hundred lots, in three hundred parcels, for \$50 each, upon the condition that they should be distributed among the purchasers by lot, would itself be a lottery, unless the lots were *in fact* of equal value, which is very improbable.

The case is in almost every respect the counterpart of the celebrated case of the American Art Union, decided in New York in 1852. The scheme of the Art Union was that by paying \$5, any person could become a subscriber, and entitled to an engraving and certain numbers of The Bulletin containing the proceedings of the society, and the *chance* of obtaining one of a number of valuable paintings which in December of each year were to be distributed by lot among the members. The drawing was to be conducted precisely as in this case, by placing the name of the subscriber in one box and the name of the painting in another. A number being drawn from the latter box, a name was drawn from the former one, and the person whose name was thus drawn was to be the owner of the prize represented by that number.

The supreme court decided that this was a lottery. 13 Barb., 577. The case was then taken to the court of appeals, and argued on behalf of the Art Union with great ability. The court of appeals affirmed the decision of the supreme court that the scheme was a lottery. 7 N. Y., 3 Seld., 228. The proceeding in the New York courts was to enforce the forfeiture of the property proposed to be distributed by this scheme, and the case turned upon the construction or

interpretation of the word "lottery" in the prohibition contained in the constitution of the state: "No lottery shall hereafter be authorized in this state."

§ 8. *Revenue law not to be strictly construed.*

This action is simply to enforce the collection of a tax imposed by the United States upon all lotteries. A revenue law is not to be strictly construed, but rather the contrary, so as to attain the ends for which it was enacted. With the policy or impolicy of allowing lotteries the revenue act does not interfere. It simply provides for taxing them, whenever and wherever they in fact take place. They are specially and heavily taxed, not for the purpose of encouraging or prohibiting them, but upon the same ground that many other special taxes are laid; because, as a rule, it is well known that their owners and managers receive from the public large gains, without giving any equivalent therefor. Keeping this end in view, it is apparent that the revenue act ought to be so construed as to include every case of the distribution of property or money which contains the essential elements of a lottery, the payment of a valuable consideration for *a chance of obtaining by lot something more valuable in return.*

It is true the defendant may have engaged in this scheme without any thoughts of becoming a dealer in what the law deems lottery tickets. Indeed, other motives than actual gain may have induced him to make the sale and distribution that he did. In the prospectus of the scheme, published by him, he asks the question: "Why is this property put into a raffle at prices which average less than half the selling rates?" and answers it as follows: "Only because the sale to citizens, for actual improvement, at full prices, at the rate of three to five thousand dollars a year, on time, as heretofore, is no longer adapted to the circumstances of the proprietor, who has become an invalid, and must hasten to complete the improvements and enterprise which he has in hand."

But even upon this mild view of the scheme, for the purpose of taxation it must be considered, or rather *is*, a lottery. By it many persons are induced to buy property which has no *present market value*, and which they otherwise would not purchase at any price, because there is set before them *the chance of obtaining by lot a certain prize or piece of property of much greater value than the consideration advanced.*

Let judgment be given for the plaintiff for the sum demanded in the complaint, and the costs and expenses of the action. Judgment accordingly.

FLEMING v. FOY.

(Circuit Court for the District of Columbia: 4 Cranch C. C., 423-426. 1834.)

STATEMENT OF FACTS.—This is an appeal from a judgment of a justice of the peace against Fleming, and founded on a writing in the following form:

"September 24th, 1832. I agree to pay Mr. M. Foy \$20 if your colour man did not execute my thre springs of my carrage all to gether moening the four springs.

JOHN FLEMING.

"MR. A. RUSSELL."

Opinion by CRANCH, J.

This is understood to be a wager, and that a correspondent writing was given by M. Foy, and that the two promises were mutual considerations to each other.

§ 9. *Authorities examined as to the validity of wagers.*

Mr. Morfit, for the defendant (the appellant), contends, that no wager can be recovered at common law, and cites the following cases, to wit: *Smith v. Ary*, 3 Salk., 175, in which the court held that *indebitatus assumpsit* would not lie upon mutual promises, because debt would not lie. But no objection was made upon the ground that the wager was unlawful; or that it was a gaming transaction, although it was for money won at play. The case turned entirely upon the form of action; it is, therefore, rather against the point for which it is cited.

Eggleton v. Lewin, 3 Salk., 176 (2 Annæ). *Indebitatus assumpsit* for £20, won at cards. Upon a writ of error, "the error assigned was, that a *general indebitatus assumpsit* would not lie for money won at play; and the greater number of judges inclined that it would; but Holt, C. J., and Pollexfen, C. J. of C. B., that it would not, because there must be some meritorious act as a consideration to maintain such action; it will lie against him who holds the wager, because the law implies a promise to deliver the money to the winner." This case also was decided upon the form of the action, and is against the point for which it was cited. It was before the 9th of Anne, and after the 16th of Car. 2, which only prohibited wagers to the value of £100.

Amory v. Gilman, 2 Mass. Rep., 5, was upon a policy of insurance; and the opinion of the court was, that a policy without interest was void; and the reason is expressed in *Goddart v. Garrett*, 2 Vern., 269, "that these insurances are made for the encouragement of trade; and not that persons unconcerned in trade, nor interested in the ship, should profit by it." The court expressed no opinion respecting the validity of wagers in general, but confined their remarks to wager policies of insurance. The case, therefore, is not in point.

Good v. Elliot, 3 T. R., 693. This was an action upon a wager that Susanrah Tye, had, before a certain day, bought a wagon belonging to D. Coleman. After verdict for the plaintiff, there was a motion in arrest of judgment, upon the ground that all wagers are illegal where the party has no other interest in the subject-matter of them than that which he chooses to create by his bet. This case is cited for the opinion of Mr. Justice Buller, which was overruled by the three other judges. Mr. Justice Grose said, "In thus stating the proposition, it seems admitted that some cases are legal; and, indeed, it cannot, after the different authorities which have been decided, be doubted;" "and that after the cases which have been determined, to say that this action cannot be maintained would be to make law and not to interpret it." Mr. Justice Ashhurst said: "As to the general ground, namely, whether an action will lie on any wager, that question does not now appear open to argument, it having been settled by so many authorities, both ancient and modern, particularly in the case of *Da Costa v. Jones*; and Lord Kenyon, C. J., said, "I have not entertained the least doubt upon this question, from the time it was argued down to the present moment." "Now, in order to know what the law has said upon this subject, let us trace it back, and it will be found that, from the earliest times, the books all speak the same language." And again he says, "From the earliest times, therefore, down to the case of *Da Costa v. Jones*, there appears to have been no doubt on the subject."

And in that case, "Lord Mansfield said, that indifferent wagers upon indifferent matters, without interest to either of the parties, are allowed by the law of this country, so far as they have not been restrained by particular acts of parliament; and the restraint imposed in particular cases supports the gen-

eral rule." And again, Lord Kenyon says, "Being bound by former decisions; not having the power to alter the law; not finding any one case against the legality of wagers in general; and finding cases without number wherein wagers have been held to be good, and that the payment of them may be enforced, I think the wager in the present case good at common law."

Robinson v. Mearns, 6 Dow. & Ry., 26. This was an action for money had and received, brought to recover back a sum of £20, which had been deposited by the plaintiff in the hands of the defendant as stake-holder upon a wager on the event of a horse-race. After the race, there being a dispute between the parties as to which horse had won, the plaintiff demanded his deposit. After verdict for the plaintiff, leave was given to the defendant to move for a nonsuit; and one ground taken was, that the wager itself was illegal and void, and no action could be maintained respecting it.

It was admitted that the wager was illegal; and the verdict was sustained "on the ground that it" (the money) "was demanded before it was paid over, the wager itself being illegal." But Holroyd, J., said, "Upon looking into the authorities, it will be found that the right of the party to recover back the deposit paid on a wager does not depend upon whether the wager be illegal and void, or whether it be won or lost; but upon whether the stake-holder has received it upon an illegal consideration; for if he has, he is bound to refund it."

This case, we suppose, is cited because it admits that a wager of £20, upon a horse-race, is illegal; and the conclusion drawn from it is, that all wagers are, at common law, illegal. But no such conclusion can be drawn, because a wager for more than £10 upon a horse-race is void by the 9th Anne, ch. 14, taken in connection with 16 Car. 2, ch. 7, as decided in the cases of *Goodburn v. Marley*, 2 Str., 1159; *Lynal v. Longbotham*, 2 Wils., 36, and *Blaxton v. Pye*, 2 Wils., 309. On the contrary, the statute which makes void the wager is evidence that it was not void at common law.

§ 10. *A fair wager may be recovered at common law; but there are exceptions to the rule.*

But it is said that the earliest case cited in *Good v. Elliot* was that of *Andrews v. Hearne*, 1 Lev., 33, in the twelfth year of Charles 2d, Anno 1660, and that prior to that time the law was otherwise. But there is no case to the contrary, and Lord Kenyon says that the law was so from the earliest times. It has also been said, that we took the common law as it existed and had been expounded at the time of the first emigration to Maryland, namely, in the year 1633, the date of the charter, which was twenty-seven years before the case of *Andrews v. Hearne*; so that that case is no authority here. If cases made the law, instead of being merely evidence of the law, this would be true; but a recent case is as good evidence of what the common law, in a like case, was one hundred years ago, as it is of what the common law now is; and such has been the prevailing opinion in Maryland, whose courts have, up to the present time, considered the decisions of the English courts as evidence of the common law in cases in which it has not been authoritatively adjudged otherwise in the courts of Maryland.

In regard to wagers in general, the cases which have been cited have generally been considered, in the United States, as settling the law. This court has so considered them; and in the case of *Denney v. Elkins*, at May term, 1831, in this court [4 Cr. C. C., 161; §§ 11-13, *infra*], the law respecting wagers in general was considered as settled; and that case was decided upon that ex-

ception to the general rule which condemns wagers against the public policy of the country in regard to the freedom of elections. The general rule is, that a fair wager may be recovered at law. To this rule there are exceptions, as stated in the case of *Good v. Elliot*, 3 T. R., 693. The wager in the present case, however, does not come within any of the exceptions. Judgment affirmed, with costs.

DENNEY v. ELKINS.

(Circuit Court for the District of Columbia: 4 Cranch C. C., 161-167. 1831.)

Opinion by CRANCH, J.

STATEMENT OF FACTS.—This is an appeal from the judgment of a justice of the peace in a suit brought by the appellee against the appellant upon a promissory note given by the appellant to the appellee, upon a wager that Andrew Jackson would not obtain the electoral vote of the state of Kentucky for the office of president of the United States. The note was made in the District of Columbia, in October, 1828, and before the electoral vote was given; the appellee and the appellant being, at the time of the wager, both residents and citizens of the District of Columbia, and neither of them having a right to vote in the election of electors for president in any part of the United States. It is objected that the note is void, because the wager was illegal, as being contrary to the principles of public policy upon which our elective governments are founded.

If the parties, or either of them, had been qualified to vote at the election, it is clearly settled that the wager could not be enforced by a court of law. The only doubt, in this case, arises from the fact that neither of the parties was qualified to vote at that election. It is contended that the reasons, given by the courts which have decided such wagers to be illegal, rest mainly on the ground that one of the parties, at least, was a legal voter.

§ 11. *Cases examined as to the validity of wagers on the result of elections.*

There is a case cited in the books from 1 Lev., 33 (*Andrews v. Herne*), where a wager was laid "that Charles Stuart would be king of England within twelve months next following," he being then in exile. After verdict for the plaintiff, it was moved in arrest of judgment, that there was no consideration; for he was king of England at the time of the promise. But the court said that the consideration was good; for the words must be taken according to the subject-matter; and that being out of possession at the time of the promise, it must be understood to be, that if the king shall be in possession within twelve months.

No objection was made that it was against public policy, nor was any intimation of such an objection made by the bar or the bench. It is therefore a case not at all applicable to the present question; unless the absence of the objection may be considered as an argument against its validity. But Mr. Justice Buller, in *Good v. Elliot*, 3 T. R., 697, said, he presumed no one would say that an action could now be maintained on any bet of that kind. The principle, that a wager against public policy is void, has been, since, conclusively established; and the question, now, in all these cases, is, whether the circumstances of the case bring it within the general principle. In the case of *Jones v. Randall*, Cowp., 39, Anno 1774, Lord Mansfield said, "many contracts which are not against morality are still void, as being against the maxims of sound policy." But, in considering whether the wager in that

case (which was, "whether a decree of the court of chancery would be reversed on appeal to the house of lords") was void because contrary to the principles of morality, he puts the case of a person who was a candidate for a bishopric laying a wager, with a person of great influence at court, that he would not have the bishopric. So he says that if, in the case then before the court, the wager had been made with one of the judges, or one of the lords, it would have been a bribe; or, even, if it had been a wager laid with the attorney or counsel in the cause. The court was of opinion, that the wager was neither against morality nor public policy. But, in delivering the opinion of the court, Lord Mansfield said, "But it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall in with the one or the other of them."

The case of *Allen v. Hearn*, 1 T. R., 56, was upon a wager between two voters with respect to the election of a member of parliament. The bet was made before the poll began. This wager was adjudged illegal, as being against public policy. The case of *Jones v. Parry*, cited in 1 T. R., 58, 59, was a bet upon the Bristol election, and was tried before Lord Mansfield at Guildhall. There it did not appear whether the parties were voters or not; for the moment Mr. Wallace had opened the case, Lord Mansfield thought it was a color for bribery, and nonsuited the plaintiff.

In the case of *Allen v. Hearn*, 1 T. R., 59, Lord Mansfield said, "whether this wager had any other motive than the spirit of gaming and the zeal of both parties, I do not know; but this question turns on the species and nature of the contract; and if that, in the eye of the law, is corrupt and against the fundamental principles of the constitution, it cannot be supported by a court of justice. One of the principle foundations of this constitution depends on the proper exercise of this franchise; that the election of members of parliament should be free; and particularly that every voter should be free from pecuniary influence in giving his vote."

The case of *Atherfold v. Beard*, 2 T. R., 610, was upon a wager, whether the Canterbury collection of the duties upon hops in 1786 would exceed that of 1785. In that case, Mr. Justice Ashhurst said, "Now I am of opinion that the present case falls within the principle of those which have been determined not to be good. The courts have said that wagers should not be allowed which, in the event, may have an influence upon the public policy of the kingdom. On this principle, a wager on the event of an election for members to serve in parliament was held to be illegal because the persons laying the wagers were interested in altering the free course of election. The present wager, also, appears to me to fall under the same class of objection, because it is against the same policy of the kingdom." "The plaintiff's counsel have admitted that the officers of excise were not bound to produce the public books. Now that goes the whole length of determining this cause; for if the wager be such that the best evidence by which it must be proved is improper to be admitted, that circumstance shows that the wager is in itself illegal."

Mr. Justice Buller, in the same case, said, "This is the case of an idle wager

between two persons who have no concern in the subject, to draw into question a matter that respects the interest and general importance of the country; and on that ground I think the wager illegal. I do not find that it has been established as a position of law, that a wager between two persons not interested in the subject-matter, is legal. But this wager could not be proved without searching the books relating to the revenue of the country; and I am glad to find that in the only two cases where this question has arisen at *nisi prius*, Lord Mansfield and my brother Ashhurst were both of opinion that the officers were not bound to produce the revenue books."

It may be observed that although in that particular case (*Atherfold v. Beard*), the defendant had confessed that he had lost the wager, and therefore it was not necessary to produce the revenue books in evidence, yet, as the books would have been the best evidence, and must have been produced to support the action, if the fact had not been admitted by the defendant, and as public policy prohibited the production of those books, the court thought that circumstance conclusive of the illegality of the wager. It was observed, also, by Mr. Justice Buller, that "what Lord Mansfield said in the case of *Murray v. Kelly* was applicable, when he said that that wager was good because it was on a private event; from whence it is to be inferred that, in his opinion, it would have been void had it been on a public event."

The principle upon which the case of *Atherfold v. Beard* was decided was, that the wager was against the public policy of the kingdom; and it was against the public policy because it brought into discussion, in a judicial tribunal, at the will of individuals having no particular interest in the subject, matters concerning the public revenue which the government might think it improper to disclose, and which could only properly be discussed in parliament, and required the production of evidence which could be properly called for by parliament only. In the case of *Good v. Elliot*, 3 T. R., 699, Mr. Justice Buller said, "I take it to be agreed by my brethren, from whom I have the misfortune to differ, that if the wager concern the interest of the public, or impute a crime or disgrace to another person, it is void, and cannot be made the subject of an action." And in p. 700 he says, "it is established, that if the action lead to improper inquiries, it may be stopped *in limine*." The same point was afterward adjudged by the common pleas in *Shirley v. Sankey*, 2 B. & P., 130.

In the case of *Lacausade v. White*, 7 T. R., 535, the wager was whether articles forming the basis of a treaty of peace between England and France would not be signed before the 11th of September, 1797; and it was admitted that the wager was illegal; and no doubt on the same ground. In *Bunn*, plaintiff in error, *v. Riker*, 4 Johns., 426, the wager was between two voters, *Riker* and *Graham*, upon the event of the election of governor of the state of New York. *Riker* had voted the day before the wager; *Graham* had not, and probably was too far from the place where he was entitled to vote at that election. The defendant, *Bunn*, was the stakeholder; *Riker*, the plaintiff, was the winner of the wager. This wager was adjudged illegal upon the ground that it was against the principles of sound policy, because it involved an inquiry into the validity of the election of the chief magistrate.

Judge Van Ness observed, "It is enough that this wager may give birth to such a question, to pronounce it to be repugnant to the dictates of good policy. The discussion to which it gives rise ought to be discouraged, unless the public good, or the due administration of justice, renders it unavoidable. It is a

discussion calculated to endanger the peace and tranquillity of a community already sufficiently heated and agitated." The wager was also decided to be against sound policy because it created a corrupt interest in the voters themselves. Judge Spencer, however, although he admitted that a wager against public policy is void, did not concur in the opinion of the court that that wager was against public policy; because he thought that it could not bring into question the validity of the election, since the statute renders the decision of the canvassers conclusive and final; and because as Riker had already voted, and Graham was not in a situation where he could exercise his right of voting, the vote of neither could be influenced by the wager.

The principle of that case was confirmed in the case of *Lansing v. Lansing*, 8 Johns., 454, where the wager was upon the election of governor of New York, after the close of the poll, and each party deposited his note with a third person. After the event was known, the notes were delivered to the winner, who indorsed to the plaintiff the defendant's note after it was payable. The court said that the case was within the principle decided in *Bunn v. Riker*, that a bet involving an inquiry into the validity of the election of governor was void on principles of policy, and reversed the judgment which had been rendered below for the plaintiff.

In the case of *Vischer v. Yates*, 11 Johns., 23, the action was against the stakeholder to recover the money deposited by the plaintiff in a wager upon the election of governor. After the event of the election was generally known, but before the money was payable according to the terms of the wager, the plaintiff gave notice to the defendant not pay over the money. The court sustained the action upon the ground that the wager was against the principles of public policy. In that case the bet was made before the election, and all the parties were legal voters at the time of the election.

Kent, C. J., in delivering the opinion of the court, said: "In this case the parties referred to the decision of the canvassers as the true and only test of the determination of the bet; and that test had not been given when the money was demanded of the defendant; the risk had not been run and determined within the purview of the contract. This objection, however, was founded upon a strict construction of the contract; and, though it would be sufficient to avoid much of what was urged on the part of the defendant, yet we choose rather to place the decision of this case upon those great and solid principles of public policy which forbid this species of gambling, as tending to debase the character and impair the value of the right of suffrage." Although the judgment in that cause was reversed in the court of errors and appeals, yet it seems, by the opinion of the only senator whose opinion is reported, that it was upon the ground that the plaintiff, by depositing the money in the hands of the stakeholder, had executed the illegal agreement on his part, and could not recall it, because "*in pari delicto melior est conditio possidentis; and fieri non debet, sed factum valet.*"

§ 12. *A wager on the result of an election is void, though neither of the parties was qualified to vote at the election.*

The general principle, running through all the cases, is that a contract, which it would be contrary to the maxims of sound public policy to enforce, is void at law. It is one of the maxims of sound public policy in all elective governments, that elections should be pure and free. Any contract which would tend to substitute a corrupt for a patriotic motive to influence a vote, either directly or indirectly, would be contrary to that maxim. It is not

necessary that it should operate directly as a bribe to a voter. If it create a contingent pecuniary interest dependent upon the event of the election, it operates as a corrupt motive to influence that election; and whether the influence of the party be more or less, the violation of the principle is the same, and equally affects the validity of the contract. It is the nature and tendency of the contract, not the degree of mischief which it may effect, that decides its validity. Although the parties may not be qualified voters, yet their means of influencing the election may be very great. They may form themselves into clubs or committees, and by exciting the passions by holding up the promise of their influence in obtaining offices for those who seek them, or by denouncing those already in office, by circulating false reports, by hiring writers and printers to extol their candidate and slander his opponent, and by many other means, may have actually as much influence in the election as if they were themselves qualified voters.

The maxim, being founded on the tendency of the contract to produce the public mischief, must be as extensive in its operation as the mischief itself. This is one great advantage which common law has over statute law, that being bottomed upon the mischief, it follows it through all its forms; whereas statute law is confined to the cases which it describes. So far as the influence used in an election is prompted by a pecuniary motive, so far it is corrupt and in violation of the maxim that elections should be pure. No vote can be perfectly pure which is not given exclusively with a view to the public good. Nor can the use of corrupt means be justified by the belief of him who uses them, that the end is the public good.

We are, therefore, of opinion that the contract in question was contrary to the maxims of the public policy upon which our elective government is founded, and, therefore, void in law, although the parties themselves were not qualified to vote at the election.

§ 13. — *a principle of public policy suggested, on which the wager might be held illegal.*

There is another principle of public policy, also, which may, perhaps, render this contract void, namely: that it tends to draw into question, in a judicial tribunal, the validity of the election of the chief magistrate of the nation, and to require the production of evidence which it might be inconvenient, if not improper, for the government to furnish. Upon this point, however, the court is not so clear, and, therefore, rests its decision mainly upon the tendency of such contracts to introduce corruption into our elections. The judgment must be reversed, with costs.

§ 14. *Lotteries.*—The city of Washington after organizing a lottery, as it was authorized to do by act of congress, sold the whole of one drawing to one G. The drawing was managed and the supply of tickets to G. partially regulated by the board of managers appointed by the city. *Held*, that the city was liable to the holder of a ticket for the prize drawn by the ticket. *Clark v. Corporation of Washington*, 12 Wheat., 40. Reversing *Clark v. Corporation of Washington*,* 2 Cr. C. C. 502.

§ 15. The city of Washington being authorized to draw a lottery sold the profits of a drawing to G. G. sold half and quarter tickets, which were on their face agreements of G. himself and not of the corporation. Among the tickets the half of which was sold by G. was a ticket which drew a considerable prize. G. presented the ticket and obtained the prize, the corporation having no notice of the sale of the half ticket. In an action by the holder of the half ticket it was held that G. could not split up the contract and render the city liable, and that as the undertaking of the half ticket was that of G. alone, there was no liability on the part of the corporation. *Shankland v. Corporation of Washington*,* 5 Pet., 390.

§ 16. Although the act of a postmaster in detaining letters addressed to the secretary of a lottery company may be unauthorized because the statute forbidding such use of the mails omits to make any provision by which he may ascertain whether such letters contain unmailable matter or not, and though an action at law would lie for such detention, it does not follow that a court of equity will grant an injunction to restrain the postmaster from so detaining them. The writ does issue as a matter of course even though complainant has made out a technical right to relief. The issue of the writ is largely a matter of discretion and it will not be granted to aid a scheme which is against public policy. *Commerford v. Thompson*, 2 Flip., 611.

§ 17. The grant by legislative act of Virginia of 1839, of the privilege of raising money to repair a portion of a turnpike by a lottery, was not a grant of franchise, but a mere license, which, in the nature of things, was intended to be exercised at once, and a subsequent act limiting the time for the exercise of the same to six years was not unconstitutional as impairing the obligation of contracts. *Phalen v. Virginia*, 8 How., 163.

§ 18. The fact that irregularities occurred in the drawing of a lottery will not defeat an action to recover the amount of a prize drawn, where such irregularities did not affect the chances of the holders of the tickets. *Brent v. Davis*,* 10 Wheat., 395.

§ 19. Though the grant of a right to draw a lottery is not a contract, but a mere license which may be subsequently revoked by the legislature, yet where it has been acted upon and vested rights have accrued under it, the power of the legislature to recall or modify it is to that extent gone. Thus, where a lottery company, authorized by a state legislature to sell lottery tickets during a period of twenty-five years, and required to pay quarterly to the state auditor the sum of \$10,000, and to give bonds with sureties for the punctual payment of such sums, did for a period of ten years fulfill all its obligations under its charter, made the payments and gave the bonds required, and had collected a large capital, established agencies, purchased buildings, and made large expenditures in its business, and had paid heavy charges and losses on the same on the faith of its charter, an act repealing the same was held unconstitutional as impairing the obligation of a contract. *State Lottery Co. v. Fitzpatrick*, 8 Woods, 222.

§ 20. The charter of a lottery company is not a franchise, and its subsequent repeal does not impair the obligation of a contract. The regulation and control of such a business is a part of the police power of the government, which it is not competent for the legislature to bargain away. *Stone v. Mississippi*, 11 Otto, 814.

§ 21. A distribution by drawing lots of a number of parcels of land for a uniform price for each parcel, though some of them are of much less, and some of much greater, value than the uniform price paid, is a lottery. *Ridgeway v. Underwood*, 4 Wash., 129.

§ 22. The first and second sections of the act of February 15, 1797, of New Jersey, prohibited lotteries as nuisances, and provided penalties for erecting one in that state. The third section punished the selling of tickets in any lottery, whether erected in that state or elsewhere. The fourth section enacted "that every conveyance or transfer of any goods or chattels, lands or real estate, which shall be made in pursuance of any such lottery shall be invalid and void." Held, that the words "any such lottery" referred to the third section as to lotteries, whether erected in that state or elsewhere, and invalidated the transfer of real estate situated in that state by means of a lottery in another state, though the same might there be lawful. *Ibid.*

§ 23. A statute, authorizing a certain firm to receive subscriptions, "and to sell and dispose of certificates of subscription which shall entitle the holders thereof to such prizes as may be awarded to them, which distribution of awards shall be fairly made in public by casting of lots, or by lot, chance, or otherwise, in such manner as to them may seem best to promote the interest of the school fund," etc., will be strictly construed and will not be held to authorize the running of a roulette table. *Aicardi v. State*, 19 Wall., 635.

§ 24. Wagers.—Some wagers are valid, but it seems that all gaming contracts are void. The distinction seems to be made on those wagers which are against public policy and good morals. *Harding v. Walker*,* Hemp., 53.

§ 25. Under the statute of Michigan, money lost by betting on a horse-race and paid, may be recovered in an action by the loser against the winner. *Grant v. Hamilton*,* 3 McL., 100.

§ 26. At the common law, where there was no concealment or fraud, a wager was recoverable. *Ibid.*

§ 27. An action under a state statute, to recover back money lost on a wager, is not an action to enforce a penalty, and may be brought in the federal courts. *Ibid.*

§ 28. A wager upon the event of a trial is void at law, and the fact that a witness has been provoked to make such a bet will not render him incompetent, though the circumstances attending the wager must go to his credit. *United States v. Carrico*, 5 Cr. C. C., 113.

§ 29. A note given for value received, which by its terms is payable to the payee when a certain person is elected to congress, is a wager upon an election, and is void as against public policy. *Cooper v. Brewster*,* 1 Minn., 94.

§ 80. Gaming.—Where judgment is rendered for a sum of money won at play, and a note is given and indorsed to secure a special bail who has become liable for the judgment and finally pays it, such a note is not a note of which the consideration was for money or other valuable thing won at any game within the meaning of the statute of Virginia against gaming. *Welford v. Gilham*,* 2 Cr. C. C., 556.

§ 81. Money won at billiards is money won at play within the meaning of the fifth section of 9 Anne, c. 14. *Sardo v. Fongeres*,* 3 Cr. C. C., 655.

§ 82. Although "seven up" is not a game prohibited by the statutes of Arkansas, yet an agreement to pay money lost at that game is a gaming contract and void. *Harding v. Walker*,* *Hemp*, 58.

§ 83. A party to whom a note has been given for a gaming consideration cannot, on a bill of discovery, decline answering as to the consideration of the note on the ground that it would criminate him or subject him to a penalty or forfeiture, unless he is asked as to the circumstances under which he won the money. There are a multitude of ways in which he may have done this without subjecting himself to a penalty. Though an affirmative answer might prevent him from recovering the money, this is not a penalty or forfeiture within the meaning of the law. *Thomas v. Watson*, *Taney*, 297.

§ 84. In an action on a covenant to pay rent for a race-field, contained in a lease, the court held that if the lessor at the time of making the lease knew that it was to be used as a race-course and as a notorious resort for large assemblages of licentious and disorderly persons, for the purposes of unlawful gambling, and of gross immorality and debauchery, he was not entitled to recover. *Holmead v. Maddox*, 2 Cr. C. C., 161.

§ 85. The feeding and training of defendant's race-horse is not an immoral consideration, and will support a promise to pay for the same. *Maddox v. Thornton*, 2 Cr. C. C., 260.

§ 86. In a suit on promissory notes in the District of Columbia the defendant sought to show that they were void, even in the hands of an innocent holder, under the statute of 9th Anne, being founded on a gaming consideration. Evidence that the defendant, when under the influence of liquor, had a propensity to gamble; that he was drunk when the notes were given; that they were in the hands of a professional gambler, and were payable to the keeper of a gaming house, was held improperly admitted. *Thompson v. Bowie*, 4 Wall., 463.

GAMING CONTRACTS.

See CONTRACTS.

GARNISHMENT.

See WRITS.

GAS COMPANIES.

See CORPORATIONS.

GENERAL AVERAGE.

See MARITIME LAW.

GENERAL ISSUE.

See PLEADING.

GEORGIA.

See STATES.

GERMAN SEPARATISTS.

See CHURCHES AND BENEVOLENT ASSOCIATIONS; HARMONY SOCIETY.

GIFTS.

[As to Voluntary Conveyances and Gifts between Husband and Wife and Parent and Child, consult DOMESTIC RELATIONS AND FRAUD.]

SUMMARY—*Requisites of gifts causa mortis*, §§ 1-4.

§ 1. Gifts *causa mortis* must be of personal property or choses in action actually delivered by the donor to the donee in apprehension of approaching death from an existing disorder or other impending peril, and death must ensue from such existing disorder or impending peril without any complete intermission. So where a person not in good health indorsed a certificate of deposit in such a manner that the indorsee could not obtain the money till after the indorser's death, and the indorser was not at the time *in extremis* and lived for some time afterwards and attended to his business in the meantime in the same manner as for months previously, *held*, that there was no valid gift *causa mortis*. *Hassell v. Basket*, §§ 5-7.

§ 2. A person purchased a share of a vessel, taking title in the name of A. in trust for himself. He subsequently declared that A. was to have his share in the ship when he died, but neither at the time of the declaration nor at the time of the purchase was he ill, and he continued to take the profits of his share of the ship after the purchase and after the declaration. He subsequently devised the trust to B. *Held*, that there was no gift *causa mortis*. *Lee v. Luther*, §§ 8-12.

§ 3. The promise in such case was revocable at pleasure. *Ibid*.

§ 4. In case of an absolute gift *inter vivos*, the donor must part with his dominion over the property. A *donatio causa mortis* also requires delivery; it also requires sickness when the gift is made. *Ibid*.

[NOTES.— See §§ 13-33.]

HASELL v. BASKET.

(Circuit Court for Indiana: 8 Bissell, 303-312; 7 Central Law Journal, 308. 1878.)

Opinion by GRESHAM, J.

STATEMENT OF FACTS.— The bill in this case alleges that Hillery M. Chaney, a citizen of Sumner county, Tennessee, on the 8th day of September, 1875, deposited in the Evansville National Bank, at Evansville, Indiana, \$23,514.70, taking a certificate of deposit therefor; that in January, 1876, said Chaney suddenly died, and the plaintiff was appointed his administrator; that the defendant, Martin Basket, who was a nephew of Chaney, by a fraudulent combination with one Bryan, whose wife was a neice of Chaney, obtained possession of the certificate of deposit and refused to surrender the same on demand; that no consideration of any kind passed from the defendant Basket to Chaney for the certificate; that Basket claimed to hold the same by gift from Chaney, but that at the time of such alleged gift, and for a long time previously, Chaney was of unsound mind. The National Bank, its president and cashier, and Messrs. Shackelford and Richardson, who as the counsel for the defendant, Basket, have possession of the certificate, are made defendants.

The defendant Basket by his answer admits the possession of the certificate, and alleges that Chaney, sixty days before his death, then being in full possession of all his mental faculties, but in apprehension of death from a disorder with which he was then suffering, with his own hand wrote and signed the following indorsement on the certificate:

"Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death. My life seems to be uncertain; I may live through this spell, then I will attend to it myself.

H. M. CHANEY;"

and delivered the paper so indorsed to the defendant, Basket; that Chaney died of the disorder, and the certificate remained in his (Basket's) possession until he placed it in the hands of his counsel, the defendants, Shackelford and Richardson; and that the certificate was a gift to him in trust, as well for himself as his brother and sisters, at his option.

The bank and its officers answered, asking the protection of the court in the payment of the money. Basket filed a cross bill, setting up the gift as in his answer, and the plaintiff answered, traversing the material allegations. General replications were filed to all the answers.

For several years before his death Chaney had been in failing health, complaining of dyspepsia, and physicians had treated him for that disease. During the sixty days that elapsed between the delivery of the indorsed certificate to Basket and Chaney's death, in January, 1876, he was generally up and about his premises, looking after his business, as he had done for months previously. It appeared from a *post mortem* examination that he had also suffered from consumption. The testimony conclusively shows that at the time the certificate was delivered to Basket, Chaney was not *in extremis*, and that he did not act in apprehension of immediate death. On this point there was no serious controversy.

Chaney's domicile being in the state of Tennessee at the time of his death, the laws of that state determine the succession to his personal property. In construing the statutes of Tennessee, relating to wills, the supreme court of that state has held that nuncupative wills must be made *in extremis*. *Hatcher v. Millard*, 2 Coldw., 30; *Gwin v. Wright*, 8 Humph., 639. Section 2165 of the Tennessee Code declares that no nuncupative will is good unless proved by two disinterested witnesses, present at the making thereof, who were specially requested by the testator to bear witness to it. The indorsement on the certificate has never been probated as a testamentary instrument according to the laws of Tennessee. It follows that the defendant, Basket, cannot claim the money as a testamentary gift.

§ 5. *What is a donatio causa mortis.*

The plaintiff, as administrator, is, therefore, entitled to the fund in controversy, unless it belongs to Basket, as a gift *causa mortis*. It would seem that the courts and law-writers have not always been clear in speaking of gifts of this kind. In Kent's Commentaries, volume 2, *page 444, we find the following: "Such gifts are conditional, like legacies, and it is essential to them that the donor make them in his last illness, or in contemplation and expectation of death; and, with reference to their effect after his death, they are good, notwithstanding a previous will, and if he recovers, the gift becomes void."

In Story's Equity Jurisprudence, section 606, the gift is thus defined: "It is, properly, a gift of personal property, by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die, but not otherwise. To give it effect, there must be a delivery of it

by the donor; and it is subject to be defeated, by his subsequent personal revocation, or by his recovery or escape from the impending peril of death. If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his lifetime; and, therefore, in no sense is it a testamentary act."

Williams, in his treatise on the Law of Executors and Administrators, in speaking of this kind of gift, volume 1, page 771, says:

"*First.* The gift must be with a view to the donor's death.

"*Second.* It must be conditioned to take effect only on the death of the donor by his existing disorder. . . .

"*Third.* There must be a delivery of the subject of the donation."

In *Nicholas v. Adams*, 2 Whart., 17, the opinion of the court was delivered by Chief Justice Gibson, who says: "*Donatio causa mortis* is something spoken of as being distinct from a gift *inter vivos*, the former having sometimes been supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me, as this gift, like every other, is not executory but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship or deliverance from the peril. The gift is consequently *inter vivos*."

§ 6. *Actual delivery of a gift causa mortis essential.*

Gifts *causa mortis* must be of personal property or choses in action, actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder or other impending peril, and death must ensue from such existing disorder or other impending peril without any complete intermission. But without further effort to define such gifts, it is sufficient to say that they are not good and are never upheld without certain essential requisites, one of which is delivery, actual or constructive, to the donee, or some one in trust for him, of the subject matter of the gift. If the subject of the gift be capable of actual delivery, the delivery must be actual. Such gifts afford tempting opportunities for fraud, and therefore the Roman law required them to be executed in the presence of five witnesses. And inasmuch as delivery lessens the opportunity for fraud, it has always been held an absolute requisite to their validity. Money on deposit may be delivered by a delivery of the certificate of deposit, provided there be the intention at the time to transfer to the donee the dominion and ownership. It is now settled that choses in action, whether negotiable or not, may be the subject of gifts *causa mortis*. *Brunson v. Brunson*, Meigs, 63; *Brown v. Moore*, 3 Head, 671; *Meach v. Meach*, 24 Vt., 591; *Hanson v. Millett*, 55 Me., 184; *Cutting v. Gilman*, 41 N. H., 147.

§ 7. *Circumstances under which a valid donatio causa mortis was not made.*

The money itself was not delivered to Basket, nor was the certificate so assigned to him as to enable him to get possession of it. With the certificate as indorsed, he had no right to demand the money from the bank. If on his demand the bank had paid the money, such payment would not have protected it against another demand by the donor. The indorsement was not of such a character as to enable Basket to reduce the money to his possession. He could not by virtue of the indorsement have compelled the delivery of the money to him by the bank during the life of the donor. The donor, by the indorsement, had not parted with the possession or dominion of the property. It was still under his control. The language of the indorsement is certainly inartistic, but its meaning is patent. In legal effect it is, "If I die in my present illness, it is my intention that the money evidenced by this certificate of

deposit shall belong to Martin Basket. When I thus die, and not before, it shall be paid to him." With this clear intention of the donor not to part with his money as long as he lived, it will not do to say that delivery of the certificate was a constructive delivery of the money evidenced by it.

But it is said that the subject of a gift *causa mortis* vests in the donee only at the death of the donor, and that therefore, the conditions expressed in the assignment would have been implied, if the certificate had been delivered with a blank indorsement, or no indorsement at all. It must be conceded that some of the authorities seem to support this view.

A will is the disposition of one's estate, to take effect after his death. Any disposition of property to take effect upon the death of the owner or donor is testamentary. It is of the essence of a bequest that it take effect on the death of the testator. It appears by the very terms of the assignment that no present title or interest in the money could pass to the donee during the life of the donor. No instrument of writing can be both a last will and testament, and gift *causa mortis*. The indorsement was testamentary in character, and if it had been properly executed according to the statutes of Tennessee, it doubtless might have been probated as the donor's will.

There is a wide difference between a legacy and a gift. Both possession and title must pass to the donee to constitute a gift. This applies as well to gifts *causa mortis* as to gifts *inter vivos*. The title must pass *inter vivos*, or it never can pass, but will go to the donor's legal representative. In a gift *inter vivos*, the donor reserves no right of revocation; in a gift *causa mortis* he does. The donee of a gift *causa mortis* holds the thing given, not as a bailee of the donor, but as present owner on the condition attached to such gifts. A gift *causa mortis* vests in the donee a present but inchoate or defeasible title, until the happening of the event necessary to render it absolute, and therein it differs from gifts testamentary and gifts *inter vivos*. This question is discussed in *Gass v. Simpson*, 4 Coldw., 294. "The property," say the court, "must pass at the time, and not be intended to pass at the giver's death. . . . Upon the happening of the event upon which the gift is dependent, the title of the donee becomes by relation complete and absolute from the time of the delivery, and that without any consent or other act on the part of the executor or administrator; consequently the gift is *inter vivos*." See, also, *Duncan v. Duncan*, 5 Litt., 12.

In *Parish v. Stone*, 14 Pick., 198, the transfer of choses in action as gifts *causa mortis* is discussed. "These cases," said Chief Justice Shaw, in delivering the opinion of the court, "all go on the assumption that a bond, note, or other security, is a valid, subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument which shows its existence and affords the means of reducing it to possession."

In the case at bar, the certificate was delivered, as the language of the indorsement clearly shows, with no intention of a present gift of the money, with authority to the donee to reduce it to possession. On the contrary, the indorsement was of such a character as to absolutely prohibit the donee from claiming any present title to the money, or any right to reduce it to his possession during the life of the donor.

The donor lived in Nicholas county, Kentucky, the place of his birth, until 1871, when he was sixty years old. He was married to Miss — Hanby in 1832, with whom he lived thirty-six years, and by whom he had seven chil-

dren; one son and four daughters grew up, married and settled near their parents. During these thirty-six years, by industry, economy and good judgment, an estate worth some \$50,000 was accumulated. The evidence shows that the donor was an eccentric man, and his widow testified that he was always a hard man to get along with. In 1868 he seems to have become fascinated with a woman named Nancy Hyatt, with whom he established immoral relations, which fact became known to the public and his family. The wronged wife's remonstrances and entreaties were of no avail in winning back to his family the faithless and unfeeling husband and father. Not content with the injustice already inflicted upon his family, he showed himself utterly insensible to every sentiment of affection and honor, by publicly attacking the chastity of his wife and denying the paternity of all but one of his children.

It is not pretended that there was the slightest foundation for this monstrous slander, and naturally enough a separation ensued, when the property was divided by agreement, the wife and children getting the home farm worth about \$8,000. Previous to this strange infatuation with the Hyatt woman, the donor had the respect and esteem of his neighbors, and previous to that time the evidence fails to show that he was not attached to his family. Shortly after the separation, and the division of the property, we find him and Nancy Hyatt in Hancock county, Indiana, where, after a residence of only four months, by a fraud on the jurisdiction of the court, he succeeded in having a decree of divorce entered in his favor, and straightway he and the Hyatt woman went through the formality of a marriage. Immediately after this, he and his pretended wife removed to Sumner county, Tennessee, and settled upon a farm, where they separated after having lived together two years.

The money on deposit, it is claimed, was given to the defendant, Basket, a nephew, when no one was present but the alleged donor and donee, and the remainder of the donor's estate all went to other collateral relations. In such a contest, it must not be thought strange if the donee is held to the strictest proof of his title. The outraged wife and children who had a natural claim upon the donor's bounty, will not appeal to a court of equity in vain, unless their adversary has established his right to the money in dispute, by the most convincing testimony. The allegation of mental unsoundness is not sustained by the evidence—it would be well for the memory of the donor if it were.

These views render it unnecessary to consider other questions which were argued with ability by counsel on both sides. Decree that the certificate of deposit be delivered to the complainant, and that the money evidenced by it be paid to him.

LEE v. LUTHER.

(Circuit court for Rhode Island: 8 Woodbury & Minot, 519-529. 1847.)

STATEMENT OF FACTS.—Joseph Lee bought a share in a vessel, the Philip Tabb, which was held in trust for him by John Luther, to whom he made a verbal promise that he (Luther) should have the share upon the death of Lee. In March, 1845, Lee ordered the share to be transferred to Henry Lee, who after the death of Joseph directed it to be paid to the administrator, and he assigned it to the plaintiff. This bill was filed to enforce a conveyance of the share to the plaintiff, and was resisted by defendant, who claimed under the parol gift by Joseph Lee to John Luther. Further facts appear in the opinion of the court.

Opinion by WOODBURY, J.

The original transaction as to this share of one-sixteenth of the whole ship Philip Tabb, the title to which is now in controversy, was very loose. If Joseph Lee in 1832, when purchasing this share, intended then to make an absolute gift of it to John Luther, to take effect at the death of Joseph, it would have been very easy to have said so in some writing directly from him to Luther. It might have been done, also, by the bill of sale of the share which was taken in the name of John Luther. If Joseph had caused it to be stated as a gift on the face of the bill and delivered it, and if the other evidence was that the parties intended by this a gift, it would be tantamount to a bill of sale, first to Joseph and then by him to John Luther. But neither of these was done.

§ 8. *Parol evidence to show a declaration of a gift of trust property is inadmissible to contradict a written declaration of trust.*

On the contrary, it is admitted in the answer, that by inserting John Luther's name as vendee in the bill, Joseph did not intend to make a gift in fee *in presenti*, or one absolutely, but both parties say it was at first to be held in trust by Luther for Joseph. Proceeding, then, as we must, to consider it a trust, if this writing had been produced (and it is said in argument to be in John Luther's possession), and had it contained an expression that the share was to be held in trust, it is very doubtful whether the parol evidence offered here, to show it was to be a gift on Joseph's death, is competent. Such evidence would directly contradict the writing as to a trust, if it showed a parol agreement to have the share go as a gift to Luther on the death of Joseph. If made at the same time with the bill of sale, it is in that view hardly admissible. But if made afterwards, and was then a subsequent parol gift of this share in the vessel, absolute or unconditional, it ought to be proved with more distinctness as to time and circumstances.

§ 9. *Evidence of a subsequent parol gift rebutted by proof that the alleged donor continued to take the profits.*

There is some evidence from which such a gift might be inferred, though it is not very strong, and it is rebutted in some degree, that such a gift had ever been really made, or anything more than contemplated in future; for Joseph continued to take the earnings of the share, and actually disposed of it or ordered it to be transferred to a different person before his death. The real truth of the transaction, then, probably was, that when Joseph bought this share, by taking the conveyance in John Luther's name, and by subsequently saying he intended to give it to him, his design was to make such a gift thereafter, but not then, and by continuing to take the income from it he meant not to perfect the gift till he might be pleased to do it soon before his death.

Both parties, also, considered it not as a gift then, but a trust, on some terms not very clear. It is so admitted in the answer, and in the deed by John to the respondent it is so described expressly. But for this, as before remarked, the title standing in Luther's name might be considered sufficient evidence of a gift then intended *inter vivos*, and the delivery of the vessel or share into his charge might be deemed a delivery of possession under the gift, if no other purpose had been expressed and acted on. But now it must be regarded as only evidence of a resulting trust in favor of Joseph, who paid the consideration, and not regarded as proof it was a present gift, or even to become one before his death, unless he did not conclude to transfer the trust

or share to some other person, but let the property when he did become the trustee. All the acts of the parties look to such an understanding.

§ 10. *To make an absolute gift inter vivos, the owner must part with his dominion over the property.*

In this view it was valid as a trust in form at the time. But it was not valid as an absolute gift at the time, because the possession was not given to John Luther of this share as an absolute donee. He was not allowed to use it so or so to deal with its income. The delivery or possession was *diverso intuitu*, and we think not as an absolute gift. To make such a gift good, the donor must at least part with dominion over it. 1 Nott & McCord, 237. That was not done here. Whether the subsequent agreement or promise by Joseph to leave it after his death to Luther could be a good gift *inter vivos* is very questionable, for the want of a delivery to carry into effect such a promise. 3 Story, 755; 2 John., 52; 7 John., 26; 10 John., 293; 4 Dane's Ab., 122; 6 N. Hamp. R., 398.

Much more is it questionable, when the promise, if existing and clear, was afterwards attempted to be rescinded by transferring the share to Henry Lee, and was never carried into effect by any new act or writing or will. It would, then, as a promise only, be revocable, and be incomplete till something more was done perfecting it. 7 John., 26.

§ 11. *A donatio causa mortis requires delivery; also sickness when the gift is made.*

In this view, too, the matter is not helped by calling it a *donatio causa mortis*, for that, likewise, requires a delivery. 4 Dane's Ab., 123; 18 John., 145. It requires, also, sickness when the gift is made, which did not exist here, in 1832, when the bill of sale was taken in the name of John Luther. 1 Bligh (N. S.), 530; 2 Ves. Jun., 121; 3 P. Wms., 357; 4 Bro. C. C., 290. Nor did the bill of sale to John amount to a will or legacy, though it might have been sufficient in most cases to pass such a title or share in a vessel as a gift *inter vivos* (4 Dane's Abridgement, "Gift," 122, 123), if the parties here had not both conceded it was meant, when done, to create a trust, and not to be evidence of an outright gift, and had not allowed some control to remain in Joseph, as *cestui que trust*, and entitled to and receiving the profits.

§ 12. *A parol promise to a trustee that at the death of the promisor (cestui que trust) he, the trustee, should have the property, is not an absolute gift, but is revocable at pleasure.*

But beside these difficulties in considering the original transaction anything except a trust, and if a trust at that time, still one, and still liable to be enforced in favor of the administrators of the *cestui que trust*, or their assignee, and beside, the difficulty in supposing the trust, then or since, by any act of Joseph, converted into a gift to John Luther, the evidence for the complainant and the conduct of Joseph prove rather the reverse. The case was considered a mere promise or mere intent to extinguish the trust at his death and turn it into a gift, if his regard to John Luther should continue to be such as to prevent him from changing that intent. But he did change it clearly.

Finding that Luther had afterwards failed in business in 1840 and assigned the trust and trust property to the respondent, and had conducted, so as, on the proof, not to meet with his entire approbation, and is stated to have taken the benefit of the bankrupt law, while indebted largely to Joseph, and paying nothing, and Joseph having other persons relations, and near him, when be-

coming indisposed, he seems to have determined at last to give his property elsewhere. He resolved, not only to refrain from giving to Luther much of his estate, as once contemplated, but to withdraw this share from him and transfer it to another person. Under all these changed circumstances such a course was natural. The writing in the case in March, 1845, to Henry Lee, which is evidence of this, was an order to convey the vessel to him and not Luther.

The words used apply, also, to the vessel itself rather than the mere income of any voyage. No income appears to have been then due for it to cover. The vessel was abroad, and he therefore directs to be transferred to Henry Lee his share in the Philip Tabb, and does not convey to him or order to be transferred to him his interest in the income of any particular voyage. To give it effect, also, as a transfer and not a mere gift, he admits *value received*, though Henry Lee, by his testimony, considered it rather an order for a conveyance to him with a view to restore the title for the benefit of the heirs, rather than a gift to Henry Lee.

It may be remarked as to this writing, as well as the bill of sale to John Luther, and the parol promise to make a gift of the share to him, if properly proved;—neither, perhaps, could be enforced as executory promises to make gifts or legacies at some future time. No legal right or title is probably created by a mere promise to make a gift. 7 John., 26; 4 Dane's Ab., 127. Such a promise is not actionable. 6 N. H., 390; 2 Barn. & Ald., 551; 10 John., 293; 2 John., 52. Even a note promising to give money, though delivered, but not actually paying over, on delivering, the money itself, has been held not to be a good gift, nor the note recoverable by the promisee. *Copp v. Sawyer*, 6 N. H., 388; *Holliday v. Atkinson*, 5 Barn. & Cres., 501; *Fink v. Cox*, 18 John., 145.

The following case may seem to conflict with the above, holding a promissory note, to be delivered after the promisor's death, good, if duly delivered. *Bowers v. Hurd*, 10 Mass., 427; 2 Dane's Ab., 257. But I do not decide on these cases of promissory notes. Naked promises to make legacies are clearly voidable as such, and this was the case of any promise to make a gift to John Luther. In respect to the written order to Henry Lee, he did not try to enforce it as a promise of any legacy or gift, but merely as a written declaration of a new trust in relation to this share. He could have received the transfer of the share under it, and it would have been a valid conveyance. But this being refused by the respondent, Henry Lee assigned it to the administrator of Joseph for his heirs, and he to the plaintiff. This passed his interest, and entitled the plaintiff to have the share.

It showed, at least, a declaration by Joseph of the trust as to the share in favor of another person than John Luther, and in writing. It showed a design before his death that the share was not to be Luther's after the date of this writing, and after the death of Joseph, whatever may have been his previous views. Joseph, doubtless, had as much right to make a new declaration of a trust as one has to make a new devise or will before his decease. Luther had paid nothing for the share, bought nothing, had been given nothing outright, not even the income. All agree it was meant at first to be only a trust, and, if a gift, till his death it stood revocable. All resulting trusts, as this was in law, may also at any time be conveyed to any other person than the grantee, if *cestui que trust* pleases. *Williams on Ex'rs*, 505.

Indeed, the conveyance to the respondent by Luther contains some matter

indicating that no interest then existed in John, or he must have had a design to defraud creditors by means of it. If John then possessed any interest *in presenti*, that could be sold and it should have passed to his creditors. So as to his bankruptcy, and not accounting for this property; if he had any interest in it left then, it should have been assigned to his creditors. The proof on these last matters comes out or rests more in concessions in the arguments than in other evidence, though the acts of John in these respects can only be justified on this hypothesis, and thus help to sustain it: that he himself then supposed he had no present interest in the share beyond that of a naked trustee.

It is objected further, that this order of transfer to Henry Lee was not directed to John Luther or Henry Luther in whose name the title stood, nor in correct form to the agent of the ship. But this is of little consequence, as it is proved what it is meant for; and enough is contained in it to show a design that the trust should operate in favor of Henry Lee, and the share transferred to him, rather than remain longer nominally, in the name of John Luther, or in the hands of others, whoever they might be. It was the share in the vessel they were looking to, rather than the name of him who might have the technical trust over it at that moment. The respondent admits in argument, and admitted in his bond to John Luther, that he was to convey to Joseph the share whenever desired. Now is not this writing to Henry Lee such a desire or wish expressed by Joseph? Is it not a conveyance or transfer requested to be made to his agent or assignee, and thus in law and equity the same as if to himself? The only objection in that view would be its address to the supposed managers of the ship, rather than to John or Henry Luther. But no one can doubt it was intended as a request to have this share conveyed to Henry Lee at his request, whoever might possess the technical authority to do it, and this is very clear on the explanatory evidence which is consistent with the writing, and therefore competent. *Heckscher v. Binney*, 3 Woodb. & M., 333.

Under all the facts and circumstances, then, it is impossible, on what is before us, without further matter in evidence, to hold that the transaction with John Luther can be treated as an absolute gift, *in presenti*, or one to be completed by a certain event, and not open in the meantime to change or revocation by the donor, and not in the meantime being under his dominion and control. And if being under his control till death, no doubt exists that he ordered it to be transferred to another person than John Luther, and hence that John Luther is not entitled to it. The executor represented here both that other person and the heirs. He assigned the share to the plaintiff, and the latter is therefore entitled to the share and its income not before accounted for.

The decree must be to account for the income of the share since in possession of the respondent, and to convey the share itself to the complainant, if the vessel remains unsold and not lost; but in either of these events, to pay over his share in her value when sold, or in the insurance if lost, and interest since.

§ 13. *Causa mortis*.—It is essential to the validity of a gift *causa mortis* that there be a delivery of the property by the donor in expectation of death from illness existing at the time, the donation depending upon death from such illness. *Grattan v. Appleton*, 3 Story, 755.

§ 14. *To married women*.—Gifts made after marriage to the wife, by third persons, may be either expressly for her sole and separate use, independent of her husband, or by implication from the nature of the gift itself; and when so given, if the husband consents to her receiving them, both he and his creditors are bound by the trust. *In re Grant*, 5 Law Rep., 11; S. C., 2 Story, 812.

§ 15. **Conditions.**—A donor may annex such conditions to his bounty as he sees fit, and the donee cannot accept the gift and repudiate the conditions. *The Lucy Anne*, 23 Law Rep., 545; S. C., 3 Ware, 256.

§ 16. A condition subsequent, if void, does not vitiate the gift. *Jones v. Habersham*, 3 Woods, 472.

§ 17. A feme covert, having a separate estate, may dispose of it as she pleases, even by gift to her husband, if done freely and voluntarily. Thus, where a married woman was entitled to a sum of money, under a settlement to her sole and separate use, and, after her death without issue, to her next of kin, by an instrument acknowledged before a justice of the peace to have been freely and voluntarily executed, directed the amount to be paid to her husband, *held*, that this vested him with a right to sue for and collect the same. *Dallam v. Wampole*, Pet. C. C., 116.

§ 18. **Rights of donee.**—A gift *inter vivos*, by one competent to give, of property which he has a right to give, to one competent to receive it, completed by transfer of possession, draws to it, in the absence of fraud upon creditors, the consequences of an executed contract. Where property, the subject of such a gift, comes under the meaning of the "Abandoned or Captured Property Act," the donee may maintain his suit for the proceeds of it. *Gallaudet v. United States*, 9 Ct. Cl., 210.

§ 19. A person who enters into possession of property of his father-in-law, under an understanding that it should be presented to him as a gift, and makes valuable improvements, is entitled to an equitable lien on the property for the money so expended, even as against creditors, although the agreement under which he entered is not sufficiently definite to support a petition for specific performance. Nor will the fact that the property has since deteriorated in value, so that its entire value is not greater than the amount so expended for improvements, affect his right to a lien, if the expenditures were made judiciously. *King v. Thompson*, 9 Pet., 204.

§ 20. The property having been sold under order of court to meet this lien, and the sum so realized being insufficient to entirely pay the same, it was held that the donee had no claim *in personam* against the general estate of the donor for the unpaid balance. *Ibid*.

§ 21. **Parol.**—Under the act of assembly of Virginia of 1758, no gift of a slave was valid unless made in writing and reduced to record; but parol evidence of the existence of a deed which was lost, going to show the nature of the possession which accompanied the deed, was held admissible. *Spiers v. Willison*, 4 Cr., 398.

§ 22. Under the act of assembly of Virginia of 1758, no gift of a slave was valid unless made in writing, subsequently reduced to record, even though possession accompanied the gift. *Ramsay v. Lee*, 4 Cr., 401.

§ 23. A parol gift of land accompanied by possession, on the faith of which the donee is induced to make improvements, will be protected in equity equally with a parol contract to sell accompanied by possession. *Neale v. Neale*, 9 Wall., 1.

§ 24. **Fraudulent as to creditors and others.**—The donee of a gift which is void as against creditors does not thereby become trustee for the creditors in the full sense of the word, though he also be the administrator of the donor. He has title against all the world except as against creditors, and he is responsible for increase, proceeds and profits only from the date of demand by creditors, and not from the date of his possession. *Backhouse v. Jett*, 1 Marsh., 500.

§ 25. In equity a husband may make gifts to his wife of personal ornaments or jewelry, for her sole and separate use, which will be good against his representatives in case of his death, but not good against his own power to reclaim them during his life, nor against the rights of his creditors. *In re Grant*, 5 Law Rep., 11; S. C., 2 Story, 312.

§ 26. Gifts by a father to his children, if appropriate and suitable to their condition in life, can be retained as against creditors, the father being solvent at the time. But if the father was insolvent, and the gifts large, they inure to the benefit of the creditors. And where the gift to children is partly paid for by the father and partly by another, the creditors can only reach the amount paid by the father. *Ibid*.

§ 27. A court of equity will not, at the suit of a devisee, set aside a deed made by the testator, without consideration, to a woman whom he had urged to become his wife, in absence of any evidence of fraudulent device on her part or of any promise of marriage as a consideration for the conveyance. *Viers v. Montgomery*, 4 Cr., 177.

§ 28. A parol gift of articles of furniture and luxury in his house by an insolvent husband to his wife, both remaining in the house, using the furniture, and living together, will not vest in the wife such a property interest adverse to her husband's creditors as to compel a proceeding at law or in equity to divest her interest before her husband's assignee in bankruptcy can take possession of the property. *In re Pierce*, 7 Biss., 426.

§ 29. Whether a voluntary gift, by way of settlement, to his wife, by a man who is doing a losing business and suffering great losses and in danger of insolvency, is fraudulent as to cred-

itors, is a question of fact to a great extent to be determined by the circumstances of each particular case. *Sedgwick v. Place*, 12 Blatch., 163.

§ 80. A gift by a son to his father of money to enable him to make repairs on his dwelling-house is not a valid consideration to support a note subsequently given for the amount as against other creditors. *In re Cornwall*,* 6 N. B. R., 305.

§ 81. A gift of property worth \$2,500 to his son-in-law by a donor possessed of assets fairly estimated at \$60,000, and whose debts only amount to thirteen or fourteen thousand dollars, and his indorsements to twenty thousand more, but who subsequently became insolvent, cannot be impeached by creditors as fraudulent because of the insolvency of the donor. *King v. Thompson*, 9 Pet., 204.

§ 82. In Arkansas, the common law rule that a husband cannot legally make a gift to his wife during marriage has not been changed. The statute which enables a married woman in that state to take and hold property in her own right expressly provides that no conveyance from man to wife, directly or indirectly, shall entitle her to the privileges of the act. The husband who has given his wife bonds still retains the legal title, and may bring an action for conversion without joining her as a party. *Kitchen v. Bedford*, 18 Wall., 413.

§ 83. Release of debt.—A gift of what is due on a contract cannot be made to the person who owes it otherwise than by a release under seal. *Wood v. United States*,* Dev., 57.

GOLD.

See MONEY.

GOOD WILL.

SUMMARY—*Good will, what constitutes*, § 1, 2.

§ 1. A mere voluntary custom of booksellers and publishers not to engage in the production of rival editions of non-copyrighted books is not a "good will" which the law recognizes as property, and a so-called good will resting on such a custom cannot form partnership assets, especially in the absence of corporeal property to which it could attach. *Sheldon v. Houghton*, §§ 3, 4.

§ 2. "Good will" adheres to and grows out of corporeal property, but no "good will" will carry corporeal property with it as an incident. *Ibid*.

SHELDON v. HOUGHTON.

(Circuit Court for New York: 5 Blatchford, 285-293. 1865.)

Opinion by SHIPMAN, J.

STATEMENT OF FACTS.—This is a case of novel impression. I am of the opinion that it cannot be sustained, either from principle, or by the application of any of the authorities submitted on the argument, or of any which I have been able to discover, after a somewhat diligent search. A full discussion of the vital points in the case will not now be attempted; and I shall, therefore, confine myself to a brief notice of such features of it as will disclose the grounds on which this motion is denied.

The first material allegation of the bill is, "that, by the custom of the trade of booksellers and publishers in the United States, when any person or firm engaged in that business has undertaken the printing, publication and sale of a book not the subject of statute copyright, and has actually printed, published, and offered an edition of such book to the public for sale, other persons and firms in the same trade, having respect to the trade priority so acquired in the publication and sale of such book, or the particular edition thereof, refrain from entering into competition with such publisher by pub-

lishing such book in a rival edition, and that thereby, and by reason and operation of the custom aforesaid, the publication of such book becomes a good will in the hands of the person or firm so first publishing the same, where such book is one for which there is an extensive popular demand, and especially in the case of foreign authors of established reputation, whose works are not the subject of statute copyright in this country, and that such good will is often very valuable, and is often made the subject of contracts, sales and transfers among booksellers and publishers."

It is also averred in the bill "that such custom is a reasonable one, and tends to prevent injurious competition in business, and to the investment of capital in publishing enterprises that are of advantage to the reading public." The bill then sets forth "that, prior to the year of 1861, one O. W. Wight projected the publication of a uniform edition of the works of Charles Dickens, a distinguished author of Great Britain, whose works are not the subject of statute copyright in the United States, and who is an author of great reputation in the United States as well as Great Britain, but whose collected works had not at that time been printed, published and sold in the United States in a uniform edition, and in the style projected by said Wight; that the said Wight contracted with W. A. Townsend & Co. for the publication of the edition aforesaid of the works of the said Dickens, and with Henry O. Houghton, the defendant herein, for the manufacture of stereotype plates from which to print the same; that one James G. Gregory succeeded to the business of W. A. Townsend & Co., and that, subsequently, and some time prior to the 27th of December, 1861, the said Wight sold and transferred to the said defendant, Houghton, the good will and right of publication, under the custom of the trade, of the edition aforesaid."

The bill then sets forth and counts upon the following contract, executed between the plaintiff and the defendant on the 27th of December, 1861: "Memorandum of an agreement made this 27th day of December, A. D. 1861, in the city of New York, by and between Henry O. Houghton, of the city of Cambridge, and state of Massachusetts, of the first part, and Sheldon & Co., publishers (comprising the following persons, viz.: Smith Sheldon, Hezekiah Shailer, Melancthon M. Hurd and Isaac E. Sheldon), of the city and state of New York, of the second part, witnesseth: Whereas, the party of the first part is the proprietor of the 'Household Edition' of the works of Charles Dickens, heretofore published by W. A. Townsend & Co. and James G. Gregory; and whereas, the party of the second part is desirous of becoming the publishers of the same, the following points are agreed to by and between the contracting parties: 1. The profits of each volume shall be equally divided between the two parties to this contract, said profit consisting of the difference between the actual cost of manufacturing each volume and the wholesale price of the same, said price to be fixed permanently, so far as this contract is concerned, at fifty cents, and the party of the second part agrees to sell the books at that price, except in small lots and on trade account. The cost of manufacturing shall be made up by said party of the first part, by charging the paper used at cost, the printing at his usual rates for works of a similar class, and according to numbers ordered, and the regular price for folding, collating, waste leaves and tissue paper, adding thereto the cost of plate paper, printing plates, cases, and any other expense that would legitimately belong to the manufacture of the book. 2. The expense of circulars and advertising of the series to be divided equally between each party, an accurate account to be kept of the

same, and rendered on the first days of July and January in each year, the balance due from either party to be paid to the other in cash. The extent of advertising, and the amount to be expended for circulars and advertising, to be regulated by mutual agreement. 3. The party of the first part agrees to abate the copyright and use of plates on all copies of each new volume given for editorial purposes, to the number of two hundred and fifty copies, said abatement to be made on settlement of advertising accounts, on the first days of July and January of each year, an accurate account to be kept of the copies presented, and to whom given, by the party of the second part. 4. The party of the second part to take, of each new volume, as issued, two thousand copies, and of subsequent editions either five hundred or two hundred and fifty copies, as may seem best to all concerned. 5. Payments to be made by the party of the second part to the party of the first part by note, at six months from average time of the delivery of the books. 6. The books to be made in the same style and uniform with, and not inferior in quality to, the previous volumes of the same series, as formerly published by W. A. Townsend & Co. and J. G. Gregory. 7. All copies of the books delivered in sheets, or folded and collated, to the party of the second part, to be subject to the proper deductions for binding. 8. The party of the first part, in consideration of the above, agrees to give to the party of the second part the exclusive right to publish the same. It is understood and agreed that this contract shall be in full force and binding for the term of three years from this date, and thereafter, until one party shall have given to the other one year's notice in writing, signifying their wish to annul this contract, and in case no satisfactory arrangement can be made for the settlement of each party's interest in the same, an arbitrator shall be chosen by each party, which said arbitrators shall choose a third arbitrator, and their decision in the case shall be final and binding on all parties. In case of the insolvency or death of the party of the first part, or the insolvency or such dissolution of the firm of the party of the second part as shall unfavorably affect their standing and credit, it shall be considered the same as though the three years had expired, and the one year's notice of the desire to terminate the contract had been given, and arbitrators shall be appointed to settle the matter as provided above, if the parties or their executors cannot agree to a settlement. Henry O. Houghton. Sheldon & Company, by Smith Sheldon. Signed and sealed in the presence of Joshua T. Davis."

The bill also sets forth, that, at the time the last named contract was entered into, a number of volumes of the edition had been published and offered for sale, part by Townsend & Co., and the rest by Gregory, but that the remaining works of the series, amounting to thirty volumes, had been published and offered for sale by the plaintiff, who had, also, since making said contract, published and sold the original volumes put forth by Townsend & Co. and by Gregory. The sales of all of the volumes appear to have been large. It is further averred that, by force of this contract between the plaintiffs and the defendant, they became partners in the business of publishing this edition; that the good will and right of publishing, under the custom of the trade, thereby became partnership property, to be held for the joint benefit of the parties, and to be valued and disposed of as partnership property; that an illustration was engraved expressly for each volume, and copyrighted by Houghton; that these copyrights were, by the contract, agreed to be transferred to the plaintiffs, and they are now the equitable owners of them, in

trust for the partnership; that, by reason of the exertions of the plaintiffs, who were eminent and well known booksellers, the good will of said edition, and the right of publication thereof, according to the custom of the trade, has become, and now is, of much greater value than before the same became partnership property, and, as is believed, is capable of being sold to others in the trade for the sum of \$30,000; that the defendant gave the notice provided for in the contract, for its termination, on the 27th of December, 1864; and that, unless the publication is continued beyond the 27th of December, 1865, in the same manner as heretofore, under the order of this court, the good will will rapidly deteriorate, and the plaintiffs will suffer irremediable injury. The prayer for relief covers all the allegations in the bill. I have not stated all its averments in detail, as that is not necessary for the purpose of this motion. Upon this bill, and certain affidavits, the plaintiffs move "for the appointment of a receiver, to continue the manufacture, publication and sale of the books described in the bill, and which are embraced in the contracts thereto annexed, until the final hearing of the case;" and that "the court direct that the business of manufacturing, publishing and selling the said books, as heretofore conducted under the said contract, be continued by the parties, the plaintiffs and the defendant, under such receiver, until the final hearing and decision of this cause, or the further order of the court, and that an injunction issue to the said parties respectively, directing and commanding them to act herein as the agents of such receiver, in discharging the several duties and obligations, and doing the several acts, provided to be done in and by the said contract, etc."

This bill and motion are sought to be grounded on the principles which govern courts of equity, in dealing with the assets of a partnership, at its dissolution; and the question, whether or not the contract between the parties to this suit amounted to a partnership or not, was discussed at length on the argument. It is possible that, in some of its features, the agreement may be held to establish a relation closely resembling that of partnership; but I do not now go into that question, because I do not deem it necessary to enable me to properly dispose of this motion. I will, therefore, assume, for my present purpose, that there was a special, limited, and peculiar partnership established between the plaintiffs and the defendant in the enterprise set forth. The question then arises — what are the partnership assets upon which this court can bring its power to bear for the purpose of protecting the interests of the parties thereto? As there is no question raised as to the rights of creditors of the partnership, the whole controversy relates to the alleged conflicting interests of the members of the firm among themselves.

This court can deal only with the assets which belong, in law or equity, to the partnership. What are they? I do not find, from the contract, or from any evidence in the cause, that the partnership acquired any title, either legal or equitable, to any corporeal property about which any dispute has arisen. I think that the stereotype plates, the plates from which the illustrations are printed, and the copyright thereto, are, clearly, the sole property of the defendant, and that all right in their use, in the interest of the plaintiffs, must cease when partnership expires. Laying out of the case the question touching what is called the "good will," I see no ground upon which it could be insisted that the partnership acquired any title to, or interest in, these plates and copyrights, beyond the right to have them used, for the term fixed by the contract, in carrying out the enterprise.

§ 3. *What a transfer of the incorporeal property, termed "good will," carries with it as its incidents.*

The only assets, then, which can, in any view, be supposed to belong to the partnership, about which there is any controversy, is this species of incorporeal property called "good will." If this could be deemed, under the peculiar circumstances of this case, to be property, capable of transfer, and possessed of value, its conveyance to the partnership, if it ever was conveyed, did not carry with it the printing establishment of the defendant, nor that portion of it which was employed in printing these books, nor the copyrights of the illustrations. If anything which can be called, in any legal sense, property, was transferred to this partnership, it must have been that incorporeal right of publishing this edition of Dickens, which is described in the bill as a "good will," founded upon the custom of the trade to forbear competition. No corporeal property was embraced in this supposed transfer, by the terms of the contract, and none could adhere to it, as an incident. Good will may adhere to, or spring out of, corporeal property, or a tangible locality or establishment; but I think it would be new doctrine to hold the reverse, and treat the material property as an incident of the good will. Good will must always rest upon some principal and tangible thing, and it has, therefore, been held that it can never arise as an asset of a partnership, where the members only contribute as capital their professional skill and reputation, however intrinsically valuable these may be.

§ 4. *"Good will," resting upon no legal foundation other than a "courtesy of the trade," is not property within the meaning of the law.*

Now, what is this alleged good will, in the present case, which this court is asked to treat as property, and for the preservation and beneficial sale of which its power is invoked, to continue the operation of this contract beyond the time fixed by its terms? It confessedly rests upon no common law of the country, recognized and administered by judicial tribunals. If it has any foundation at all, it stands on the mere will, or, as it is termed in the bill, the "courtesy" of the trade. True, it is called by the plaintiffs, the "custom" of the trade, and is alleged in the bill to be a "reasonable custom." But I apprehend that it is very far from being a legal custom, furnishing a solid foundation upon which an inviolable title to property can rest, which courts can protect from invasion. It can, therefore, hardly be called property at all — certainly not in any sense known to the law. It may be an advantage to the party enjoying it for the time being, but its protection rests in the voluntary and unconstrained forbearance of the trade. I know of no way in which the publishers of this country can republish the works of a foreign author, and secure to themselves the exclusive right to such publication, in any form of edition, except so far as new matter or illustrations are incorporated into it, and then, to that extent, made a subject of copyright. The ornamental designs of the binding or dress of the volumes might possibly be patented; but nothing relating to the edition can come under the protection of the law, except what is new and original, and is covered by copyright or letters patent. For this court to recognize any other literary property in the works of a foreign author, would contravene the settled policy of congress, and be an attempt to enter the field belonging exclusively to the national legislature. Of the wisdom of our legislative policy I have nothing to say here.

This alleged good will rests, therefore, upon no legal foundation, and, consequently, is not a partnership asset possessing any legal value. The books

were printed by the defendant at his printing establishment in Cambridge, Massachusetts, and were published and sold by the plaintiffs, at their book store in New York; but neither of these establishments are partnership assets, which this court can decree to be sold, so as to carry with them a good will, in the ordinary sense in which that term is regarded as descriptive of property. Neither are the types, plates or copyrights, from and under which the edition was printed, such assets. The only thing the court could decree a sale of would be this peculiar advantage called the good will of the trade toward this particular edition. If this court were to appoint a receiver, he would have nothing to take but this peculiar incorporeal right or advantage; and, should the business be continued under this contract for a period of years, the receiver would take nothing else, as there is nothing else belonging to the partnership which the parties are not agreed between themselves to take, without the interposition of the court. At the end, the court could decree the sale of nothing else. The buyer would take nothing valuable but what he would have been entitled to before, except the negative advantage of having the parties to this suit enjoined against the further use of the implements or materials by which this edition has been produced. This the court would not do if it had the power, because it would tend to destroy, and not conserve, the property. As it could not compel the sale and transfer of these implements and materials to the purchaser of the good will, but only forbid their further use by the defendant, its decree would be only productive of mischief to the defendant and the public, without conferring any benefit upon the plaintiffs; for the sale of this advantage called good will would bring nothing, as it would be worth nothing. The motion is, therefore, denied.

GOVERNMENT.

For the Powers and Duties of the various Departments of the Government, including the Heads of Executive Departments, consult the appropriate general heads of the work. See CONSTITUTION AND LAWS; COURTS; CRIMES; FEES AND SALARIES; OFFICERS; STATES AND TERRITORIES; TREATIES; WAR.

- I. IN GENERAL, §§ 1-61.
- II. THE PRESIDENT, §§ 62-183.
- III. HEADS OF DEPARTMENTS, §§ 184-235.
- IV. CONGRESS, §§ 236-258.
- V. DIVISION OF POWERS, §§ 259-268.
- VI. SUITS BY AND AGAINST THE UNITED STATES, §§ 269-318.
- VII. PROPERTY RIGHTS, §§ 314-347.

- VIII. GOVERNMENT CONTRACTS, §§ 348-631.
- IX. CLAIMS AGAINST THE GOVERNMENT, §§ 632-800.
- X. PRIORITY OF THE UNITED STATES AS A CREDITOR, §§ 801-915.
- XI. CONQUERED AND CEDED TERRITORY, §§ 916-932.

I. IN GENERAL.

§ 1. Included within terms of a statute, when.—The government will not be held to be included within the provisions of a statute, nor its rights affected, unless that construction be clear and indisputable upon the text of the act. *United States v. Hoar*, 2 Mason, 311. See CONSTITUTION AND LAWS, § 2629.

§ 2. The sovereign is not bound by the general words of a statute unless expressly mentioned. *Held*, that the act of February 28, 1839, providing that "no person shall be imprisoned for debt in any state on process issuing out of a court of the United States, where, by the laws of such state, imprisonment for debt has been abolished," does not apply to debts due to the United States. *United States v. Hewes, Crabbe*, 307.

§ 3. The statute of limitations does not bar a claim of the government, unless the provision be express that it shall be a bar. *United States v. Davis*, 3 McL., 483. See LIMITATIONS.

§ 4. The United States takes no better title by assignment than the assignor had; and if the

claim was barred by limitation in his hands, it is barred in theirs. *United States v. Buford*, 3 Pet., 12.

§ 5. The United States are bound by the judiciary acts, though not specially mentioned therein, where provisions are adapted to them and made in terms sufficiently comprehensive to include them. *Jacob v. United States*, 1 Marsh., 520.

§ 6. Prerogative powers.—Powers not judicial, exercised by the chancellor as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts. Prerogative powers belonging to the sovereign have not been delegated to the federal government, but remain in the several states, to be exercised according to the laws and usages prevailing in the several states. Consequently in cases before the federal courts involving the validity of a bequest or devise to charitable uses, the question to be considered always is whether it would be held valid or not in the courts of the state. *Loring v. Marsh*, 2 Cliff., 311.

§ 7. The power exercised by the English court of chancery "in enforcing donations to charitable uses, which would not be valid if made to other uses," is not a part of its jurisdiction as a court of equity, but a prerogative power exercised by that court. Such prerogative powers belong to the sovereign as *parens patriæ*, and remain with the states. They cannot be exercised by the federal government or the federal courts. *Fountain v. Ravenel*, 17 How., 369.

§ 8. Defense of officers.—Where a public officer of the government is sued for a tort or malfeasance, committed in the discharge of his duty, it rests entirely in the discretion of the head of the department where the question arises whether the public interests involved are of such a character as to require that the officer be defended by the United States. And if, after such defense, judgment for damages is rendered against the officer for an act done within the scope of his duty, congress is to determine as to indemnifying the party. *Case of Lund v. Ogden*,* 6 Op. Att'y Gen'l, 75.

§ 9. The duty of the superintendent of public printing, under the act of August 26, 1852, to receive from the secretary of the senate and the clerk of the house of representatives all matter ordered by congress to be printed, and, when both houses ordered a document to be printed, to give the entire printing of that document to the printer of the house first ordering the printing, is a duty involving the exercise of judgment and discretion, and cannot be controlled by *mandamus*. *United States v. Seaman*, 17 How., 225.

§ 10. When a government becomes a partner of any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Consequently, the fact that the United States was a stockholder in the Bank of the United States does not affect the right of a debtor of the bank to plead the statute of limitations. *Bank of United States v. McKenzie*, 2 Marsh., 393.

§ 11. Offenses in Indian country.—The federal government has no powers except such as have been delegated to it by the constitution. The power to regulate commerce among the Indian tribes does not include the power to punish the crime of murder committed by one white man upon another within the Cherokee country in the state of Tennessee, the offense having no relation to the Indians and not affecting their commerce. *United States v. Bailey*, 1 McL., 234. See CRIMES; INDIANS.

§ 12. Where a place is a part of the territory of the United States and not within the limits of any state, but has been assigned to a tribe of Indians as a place of residence, congress may enact laws to punish offenses committed there, whether by Indians or white persons. *United States v. Rogers*, 4 How., 567.

§ 13. Power to incorporate a bank.—The express powers delegated by the constitution to the federal government imply the ordinary means of carrying those powers into execution. From the power to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; to raise and support armies and navies, may be implied the power of incorporating the Bank of the United States, and to establish branches thereof in the various states. The federal and state governments are each sovereign with respect to the objects to each committed, and a law of the state of Maryland taxing the Branch Bank of the United States, located in that state, is unconstitutional. *McCulloch v. State of Maryland*, 4 Wheat., 410.

§ 14. Imprisonment for debt.—The United States, in dealing with public debtors, is bound by the act of congress of March 2, 1867 (14 Stat., 543), which adopts the restrictions, conditions and modifications of imprisonment for debt, then existing by the laws of the several states, though the government is not expressly mentioned in the act. *United States v. Tetlow*, 2 Low., 159. See DEBTOR AND CREDITOR.

§ 15. An insolvent debtor in execution under a judgment obtained by the United States is not entitled to a discharge of his person under a state statute abolishing imprisonment for debt. *United States v. Wilson*, 8 Wheat., 253. See DEBTOR AND CREDITOR.

§ 16. May take security for debts.—The officers of the government may legally take bonds or other securities, for debts due to the United States, although no act of congress authorizes

their being taken in the particular case. *United States v. Howell*, 4 Wash., 620; 2 Am. L. Cas., 5th ed., 419.

§ 17. **Release of sureties.**—Where the United States acting through the secretary of the treasury, the commissioner and supervisor of revenue, enlarges the credit given to the principal on a bond to the government, the sureties are discharged. *United States v. Hillegas*, 3 Wash., 70. See BONDS.

§ 18. **Gift of money to heirs — Rights of creditors.**—A sum of money bestowed by act of congress upon the heirs of a decedent in recognition of meritorious services rendered by him, cannot be reached by his creditors. *Emerson v. Hall*, 13 Pet., 409.

§ 19. **Granting jurisdiction to courts.**—The act of March 3, 1873, directing the attorney-general to bring suit against the Union Pacific Railroad company and others, in the name of the United States, in any circuit court, is not unconstitutional. Congress may by special act invest a court with jurisdiction in a particular case, and provide a specific mode of procedure therein. *United States v. Union Pacific R. Co.*, 8 Otto, 605.

§ 20. **Taking private property.**—The maxim of the English constitutional law, that "the king can do no wrong," has no application to the system of government under the constitution of the United States, and consequently an officer of the government in taking and using the property of an individual against his consent and by force, for government purposes, is guilty of a tort. *Langford v. United States*, 11 Otto, 341.

§ 21. **Rights as creditor.**—The United States, having recovered judgment against a delinquent postmaster and his sureties, are creditors, within the law of Illinois, which makes unrecorded conveyances void as against creditors. *Ross v. Prentiss*, 4 McL., 106.

§ 22. **Government certificates for the payment of money, under the treaty between the United States and Mexico, payable under the act of congress to the person entitled, his legal representatives or assigns, while not negotiable under the law merchant, are property, and, being indorsed in blank, pass by delivery.** *Baldwin v. Ely*, 9 How., 580.

§ 23. **Congress, during the revolution, had all the rights of a belligerent and independent sovereign.** Among these are the power to commission privateers, and prescribe rules for the distribution of prizes, and to appoint commissioners of appeal. An appeal having been taken from the New Hampshire court of appeals to the commissioners of appeal, a decree by them was held *caram judice* and valid. *Penhallow v. Doane*, 3 Dal., 54.

§ 24. **Powers not lost by non-user.**—The power of a government, granting a charter to common carrier, to regulate the maximum rates of fare and freight, is not lost by a non-user for more than twenty years. *Chicago, etc., R. Co. v. Iowa*, 4 Otto, 155.

§ 25. **Vessel subject to liens.**—The purchase by the United States of a vessel for the revenue service which is subject to valid liens, does not relieve it of such claims. The government takes *cum onere*. *Fox v. Revenue Cutter*,* 8 Am. L. Reg., 459.

§ 26. **Use of an invention.**—The patentee of an invention cannot maintain against the government an action on an implied contract to pay a royalty, because of the use of the same invention under a license of another inventor who discovered the same principle, under different experiments and circumstances. Nor has the court of claims any jurisdiction of a suit against the government for the infringement of a patent. *Fletcher v. United States*,* 11 Ct. Cl., 748.

§ 27. **It is the usage of sovereigns not to interfere in the administration of justice until the foreign subject who complains has gone to the court of last resort.** *President and Judiciary*,* 1 Op. Att'y Gen'l, 25.

§ 28. **Public moneys.**—Although under the sub-treasury act no public officer had the right to deposit public money in a state bank, yet a bank or an individual banker might be employed to transmit funds, and the secretary of the treasury had the right to make such an arrangement. *United States v. City Bank*,* 6 McL., 130.

§ 29. **It seems that agents of the government do not bind it, when they transcend their powers, and that where an officer has illegally deposited money of the United States, the depositary in an action to recover the money cannot set up the illegality of the transaction to defeat a recovery.** *Ibid.*

§ 30. **Advances of public moneys.**—The act of January 31, 1823, prohibits in general terms the advance of public money in any case whatever, but this general prohibition is subsequently modified to the extent, among other things, of allowing such advances to persons in the military and naval service, who may be employed on distant stations, and the provisions of this act do not affect the right of the president to make an advance to a United States minister, beyond the amount of his outfit, who is about to depart for his foreign station. *Advances to Public Ministers*,* 2 Op. Att'y Gen'l, 204.

§ 31. **Jurisdiction over places within a state.**—The exclusive jurisdiction of the United States under article 1, section 8, of the constitution over "places purchased by consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals,

dock-yards and other needful buildings" will not extend to a field *rented* by the government as a camp, without the consent of the legislature of the state. *United States v. Tierney*, 1 Bond, 571. See COURTS; CRIMES.

§ 82. The United States may purchase land within a state for public purposes without the consent of the legislature. Such a purchase does not oust the jurisdiction of the state. But where a state consents to the purchase of land within its limits for public purposes, by the general government, the effect of such purchase is to vest in the United States the exclusive jurisdiction given to it by the constitution over such lands. *United States v. Cornell*, 2 Mason, 60.

§ 83. Under section 8, article 1, of the federal constitution, the exclusive jurisdiction of the United States over lands owned by it and used for forts, magazines, etc., rests upon the expression of the assent of the legislature of the states to such exclusive jurisdiction. *Ex parte Hebard*, 4 Dill., 380.

§ 84. An Indian reservation within the territory of a state is not within the sole and exclusive jurisdiction of the federal authorities, unless withdrawn from the state jurisdiction by a proviso of the act admitting the state pursuant to a guaranty by the federal government in the treaty making the reservation. *United States v. Ward*, 1 Woolw. 17.

§ 85. A reservation, in an act of cession by a state legislature of territory to the United States for public purposes, of "concurrent jurisdiction" for the service of state process, is simply a condition of the grant and does not exclude the exclusive legislative jurisdiction of the United States under the act of 1790. *United States v. Davis*, 5 Mason, 356.

§ 86. The state officers in New York having assessed county and school taxes on the personal property of several enlisted men in the United States army, who were quartered on the government lands at West Point, the question of the authority to do so arose, and it was settled in the affirmative, the state officers having the right of entry upon lands, or into buildings thereon, which are owned by the government, but of which the state has not ceded jurisdiction, to satisfy by seizure of personal property a tax-warrant against any person in the military service, provided such right is so exercised as not to interfere with the operations of the government. *Execution of State Tax Laws*, * 14 Op. Att'y Gen'l, 199.

§ 87. **Dealing in commercial paper.**—When the United States by its postmaster general accepted a bill of exchange drawn on it, it became a party to negotiable paper with all the rights and all the responsibilities of individuals who are parties to such instruments. *United States v. Bank of the Metropolis* 15 Pet., 377.

§ 88. Upon an unconditional acceptance the acceptor is absolutely bound, no matter what equities exist between the drawer and acceptor, provided the holder be a *bona fide* purchaser without notice, and this rule applies to the United States as to all others. *Ibid.*

§ 89. A check drawn on a public depositary by an officer of the government in favor of a public creditor is commercial paper and subject to the laws which govern such paper. *Bank of the Republic v. Millard*, 10 Wall., 152.

§ 40. The United States in the fiscal operations of the government may avail itself of bills of exchange whenever it may be necessary: and when by the action of its authorized officer it becomes a party to such paper, it has all the rights and incurs all the responsibilities of individuals who are parties to such instruments. But it is incumbent upon the purchaser of paper purporting to bind the government to ascertain at his peril whether the officer was duly authorized. The fact that such bills of exchange may be authorized in some instances, and their use in such cases, cannot establish a usage in cases not authorized. There is no express statutory power to bind the government by such paper, and where it exists it is as the concomitant of some other power. There being no occasion for any officer of the government to accept drafts, such acceptances cannot bind the government. *The Floyd Acceptances*, 7 Wall., 666; *Pierce v. United States*, * 1 Ct. Cl., 270.

§ 41. Although it is true that when the government enters the domain of commerce, it submits itself to the same laws that govern individuals there, and among these to the rule that where one accepts forged paper purporting to be his own and pays it to a holder for value, he cannot recall the payment, still the government cannot be so charged by any action of its agents which falls short of an adoption of the paper by it. Thus, where the sub-treasury department in New York received paper purporting to be genuine 7-30 treasury notes, and paid the market price for them, this cannot be regarded as an adoption of such paper as genuine by the government; for all claims against the government must be settled "in the treasury department," which is located at Washington; and before the action of the assistant treasurer at New York can be regarded as conclusive, sufficient time must elapse for the notes to be sent to Washington and there examined, in connection with the accounts kept in that department. *Cooke v. United States*, 1 Otto, 389; 12 Blatch., 43.

§ 42. When the United States become parties to commercial paper they incur all the obligations of private persons under similar circumstances, and though laches is not imputable to

the government in its sovereign capacity, yet when it comes down from its position of ruler and enters into the domain of commerce, it is bound by the same rules as govern individuals there. Consequently, where the assistant treasurer of the United States has purchased for the government, with government funds, treasury notes purporting to be genuine, which subsequently prove to be not genuine, the government cannot recover the money so paid, it appearing that the person selling them held them in good faith. *United States v. Cook*, * 8 Ch. Leg. N., 129.

§ 43. The United States, as the drawer of a protested bill of exchange, is liable to pay damages. *Bank of the United States v. United States*, 2 How., 711.

§ 44. When the United States becomes a party to, or is the holder of, commercial paper, it is subject to the same law, and bound to use the same diligence to charge an indorser, that an individual is. *United States v. Barker*, 12 Wheat., 559.

§ 45. By becoming a party to negotiable paper, the United States possess all the rights and incur all the responsibilities that attach in the case of a private individual. But there is an exception to this rule in the practice of the postoffice department, that dispenses with formal protest of dishonored drafts. *Government Drafts*, * 8 Op. Att'y Gen'l, 1.

§ 46. As to the acceptance of drafts by departmental heads, the rule is that when the United States, by their authorized officers, become a party to negotiable paper, they incur all the responsibilities of individuals who are parties to such instruments. *Acceptance of Drafts by Government Officers*, * 4 Op. Att'y Gen'l, 90.

§ 47. Political questions.—Whether the provisions of a treaty with a foreign sovereign have been violated by him, so that it is no longer obligatory upon the other party, is a political question, to be decided by the political department of the government and not by the judiciary. *Taylor v. Morton*, 2 Curt., 454. See COURTS, p. 815.

§ 48. The political department of the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the United States are bound to consider as lawful those acts which war authorizes, and which the new governments in South America may direct against their enemy. *United States v. Palmer*, 8 Wheat., 610; *The Divina Pastora*, 4 Wheat., 52.

§ 49. The action of the political departments of the government in treating with the king of Spain as having the power to annul grants of the public lands in Florida made to his subjects pending the negotiations for the cession of that territory to the United States, is conclusive upon the judicial department of the latter. *Doe v. Braden*, 16 How., 635.

§ 50. The relations of the United States to insurgent portions of foreign nations is of exclusively political cognizance. The courts can only follow the co-ordinate branches of the government. If the political department remains neutral but recognizes the existence of civil war, the courts cannot regard as criminal those acts of hostility which war authorizes and which the insurgent government directs against its enemy. *United States v. Palmer*, 8 Wheat., 610.

§ 51. The matter of captures within the territorial limits of the United States, the liberty of selling prizes and the bringing of prizes into our ports, is a matter of political, not judicial, arrangement. *Findlay v. Ship William*, 1 Pet. Adm., 12.

§ 52. The judicial department has no power to grant relief in matters depending upon the political power of the government. *Cherokee Nation v. State of Georgia*, 5 Pet., 1.

§ 53. Whether a foreign community in insurrection is to be treated as a new government is a political question. Until such community is recognized by the political department of the government, it will not be recognized by the courts of the United States, nor allowed to intervene as claimant in admiralty. *The Hornet*, * 2 Abb., 35.

§ 54. In a controversy between two nations concerning national boundaries, the courts of either will abide by the measures adopted by their own government. The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided, but must decide upon individual rights according to the principles established by the political departments having authority in the matter, particularly if expressed clearly by legislation. The government of the United States, holding that under the treaty with France of April 30, 1803, the territory acquired by it included that lying between the rivers Iberville and Perdido, the courts of the United States must so consider it. *Foster v. Neilson*, 2 Pet., 309.

§ 55. In a dispute between two independent sovereignties as to claims of territory and questions of boundary, the courts will follow the decisions and views of the political departments. *Williams v. Suffolk Ins. Co.*, 3 Sumn., 270.

§ 56. When the executive is charged with foreign relations, his decision in such matters is binding upon the people and the other branches of the government. The president, in his message and in correspondence with Buenos Ayres, having denied the sovereignty of the latter over the Falkland Islands, his action is conclusive upon the courts. *Williams v. Suffolk Ins. Co.*, 18 Pet., 415.

§ 57. The question of boundary between the United States and Spain, in the province of Florida, was a political question in which the judiciary are bound to follow the political action of the government. *Garcia v. Lee*, 12 Pet., 511.

§ 58. A controversy between two states of the Union, as to the location of a point in the boundary between them is a judicial not a political question, and within the jurisdiction of the supreme court. *State of Rhode Island v. State of Massachusetts*, 12 Pet., 657.

§ 59. In a proceeding in equity to abate the railroad bridge across the Mississippi river at Clinton, Iowa, as a public nuisance and obstruction to navigation, the act of congress of February 27, 1867, declaring the bridge to be "a lawful structure and a post route" was attacked as unconstitutional on the ground that it was in conflict with certain treaties between the United States and foreign nations, to the effect that the navigation of the river shall forever remain free and unobstructed. *Held*, that this is a political question, and that the courts have no power to declare a statute void because it may violate treaty obligations. *Gray v. Clinton Bridge*, * 7 Am. L. Reg., 149.

§ 60. The political department of the federal government alone has the power to determine the status of a state, or rather of its inhabitants, as to a "condition of hostilities, or insurrection against the United States;" and when its decision is made, it is binding upon the courts. *United States v. One Hundred Barrels of Cement*, * 3 Am. L. Reg. (N. S.), 735; *United States v. One Hundred and Twenty-nine Packages*, * 2 Am. L. Reg. (N. S.), 419.

§ 61. The political power of the government is vested in congress. By the act of February 28, 1795, congress delegated to the president the power to decide, for the purposes of that act, whether the existing government of a state is the legally constituted government or not, and the courts of the United States must follow his decision. The question belongs to the political not the judicial department of the government. *Luther v. Borden*, 7 How., 1.

II. THE PRESIDENT.

[Pardoning Power, see **CRIMES**. War Powers and Proclamations, see **WAR**.]

SUMMARY — *Proclamation takes effect without publication*, § 62.

§ 62. A proclamation by the president is operative as soon as it is signed and the great seal affixed, and it is deposited in the government archives, and its publication in the newspapers is not necessary before it can take effect. *Lapeyre v. United States*, §§ 63-65.

[NOTES.—See §§ 66-133.]

LAPEYRE v. UNITED STATES.

(17 Wallace, 191-206. 1872.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—On June 26, 1865, Lapeyre executed a conveyance of a lot of cotton to the agent of the government at New Orleans, and one-fourth of it was exacted as a tax, it having been brought from an insurrectionary district. On the 24th of that month the president of the United States signed a proclamation and caused the great seal to be affixed, removing all restrictions upon trade west of the Mississippi river, whence the cotton in question came. The proclamation was published in the newspapers on the 27th June, and on the same day the secretary of the treasury sent a telegram to the treasury agent in New Orleans that the twenty-five per cent. tax on cotton had been rescinded. Lapeyre sued in the court of claims for the value of the fourth part of his cotton so taken by the treasury agent. There being a judgment rendered against him he appealed.

§ 63. *The proclamation of the president takes effect upon the day that it is signed and has the great seal of the United States affixed to it.*

Opinion by MR. JUSTICE SWAYNE.

The only inquiry presented for our consideration is, when the proclamation, which is the hinge of the controversy, took effect. The question arises on the third finding of the court of claims, which is as follows: "The proclamation

of the president of June 24, 1865, was not published in the newspapers until the morning of the 27th of that month; nor was it published or promulgated anywhere or in any form prior to said last-named day, unless its being sealed with the seal of the United States, in the department of state, was a publication or promulgation thereof." There is no act of congress, and nothing to be found in American jurisprudence, which bears very directly on the subject. In the English law the instrument is thus defined: "Proclamation, *proclamatio*, is a notice publicly given of anything whereof the king thinks fit to advertise his subjects. And so it is used, 7th Richard II, ch. 6." Cowel's Law Dictionary.

Proclamations for various purposes are mentioned in the English authorities, but it could serve no useful end particularly to refer to them. 2 Jacobs' Law Dictionary. In England they must be under the great seal. 7 Comyns' Digest, 31. If their existence is intended to be denied, the proper plea is *nul tiel record*. Keyley v. Manning, Cro. Car., 180; Howard v. Slater, 2 Rolls, 172. It is a part of the king's prerogative to issue them. 1 Black. Com., 70. It is a criminal offense to issue them without authority. Broke's Abridgment, fol. 160; 17 Viner, 199. By the 31st of Henry VIII, ch. 8, it was enacted that the king, with the advice of his council, might issue proclamations denouncing pains and penalties, and that such proclamations should have the force of acts of parliament. This statute, so fraught with evil to the liberties of the subject, was repealed a few years later in the succeeding reign of Edward VI, and during his minority. A very careful and learned writer says: "A proclamation must be under the great seal, and, if denied, *is to be tried by the record thereof*. It is of course necessary to be published in order that the people may be apprised of its existence and may be enabled to perform the injunctions it contains. In the absence of any express authorities it should seem that if the proclamation be under the great seal, it need not be made by any particular class of individuals or in any particular manner or place, and that it would suffice if it were made by any one under the king's authority in the marketplace or public street of each large town. It always appears in the gazette." Chitty on Prerogatives, 106. This is the only authority on the subject here under consideration which our researches have enabled us to find. The writer refers to no other author and to no adjudicated cases in support of his views. The third section of the documentary evidence act (8 and 9 Victoria, ch. 113) declares that the copy of a proclamation purporting to be printed by the queen's printer shall be sufficient proof of the existence of the original. Under the circumstances it may be well to look to the analogy afforded by the promulgation of statutes. At the common law every act of parliament, unless a different time were fixed, took effect from the first day of the session, no matter how long the session or when the act was passed. This rule was applied to acts punishing offenses of all grades, including those which were capital and even attainments. The authorities on the subject are learnedly collected by Mr. Justice Story in the case of *The Brig Ann*, 1 Gall., 64. Such was the law in England until the passage of the 33d George III, chapter 13, which declared that the royal assent should be indorsed, and that the act should take effect only from that time.

The act of congress of July 27, 1789, section 2, declares that whenever a bill, order, resolution, or vote of the senate and house of representatives has been signed by the president, or not having been returned by him with his objections, shall have become a law, it shall forthwith thereafter be received

by the secretary of state from the president; and that whenever a bill, order, resolution, or vote, having been returned by the president with his objections, shall have been approved by two-thirds of both houses of congress, and become a law, it shall be received by the secretary from the president of the senate, or speaker of the house of representatives, in whichever house it shall have been last approved; and it is made his duty carefully to preserve the originals. The first section of the act of April 20, 1818, directs that the secretary shall publish all acts and resolutions currently as they are passed, in newspapers. The fourth section provides that he shall cause to be published at the close of every session of congress copies of the acts of congress at large, including all amendments to the constitution adopted, and all public treaties ratified, since the last publication of the laws.

Both those acts are silent as to proclamations, and we have been unable to find any provision in the laws of congress touching the manner of their original promulgation or their subsequent printing and preservation. Numerous acts were passed during the late war authorizing proclamations to be issued, but they are silent upon these subjects. In the act of July 10, 1861, under which the proclamation here in question was issued, the language is—"it may and shall be lawful for the president by proclamation to declare," etc. 12 Stat. at Large, 257. In the act of June 22, 1861, the language is—"the president shall from time to time issue his proclamation." Id., 268. In the act of December 31, 1862, the language is the same as in the act first referred to. Id., 633. In the act of March 3, 1863, the language is—"the president shall issue his proclamation declaring," etc. Id., 735. We have nowhere found in the legislation of congress any material departure from this formula, nor anything further in anywise affecting the question before us.

§ 64. *Acts of congress, unless otherwise provided, take effect from their date.*

We know that the established usage is to publish proclamations with the laws and resolutions of congress currently in the newspapers, and in the same volume with those laws and resolutions at the end of the session.

There is no statute fixing the time when acts of congress shall take effect, but it is settled that where no other time is prescribed, they take effect from their date. *Matthews v. Zane*, 7 Wheat., 211. Where the language employed is "from and after the passing of this act," the same result follows. The act becomes effectual upon the day of its date. In such cases it is operative from the first moment of that day. Fractions of the day are not recognized. An inquiry involving that subject is inadmissible. See *Welman's Case*, 20 Vt., 653; see also *Howe's Case*, 21 id., 619; *The Ann*, 1 Gall., 62; *Arnold v. The United States*, 9 Cranch, 104; 1 Kent, 457, where the subject is examined with learning and ability.

§ 65. *Publication in the newspapers is not requisite to make a proclamation operative.*

Publishing by outcry, in the market-place and streets of towns, as suggested by Chitty, has, we apprehend, fallen into disuse in England. It is certainly unknown in this country. While it is said the proclamation always appears in the gazette, he does not say that it cannot become operative until promulgated in that way. As no mode of publication is prescribed, and those suggested will answer, we do not see why applying the seal and depositing the instrument in the office of the secretary of state may not be held to have the same effect. The president and secretary have then completed their work. It is there amidst the archives of the nation. The laws of congress

are placed there. All persons desiring it can have access, and procure authenticated copies of both. The president signs and the secretary of state seals and attests the proclamation. The president and congress make the laws. Both are intended to be published in the newspapers and in book form. Acts take effect before they are printed or published. Why should not the same rule apply to proclamations? We see no solid reason for making a distinction. If it be objected that the proclamation may not then be known to many of those to be affected by it, the remark applies with equal force to statutes. The latter taking effect by relation from the beginning of the day of their date, may thus become operative from a period earlier than that of their approval by the president, and indeed earlier than that at which they received the requisite legislative sanction. The legislative action may all occur in the latter part of the day of their approval. The approval must necessarily be still later. It may be added, as to both statutes and proclamations, that even after publication in the newspapers, there are in our country large districts of territory where actual knowledge does not usually penetrate through that or any other channel of communication, until a considerably later period. It will hardly be contended that proclamations should take effect at different times, in different places, according to the speedier or less speedy means of knowledge in such places respectively.

But the gravest objection to the test of publication contended for by the defendant in error remains to be considered. It would make the time of taking effect depend upon extraneous evidence, which might be conflicting, and might not be preserved. The date is an unvarying guide. If that be departed from, the subject may be one of indefinitely recurring litigation. The result in one case would be no bar in another if the parties were different. Upon whom would rest the burden of proof, the party alleging or the party denying the fact of publication? If, after a lapse of years, the proof were that a proclamation purporting to be published by authority, was seen at a specified time in a newspaper, but the paper were lost and its date could not be shown, would the proclamation be held to take effect only from the time it was so seen by the witness? Suppose in the distant future no proof of publication could be found, would all the rights which had grown up under it be lost unless protected by the rule of limitations? Would the instrument itself be a nullity? Would an exemplified copy from the proper office be an insufficient answer to the plea of *nul tiel record*? According to the views maintained by the counsel for the plaintiff in error all these questions must be answered in the affirmative. The only way to guard against these mischiefs is to apply the same rule of presumption to proclamations that is applied to statutes, that is, that they had a valid existence on the day of their date, and to permit no inquiry upon the subject. Conceding publication to be necessary, the officer upon whom rests the duty of making it should be conclusively presumed to have promptly and properly discharged that duty. If the proclamation here involved were a resolution or an act of congress no such question could arise. That "a proclamation," . . . "if denied, *is to be tried by the record thereof*," and that in such case the proper plea is *nul tiel record*, seems to be conclusive upon the subject.

It would be unfit and unsafe to allow the commencement of the effect, whenever the question arises, whether at a near or a distant time, to depend upon the uncertainty of parol proof, or upon anything extrinsic to the instrument itself, as found in the archives of the nation.

Judgment reversed, and the case remanded with directions to enter a judgment in favor of the appellant.

MR. JUSTICE DAVIS concurred in the judgment.

JUSTICES HUNT, MILLER, FIELD and BRADLEY dissented, holding that a proclamation does not become operative till it is made public; that the fact that it has the seal of the United States affixed, and is deposited in the state department, does not make it operative.

§ 66. War powers.—The proclamation of the president, of August 16, 1861, in pursuance of the act of July 13, 1861, declaring a state of insurrection to exist in certain states, and forbidding all commercial intercourse between them and the citizens of the loyal states; and the proclamation of February 28, 1862, modifying the former so as to license and permit such commercial intercourse as might be within the rules and regulations of the treasury department; and the treasury regulation requiring a fee of four cents a pound for a license to purchase cotton in any insurrectionary district and transport it to a loyal state, were a legitimate exercise of the belligerent powers of the government. *Hamilton v. Dillin*, 21 Wall., 73. See WAR.

§ 67. The right to cause a blockade of the ports of an enemy is a belligerent right and, under the constitution and laws of the United States, can be exercised by the president, in case of war, in his capacity of commander-in-chief of the army and navy, without the intervention of any act of congress. *The Schooner Tropic Wind*,* 14 Law Rep., 144.

§ 68. The president of the United States, as commander-in-chief of the army and navy, is not only authorized but is bound to exercise the powers of that office when the occasion shall arise, without any declaration of war by act of congress. The method of doing this is largely a matter of executive discretion. He may make maritime captures and subject them to judicial investigation. *The Amy Warwick*, 2 Spr., 123; 14 Law Rep. (N. S.), 335.

§ 69. The power of the president to establish rules and regulations for the government of the army is undoubted. The power to establish implies, necessarily, the power to modify or repeal, or to create anew. The secretary of war is the regular constitutional organ of the president for the administration of the military establishment of the nation; and the rules and orders publicly promulgated through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority. *United States v. Eliason*, 16 Pet., 291.

§ 70. The secretary of the navy, unauthorized by congress, assisted by a board of officers convened specially, formulated a code of regulations for the government of the navy which met with the approval of the president, and by him were ordered to be adopted and observed, etc. A question being raised as to the power of the president, or the secretary of the navy acting by his direction, to adopt and enforce the new code without authorization of congress, elicited the fact that while the president possesses a limited power to establish regulations purely enabling or executive in their nature, yet he can not usurp the legislative functions of congress, as he has done in this case, and authorize the establishment of new rules for the government of the navy. *Navy Regulations*,* 6 Op. Att'y Gen'l, 10.

§ 71. The power of the president under the act of February 28, 1795, to call out the militia, is a discretionary power to be exercised by him upon his own opinion of the exigency of the occasion. His decision upon the existence of the exigency is conclusive. *Martin v. Mott*, 12 Wheat., 19.

§ 72. Appeal from heads of departments.—The settlements of the accounting officers of the treasury are, as far as the executive department is concerned, final and conclusive. One who conceives himself injured by such settlement must have recourse to the judiciary or congress. The president has no authority to interfere. *President and Accounting Officers*,* 1 Op. Att'y Gen'l, 624, 636.

§ 73. A claim for an increase of pension was disallowed by the commissioner of pensions; upon an appeal to the secretary of war, the former decision was affirmed. It was then endeavored to appeal to the president, but the latter possesses no power to entertain such an appeal; for while he has the power of removal from office he cannot correct, by his own official act, the errors of judgment of his subordinates. *Power of the President Respecting Pension Cases*,* 4 Op. Att'y Gen'l, 515.

§ 74. The president has no power to entertain appeals in matters of account on the application of the commissioner of customs. *Jurisdiction of Accounting Officers*,* 5 Op. Att'y Gen'l, 630.

§ 75. The decision of accounting officers upon a matter within their jurisdiction is conclusive

upon the president, and an appeal in such a case will not lie to him. Appeals from Accounting Officers,* 2 Op. Att'y Gen'l, 544.

§ 76. It is inadvisable, though not *ultra* his power, for the president to entertain an appeal from the decision of the head of a department regarding a private claim against the government. Bollman's Case,* 10 Op. Att'y Gen'l, 526.

§ 77. The members of congress from the state of Rhode Island appealed to the president from a decision of the commissioner of the general land office, relative to the reservation of lands for the state of Rhode Island, under act of congress. This was improper, for while the president has power to entertain such appeal, yet it is inexpedient for him to create a precedent of such doubtful propriety. The review of an appeal of this nature would fall more properly within the province of the secretary of the interior. Relation of President to Executive Departments,* 10 Op. Att'y Gen'l, 527.

§ 78. Interference in judicial proceedings.— While a person, acting under a commission from a sovereign of a foreign nation, is not amenable for his actions under it, to any judiciary tribunal in the United States, still the president will not interfere with judicial proceedings between an individual and such commissioner, where the controversy is entitled to a trial according to law. Actions against Foreigners,* 1 Op. Att'y Gen'l, 81.

§ 79. The president has no right to interpose his authority to stop an individual suit against a consul of a foreign government. He must leave the matter to the tribunals of justice. Consular Privileges,* 1 Op. Att'y Gen'l, 77.

§ 80. The president will not order a *nolle prosequi* to be entered in a proceeding for the condemnation of a foreign vessel for a breach of our navigation laws pending an appeal from the decree of the district court. It is the office of the judicial department to construe acts of congress, and the executive will not interfere with it. Interference with the Judiciary,* 1 Op. Att'y Gen'l, 366.

§ 81. The president will not officially interfere in a matter of private and individual litigation. Executive Interference with Private Litigation,* 1 Op. Att'y Gen'l, 405.

§ 82. The president can order a *nolle prosequi* in any stage of a criminal proceeding in the name of the United States. Power to Order a *Nolle Prosequi*,* 5 Op. Att'y Gen'l, 729.

§ 83. Under the constitution and laws of the United States, the president has no right to interfere in a civil suit between two citizens. But where the arrest of an army officer, at the suit of another individual occurred in Florida, while that territory was still governed by the laws of Spain, the right of the president to exercise such a power would depend entirely upon those laws. Concerning the Imprisonment of Captain Bell,* 5 Op. Att'y Gen'l, 742.

§ 84. The constitutional right of the president to order the discontinuance of a suit begun in the name of the United States, wrongfully, is indisputable. But a case by the government against the mayor, aldermen and inhabitants of New Orleans, praying for an injunction to prohibit them from selling certain unoccupied lands lying between the line of buildings fronting on the Mississippi and the river itself, the petition asserting the right to the same to be in the United States, and setting forth the grounds on which such right is based, where the filing of the petition is followed by the award of an injunction, does not present an opportunity for the proper exercise of that right. Nor does any other case, where a federal court, free from suspicion of impurity, has taken cognizance of the matter and thereby given countenance to the claim. Power of President to Discontinue a Suit,* 2 Op. Att'y Gen'l, 53.

§ 85. A balance was found against a party upon a settlement of his accounts by the accounting officer, and a suit begun therefor; the power of the president to order a discontinuance of the suit on the ground of alleged errors in the settlement was called in question. It was decided that the executive was concluded by the decision of the comptroller, and that the executive power is not extensive enough to permit the president to question the correctness of the account for the purpose of taking any measures to repair the errors which the accounting officers have committed. Accounts and Accounting Officers,* 2 Op. Att'y Gen'l, 507.

§ 86. Where a suit begun by the government against a private individual has been repeatedly dismissed, and each time renewed, the president may interfere and compel the district attorney to proceed to a trial without delay. *Ibid.*

§ 87. Removal of officers.— As the tenure of office of no officers except those in the judicial department is, by the constitution, provided to be during good behavior, it follows that the power of the president to dismiss a civil or military officer is discretionary, unless congress have provided for the term for which the office shall be held. *Gratiot v. United States*,* 1 Ct. Cl., 258. See OFFICERS.

§ 88. Military storekeepers are *quasi* officers of the army, and as such subject to be deprived of their commissions at the will of the executive. Military Storekeeper,* 6 Op. Att'y Gen'l, 4.

§ 89. Under the settled construction of 1789, in regard to the executive power, the president has absolute power to strike an officer of the United States army from the rolls without a trial,

even though a court of inquiry, appointed to investigate his conduct, has given a decision in his favor. Power of President to Dismiss from Military Service,* 4 Op. Att'y Gen'l, 1.

§ 90. **Transfer of appropriations.**—The act of July, 1836, authorizing the president to make transfers from head of appropriations for fortifications to another for a like object, is sufficient authority to enable him to transfer part of an appropriation for Fort Moultrie to Fort Johnson. Transfer of Appropriations,* 4 Op. Att'y Gen'l, 110.

§ 91. By the act of 1820, the president has a discretionary power to direct transfers of appropriations from the branch of expenditure of incidental expenses of the quartermaster's department to the other branches of barracks, quarters, etc., and to that of transportation of officers' baggage. Transfer of Appropriations for the War Department,* 4 Op. Att'y Gen'l, 363.

§ 92. Congress appropriated a particular sum of money for the mileage and pay of the members of the house of representatives; and another sum, in gross, for the contingent expenses of the house. A deficiency occurring in the contingent fund after the adjournment of the house, it was endeavored to have the president transfer the amount of the deficiency from the appropriation for mileage and pay of members to the contingent fund. But the president has not the power, in the absence of express authority conferred by congress, to make any such transfer. Transfer of Specific Appropriations of House of Representatives to Contingent Fund,* 8 Op. Att'y Gen'l, 442.

§ 93. **Protection of aliens.**—It is the duty of the executive of the United States, to whom the care of the government's foreign relations is committed by the constitution, to take all lawful measures to protect in their personal rights alien subjects of a nation with whom the United States are at peace, who place themselves under the safeguard of this government's laws. But the capacity of the executive, in this respect, is limited to the execution of the laws that congress has passed. Duty of the Executive Respecting Alien Residents,* 3 Op. Att'y Gen'l, 253.

§ 94. **Discharge of debtors.**—The president has not the power under the act of March 3, 1817, to discharge public debtors imprisoned upon mesne process, but only debtors imprisoned on execution. Executive Power to Discharge Public Debtors,* 1 Op. Att'y Gen'l, 231.

§ 95. A. was imprisoned for a debt arising from moneys had and received by him as an agent of the United States. The act of 1817, authorizing the president to discharge persons confined under execution, and providing that the judgment shall remain good and sufficient in law, has no application to A.'s case, as he was not confined under execution. In order that he may be within the provisions of the act, A. should confess judgment for the amount due; a *capias* should issue on this, and A. should then be charged in execution. The presidential authority can then be exerted. Power of President over Imprisoned Debtors,* 2 Op. Att'y Gen'l, 285.

§ 96. The president has no power to order moneys paid into the treasury by judgment and execution, upon the penalty of a bond, to be refunded several years after payment made, the constitutional power given him to grant "reprieves and pardons," etc., and the act of March 3, 1817, giving him authority to discharge from prison certain debtors of the government, being totally inapplicable to the subject. Power of President to Refund Moneys,* 2 Op. Att'y Gen'l, 189.

§ 97. **Acts binding on successor.**—Under the reservations in a treaty entered into between the United States and the Choctaws, half a section of land was granted to A., which was subsequently located, and approved by the president. Following this approval, application was made by commissioners of the state, on behalf of the school fund, for the same tract of land, on the ground that they had selected it prior to its being located for A. They had made prior selections that had been rejected by the register of the land office. The president's approval of A.'s selection vested the right in A., and such right cannot be divested by any act of the president's successor in office. Power of the President,* 6 Op. Att'y Gen'l, 603.

§ 98. The judgment and sentence imposed upon an officer by a court-martial, having been duly approved by the president and executed, cannot be reviewed and reversed by a successor in office. Howe's Case,* 6 Op. Att'y Gen'l, 506.

§ 99. A question was referred to the attorney general as to whether A. and B. were then in the service and entitled to their pay as pursers in the navy, the cases having met with an adverse decision under a former president. The question was then suggested, "how far the present executive is authorized to review and unsettle the acts of his predecessor." The conclusiveness of an act of an executive upon his successor was understood to be not only a rule of action adopted by each administration, but was also a mark of courtesy and respect due from one executive to another. Right of Executive to Review Acts of Predecessors,* 2 Op. Att'y Gen'l, 8.

§ 100. Where a matter was referred to the president for his decision, with the proviso that said decision should be binding and obligatory upon the parties, and in accordance with such

reference the president considered, decided and settled the controversy, his award is final and conclusive, and his successor in office cannot re-open the subject. Georgia and the Treaty of Indian Spring,* 2 Op. Att'y Gen'l, 110.

§ 101. Release of sureties.—No power exists in the executive to discharge sureties from their obligations on a bond given the United States by a marshal. Sureties on a Marshal's Bond,* 7 Op. Att'y Gen'l, 62.

§ 102. Employment of counsel.—The president has no proper authority to employ counsel at the public expense, to advise, protect and defend the marshal of the southern district of New York in cases arising from the discharge of his official duties under the fugitive slave law. Duty of President Respecting District Marshals,* 5 Op. Att'y Gen'l, 287.

§ 103. A marshal having been sued for arresting a person, in the performance of his duty, supposed to be extraditable as a fugitive from service, it would be a lawful exercise of his power for the president to authorize the marshal's defense by the United States. Extradition of Fugitives from Service,* 6 Op. Att'y Gen'l, 220.

§ 104. As to claims for necessities furnished the Indians, it rests in the discretion of the president whether and in what manner the same shall be paid. Contracts of Indians,* 6 Op. Att'y Gen'l, 462.

§ 105. Pardoning power.—Where the law provides for the payment of a portion of a fine to an informer, after a judgment the informer's right becomes a vested interest, and it is not within the pardoning power of the president of the United States, in remitting the fine, to divest that interest. *United States v. Harris*, 1 Abb., 116. See CRIMES.

§ 106. The grant of power in the constitution to the president, to pardon "offenses against the United States," is limited in its exercise to offenses, i. e., crimes and misdemeanors. Hence in the case of an action *in rem*, against a vessel, for a violation by her owner of the act of 1838, the president does not possess the power to remit the penalty and forfeiture. Case of *Steamboat Minnesota*,* 11 Op. Att'y Gen'l, 122.

§ 107. The second section of the second article of the constitution, giving the president power to grant . . . pardons for offenses against the United States, except in cases of impeachment, is sufficiently broad to enable him to remit forfeitures of vessels condemned for an infraction of the slave-trade act of 1818. But such power should extend only to a remission of the interests of the government and should not affect the vested interests of others. Power of Executive to Remit Forfeitures,* 4 Op. Att'y Gen'l, 578.

§ 108. Remission of forfeitures.—The president has no power to remit the forfeiture of a bail-bond. Power of President to Remit Bail-bond Forfeitures,* 4 Op. Att'y Gen'l, 144.

§ 109. Conflict between state officers.—There is no duty incumbent upon the president, nor has he the power, to interfere or take cognizance of any internal conflict arising between the officers of any state. Hence, where the governor of Louisiana removed a state judge from office, the justice or injustice of the removal was a matter entirely within the cognizance of the state judiciary. Case of Judge Handlin,* 11 Op. Att'y Gen'l, 116.

§ 110. Execution of foreign laws.—A legislative enactment in New South Wales purposed the prevention of desertion and other misconduct of seamen belonging to foreign ships within the jurisdiction of said colony, but provided that no punishment under the act should be meted out except at the instance of the consul of the nation to which such ship should belong, unless such nation, by its proper officer, shall have signified its desire that said act should be enforced as to the crews of its vessels. The president has no power to effectuate this act on the behalf of the United States. Neither the constitution nor treaties between this government and that of Great Britain, nor acts of congress, empower him to impart life to a foreign law which does not, of its own force, possess such life. That can only be done through an act of congress or by a treaty. Power of the President,* 6 Op. Att'y Gen'l, 209.

§ 111. Suspension of writ of habeas corpus.—The president of the United States has not power to suspend the writ of *habeas corpus*. Such action can be taken only by congress. *Ex parte Merryman*, 9 Am. L. Reg., 524; Taney, 246. See WRITS.

§ 112. In the time of a great and dangerous insurrection, the president has the discretionary power to cause to be arrested and held in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity. And in cases of such arrests he is justified in refusing to obey a writ of *habeas corpus* issued by a court or a judge, requiring him or his agent to produce the body of the prisoner and show the cause of his caption and detention, to be adjudged and disposed of by such court or judge. Suspension of the Privilege of the Writ of Habeas Corpus,* 10 Op. Att'y Gen'l, 74.

§ 113. The president of the United States has no authority to suspend the privileges of the writ of *habeas corpus*, except as authorized and directed by congress; and at the date of the proclamation of September 24, 1862, no such power existed. *McCall v. McDowell*, Deady, 233.

§ 114. **Trespassers on public lands.**—The president, by virtue of the act of March, 1807. (2 U. S. Stat. at large, 445) may direct the marshal of the district where the offense shall be committed, to remove all persons intruding or trespassing upon the public coal lands in California. Coal Lands in California,* 10 Op. Att'y Gen'l, 184.

§ 115. **Prize courts.**—Neither the president of the United States nor any executive officer has authority to establish a prize court in a conquered country, and authorize it to decide upon the right of the United States, or of individuals in prize cases, nor to administer the laws of nations. *Jecker v. Montgomery*, 13 How., 498.

§ 116. **No power to revive laws.**—The president of the United States has no common law prerogative to interdict commercial intercourse with any nation, or to revive by proclamation any act of congress, whose operation has expired. His authority for this purpose must be derived from some positive law. The proclamation of August 9, 1809, did not revive the non-intercourse act of March 1, 1809, chapter 91. *Schooner Orono*, 1 Gall., 137.

§ 117. **Public measures, how made known.**—It is to the department of state that reference must be made for the official acts of the president in relation to those public measures which he may establish, and which are not more immediately connected with the duties of some other department; but the president may direct some other department to make known the measures which he may think proper to establish. *Lockington v. Smith*, Pet. C. C., 466.

§ 118. **Orders—No seal required.**—There is no law or usage requiring a seal to the orders of the president to give them validity. *Ibid.*

§ 119. **No power has been given the president to fill up public lots in the city of Washington or to cause the removal of stagnant water and thereby prevent disease.** President and Washington City,* 1 Op. Att'y Gen'l, 615.

§ 120. **Approval of bills.**—The only duty required of the president by the constitution in regard to a bill which he approves is that he shall sign it. It is not required that he shall write on the bill the word "approved," nor that he shall date it. *Gardner v. The Collector*, 6 Wall., 499.

§ 121. **That the illegal seizure of a neutral vessel was made under orders of the president of the United States will not constitute a valid defense in an action against the commander of the vessel making the seizure.** *Little v. Barreme*, 2 Cr., 170.

§ 122. **Appointment of officers.**—The executive of the United States has no right, after the appointment of an officer who is not removable at will, to withhold his commission. *Marbury v. Madison*, 1 Cr., 137. See OFFICERS.

§ 123. **The president of the United States has no power to declare war either against a foreign nation or a domestic state, but he is authorized to use military and naval force against a foreign invasion, or to suppress an insurrection against the government of a state or of the United States; and he has the right *jure belli* in the case of an actual insurrection to institute a blockade of ports in possession of states in rebellion, which neutrals are bound to regard.** The Prize Cases, 2 Black, 635; The *Hiawatha*, Bl. Pr. Cas., 1.

§ 124. **Protection of citizens abroad.**—It is the duty of the president of the United States to protect citizens residing abroad. When and how this duty is to be performed is a matter of executive discretion. In the exercise of this discretion, neither he nor his authorized agent is personally civilly responsible for the consequences. Thus the commander of a naval vessel, ordered by the president to bombard a city of a foreign country for the protection of citizens residing there, is not personally liable for damages caused by such bombardment. *Durand v. Hollins*, 4 Blatch., 451.

§ 125. **May order discharge of arrested vessel.**—A vessel, arrested to prevent her cruising against belligerent powers, may be discharged simply by an order from the president to the marshal in custody; a formal pardon is not necessary. The payment of the expenses of the arrest by the owner and the dismissal of a suit instituted by him against the marshal for damages for the seizure, may be made a condition of such discharge. Discharge of a Cruiser,* 1 Op. Att'y Gen'l, 48.

§ 126. **Admitting to bail.**—The president has no power to direct that a person charged with an offense against the United States be admitted to bail. The question of bail is a judicial not an executive one. Power of President Concerning Bail,* 1 Op. Att'y Gen'l, 213.

§ 127. **Ordering arrest without warrant.**—Although the president has no power to order by proclamation or instructions to marshals the arrest of any person without warrant from a court of justice, for the issue of a warrant of arrest belongs to the judiciary rather than to the executive department, still the president may by proclamation order the arrest of an offender who has been once regularly arrested and has subsequently escaped; for the regularity of the arrest implies that the probable cause has been furnished on oath or affirmation according to the amendment to the constitution, and that the warrant has been duly issued. Power to Cause an Arrest,* 1 Op. Att'y Gen'l, 229.

§ 128. Courts-martial.—The president has the power to order a new trial by a court-martial upon the motion of the defendant, when in his opinion the court erred in excluding proper testimony. *New Trials Before Courts-Martial*,* 1 Op. Att'y Gen'l, 233.

§ 129. It is beyond the power of the president to annul or revoke a sentence of a court-martial, which has been approved and executed under a former president. Nor is the rule confined to cases in which the sentence of the court is required to be approved by the president. Hence where A. had been convicted and sentenced by a general court-martial, and the sentence confirmed by the commanding officer and directed to be carried into execution, the president was powerless to revise it. *Ryan's Case*,* 10 Op. Att'y Gen'l, 64.

§ 130. Where the president is dissatisfied with the opinion of a naval court-martial, he has authority to refer the case back for reconsideration, where his previous sanction is necessary for the execution of its judgment. *The President and Courts-Martial*,* 4 Op. Att'y Gen'l, 19.

§ 131. Execution of death sentences.—It is the duty of the president to issue warrants for the execution of death sentences by federal courts, in all cases where they are made necessary by the practice of the state in which the sentence is passed. *Death Warrants*,* 1 Op. Att'y Gen'l, 228.

§ 132. Miscellaneous.—The effects of a party having been confiscated for an alleged violation of the laws regulating intercourse with the Indians, it is for that party, denying the regularity of the proceedings, to pursue his remedy at law, the case not being a proper one for the intervention of the president. *Remedy for Alleged Illegal Prosecution*,* 6 Op. Att'y Gen'l, 392.

§ 133. The president should not consent to place the government of the United States, which is not liable to be questioned in its own courts without its special consent, in a position of accountability as stakeholder, or garnishee, to its debtors, their assignees, or creditors, at least in the absence of a judicial decision to that effect by the supreme court. *Attachment of Seamen's Wages*,* 8 Op. Att'y Gen'l, 718.

III. HEADS OF DEPARTMENTS.

§ 134. In general.—Official instructions issued by the heads of the several executive departments, civil or military, within their respective jurisdictions, are valid and lawful without containing express reference to the direction of the president. And the direction of the president is to be presumed in all instructions and orders issuing from the competent department. *Relation of the President to the Executive Departments*,* 7 Op. Att'y Gen'l, 453.

§ 135. Certification of the various instruments requiring it cannot be delegated by any departmental head or chief of bureau, in the absence of authority of congress. *Signature of Public Officers*,* 7 Op. Att'y Gen'l, 594.

§ 136. When a district court of the United States, in the exercise of the discretion vested in it by law, has granted an application by the claimants to bond a vessel after condemnation, and ordered the release of the vessel, the executive department has no right to interfere. *The Meteor*,* 12 Op. Att'y Gen'l, 2.

§ 137. An executive department has no right to omit or delay the discharge of the duties imposed upon it by law, at the request of a committee of the house of representatives, and can only pay attention to such a request when it affects a discretionary power. *New Idria Mining Co.*,* 13 Op. Att'y Gen'l, 118.

§ 138. According to the traditional practice of the government, any departmental head in his discretion may employ counsel for the conduct of the legal business arising in his department, and the existence of this power is expressly recognized by the act of February, 1853 (10 U. S. Stat. at Large, 162), regulating the fees in the legal business of the government. *Employment of Counsel*,* 7 Op. Att'y Gen'l, 141.

§ 139. Expenditures for services rendered in preserving the neutrality of the United States by watching certain suspected vessels, the orders for which issued from the department of state, are properly chargeable to funds in the state department for objects of foreign relations. *Expenditures for Preserving Neutrality*,* 7 Op. Att'y Gen'l, 398.

§ 140. Congress having directed certain accounts to be reopened, to allow certain claims, the officers, upon whom that duty devolves, have no power to open the accounts for any other purpose. *Accounts and Accounting Officers*,* 2 Op. Att'y Gen'l, 515.

§ 141. Department clerks are not liable to military duty. *Ex parte Smith*, 2 Cr. C. C. 693.

§ 142. By the act of February, 1855, the court of claims is entitled to call upon any of the departments for any information or papers it may deem necessary, and such a request can only be refused where the head of the department shall deem a compliance injurious to the public interest. *Court of Claims*,* 13 Op. Att'y Gen'l, 539.

§ 148. The president of the United States has the authority under the act of January 81, 1823, to order advances of public money to disbursing officers of the government. The marshal of the District of Columbia is such an officer within the meaning of that act. Where such advances have been made the order of the head of a department will be regarded as the order of the president, and the sureties of the marshal will be liable for such sums. *United States v. Williams*, 5 Cr. C. C., 619; *United States v. Cutter*, 2 Curt., 617.

§ 144. The executive branch of the government is bound to give effect to the laws which regulate its duties. This necessarily requires a construction of those laws. Where such construction has been acted on for a great number of years under the sanction of the law making power, it becomes a serious question how far the judicial power can interfere with such construction. It will not be disturbed where no wrong is done to an individual. *United States v. Lytle*, 5 McL., 9.

§ 145. The immunity of an executive officer from personal liability for his official acts does not extend to acts illegally or erroneously done under color of his official character. *United States v. Kendall*, 5 Cr. C. C., 163.

§ 146. The release of a joint and several obligor on a bond to the United States, by a head of a department, under provisions of an act authorizing him to compromise with debtor, has the effect of an ordinary release between man and man, and unless expressly excepted by the statute, will release the joint obligor. *United States v. Thompson*, Gilp., 614.

§ 147. A writ of *mandamus* issued by the circuit court of the District of Columbia will lie to an executive officer where some ministerial action is necessary for the completion of an individual right under the laws of the United States. *United States v. Kendall*, 5 Cr. C. C., 163. See WRITS.

§ 148. A *mandamus* will not lie against the secretary of the treasury to compel him to pay a balance due by the government for which there has been no appropriation made by law. *Reese v. Walker*, 11 How., 272.

§ 149. The federal courts have no jurisdiction, under the national currency act, of suits against the treasurer of the United States, or against the comptroller of the currency, for acts done in their official capacity, or to control their official action. *Van Antwerp v. Hulburd*, 7 Blatch., 426.

§ 150. A writ of *mandamus* will lie from the circuit court of the United States to compel the collector of a port to grant a clearance to a vessel, which has been refused, pursuant to the instructions from the secretary of the treasury, if such instructions were not warranted by law. *Gilchrist v. Collector of Port of Charleston*,* 1 Hall L. J., 429.

§ 151. A *mandamus* to the secretary of the treasury will not lie to command the withdrawal of a sum of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States. *United States v. Guthrie*, 17 How., 284.

§ 152. The writ of *mandamus* will lie to the postmaster-general to compel the performance of a merely ministerial act which neither he nor the president has authority to deny or control. *Kendall v. United States*, 12 Pet., 524.

§ 153. The duties of the heads of departments of the federal government are not merely ministerial, but require judgment and discretion. A *mandamus* will not lie to the secretary of the navy to require him to make payment of a sum claimed as pay by an officer in the United States navy, though a valid title to the same should be made out by plaintiff. *Brashear v. Mason*, 6 How., 92.

§ 154. *Mandamus* will not lie to the secretary of the navy to control his official action about a matter not purely ministerial. *Decatur v. Paulding*, 14 Pet., 497.

§ 155. Acts binding on successor.—A head of a department of the government has no right to review the acts of his predecessors except to correct an error of calculation. He cannot recall a credit given or allowance made. Such action is for the judiciary. *United States v. Bank of Metropolis*, 15 Pet., 377.

§ 156. The head of an executive department of the government cannot, in a matter involving judgment and discretion, reverse the decision and action of his predecessor, even in a matter relating to the general affairs and management of the business of the department. *Lavalette v. United States*,* 1 Ct. Cl., 147.

§ 157. Where a claim was presented to a departmental head, and by him decided adversely after referring the same to the president, the principle of *res adjudicata* applies, and the official's successor cannot re-open and reverse the matter. *Claim of Benson for Damages*,* 5 Op. Att'y Gen'l., 28.

§ 158. Where a claim within the scope of his official authority was submitted to the secretary of the treasury, and by him decided adversely, it is incompetent for his official successor to set the same aside, or re-open it, unless there has been a mistake in a matter of fact or material testimony discovered and produced. Power of Secretary of Treasury to Reverse the Decisions of his Predecessor,* 5 Op. Att'y Gen'l. 664.

§ 159. Where, under an act of congress, the legality of a claim upon the government was referred to the opinion of the attorney general, and in pursuance of such reference that official gave an adverse decision, his official successor declined to give an expression of his views on the matter, holding himself concluded by the prior decision. *Claim of Beals and Dixon*,* 12 Op. Att'y Gen'l, 169.

§ 160. Where a departmental head has heard and finally determined a claim, where all the parties in interest have had a hearing, such determination is final and conclusive on his successors in office, and cannot be disturbed except for some extraordinary circumstance. The mere allegation that it was erroneous in law is insufficient ground for a re-hearing. *Western Pacific R. Co.*,* 18 Op. Att'y Gen'l, 387.

§ 161. The principle has been so frequently declared, that the final decision of a matter before the head of a department is binding upon his successors in the same department, under certain well defined exceptions that it is now entitled to be regarded as a settled rule of administrative law. *Case of R. H. McGoon*,* 18 Op. Att'y Gen'l, 456.

§ 162. Attorney-general.—Instructions given by the attorney-general as to the conduct of prosecutions are presumed to have the sanction of the president. The power of the president to interfere, upon considerations of public policy and domestic tranquillity in the conduct of criminal prosecutions in the federal courts, can be exercised only to put an end to such prosecutions and to discharge the accused, never to change the proceedings or the place of trial. *United States v. Conie*,* 18 Law Rep. (N. S.), 145.

§ 163. The attorney-general is *ex officio* a member of the Smithsonian Institution; but he has no right as such to give legal advice to the regents of that institution. *Relation of the Attorney-General to the Smithsonian Institution*,* 6 Op. Att'y Gen'l, 24.

§ 164. By the judiciary act of 1789, it is the duty of the attorney-general "to give his advice and opinion upon questions of law when required by the president of the United States, or when requested by the heads of any of the departments, touching matters that may concern their departments," and while not required to do so, it has been the practice of the government invariably to follow it. *Opinions of Attorneys-General*,* 5 Op. Att'y Gen'l, 97.

§ 165. The attorney-general having been requested by the secretary of war to give his views in regard to the opinion of an official predecessor, and a recent decision of a departmental head, declined doing so, averring that it would be a speculative opinion upon an abstract question of law, having no visible practical interest to the interrogating official. *Duty of Attorney-General*,* 11 Op. Att'y Gen'l, 189.

§ 166. It is not competent for the attorney-general to give opinions concerning any matters pending in congress upon the request of either of the houses, or of any committee. *Power of the Attorney-General*,* 12 Op. Att'y Gen'l, 544 and 546.

§ 167. It is on questions of law arising in the actual administration of the departments that the opinion of the attorney-general may be required, and not upon hypothetical questions. *Attorney-General*,* 18 Op. Att'y Gen'l, 531.

§ 168. The direction of the attorney general is not necessary to an appeal by the United States. If the appeal is taken by the district attorney and sanctioned in the supreme court by the attorney general it is sufficient. *United States v. Curry*, 6 How., 106.

§ 169. When a district attorney moves for trial in a criminal case, it is not error for the court to proceed with the trial, notwithstanding the defendants offer to read a letter from the attorney general to the district attorney's predecessor, instructing him to permit the defendant to have the opportunity of putting himself without the jurisdiction by leaving the country, and his offer to prove that he had not been afforded such opportunity. *United States v. Davis*, 6 Blatch., 484.

§ 170. Secretary of the interior.—The action of the secretary of the interior and commissioner of the land office, in canceling an entry for land, is not a ministerial duty, but a matter of discretion, and the rule is that where an executive officer of the government is vested with a discretion the courts will not interfere to control it. *Gaines v. Thompson*, 7 Wall., 347.

§ 171. Where a land patent has once issued from the interior department, the secretary cannot annul or cancel the same of his own motion. To accomplish that, the intervention of a court is necessary. *Case of McGoon*,* 13 Op. Att'y Gen'l, 456.

§ 172. A. was marshal of the District of Columbia from 1858 until 1861. It had been the custom prior to his induction into office to allow the marshal of that District thirty-four cents a day for keeping and subsisting criminals confined in jail. Upon his entry into office, the secretary of the interior changed the rate to twenty-one cents and a fraction, and on the basis of this change A.'s accounts were settled and adjusted and closed. Upon a subsequent application to a succeeding secretary of the interior, he declined to take any action in the premises. This then is conclusive, and an appeal to the president to direct the accounting officer to re-open such accounts will not lie, owing to the absence in law of any authority on the part of the executive to give such direction. *Accounts of United States Marshals*,* 11 Op. Att'y Gen'l, 129.

§ 178. The secretary of the interior is invested by statute with exclusive supervisory power over the accounts of marshals, clerks and other officers of all the courts of the United States, and his decision of all questions in that connection is final and conclusive. *Ibid.*

§ 174. The secretary of the interior has the power to determine the necessity of the expenses of clerks of the circuit and district courts, and to regulate the same in advance, subject to subsequent modifications of amount as the administration of justice may require. Clerks of the Circuit and District Courts.* 7 Op. Att'y Gen'l, 543.

§ 175. The act of March, 1857 (11 U. S. Stats. at Large, 200), declares that the commissioner of the general land office shall state an account between the United States and each of the other states and shall allow and pay over to the state such amount as may be found due. The state of Illinois made application under this act, and the secretary of the interior, as the superior officer of the land commissioner, took cognizance of the cause and refused to allow the state either payment or an accounting. An appeal to the president, under the circumstances, will not lie. Appeal of Illinois to the President,* 11 Op. Att'y Gen'l, 14.

§ 176. Where an act of congress was passed for the benefit of a late government official, directing the accounting officers of the treasury department "to settle with him upon principles of equity and justice, so as to indemnify him for all moneys paid . . . for the benefit of the government," and such officer fails to take any action, the authority of the secretary of the interior to give instructions to the auditor, to take cognizance of and pass upon the matter, is undoubted, and the auditor is obliged to obey such instructions, a failure to do which presents good grounds for dismissal from office. But in the event of the auditor's dereliction, the president has no authority to perform personally the duties appropriate to his office and state the account. Dart's Case,* 11 Op. Att'y Gen'l, 108.

§ 177. The general supervision and direction over the patent office vested in the secretary of the interior, comprehends the appointment of such temporary clerks in that office as are authorized by law, and also the payment of their salary or compensation out of any money appropriated for that purpose. The commissioner of the patent office, in employing such clerks and paying them, acts under the superintendency and control of the secretary of the interior. And it makes no difference in the case from what source the money to be disbursed is appropriated. Authority of Secretary of Interior Respecting Patent Office,* 5 Op. Att'y Gen'l, 283.

§ 178. Where a claimant to a patent for certain lands was prepared to establish his right to the same before the interior department, it is not discretionary with the department officials, whether they shall suspend action at the request of a committee of the house of representatives; they are bound to consider and determine the same immediately. New Idria Mining Co.,* 18 Op. Att'y Gen'l, 113.

§ 179. The secretary of the navy represents the president and exercises his power on the subjects confided to his department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions on subjects submitted to his jurisdiction and control by the constitution and laws do not require the approval of any officer of another department to make them valid and conclusive. So where the secretary of the navy forwarded to a lieutenant a sum of money to pay medical expenses necessitated by a wound received in a foreign country, the accounting officers of the treasury have no authority to retain the sum thus disbursed out of the pay accounts of the lieutenant. *United States v. Jones*,* 18 How., 92.

§ 180. A letter of the secretary of the navy addressed to the clerk of the court of claims concerning a case pending before that tribunal, is not an official document, and consequently is not evidence. *Mason v. United States*,* 5 Ct. Cl., 495.

§ 181. The secretary of the navy is the organ through which the president as commander-in-chief makes known his will to the navy. Orders issued by him are in contemplation of law the orders of the president. He may, therefore, suspend, modify or rescind at pleasure any order issued by any subordinate officer of the marine corps, which is a part of the navy, whether in service on ship-board or on shore. Power of Secretary of Navy over Marine Corps,* 1 Op. Att'y Gen'l, 380.

§ 182. The numbering of naval commissions is not the act of the president and senate, but an act of the secretary of the navy alone, to prevent questions of rank from arising among the officers, from the circumstance of identity of date in the commissions. Numbering of Naval Commissions,* 1 Op. Att'y Gen'l, 825.

§ 183. The written record of the proceedings before a naval court-martial become, when the proceedings are consummated by the action of the proper revisory authority, the record of an adjudicated case tried and determined by a legally constituted court of justice, and the secretary of the navy or any of his subordinates are bound, on proper application of any person having an interest in it, to furnish an exemplified copy of such a record on file in the navy department. Records of Courts-Martial,* 11 Op. Att'y Gen'l, 137.

§ 184. The secretary of the navy and any of his subordinates, having knowledge of the contents of records of naval courts-martial on file in the navy department, after the proceedings

have been consummated by the proper revisory authority, are bound to answer to a commission of a state court, directing the taking of his or their testimony as to the contents of such records. *Ibid.*

§ 185. The secretary of the navy would be acting in derogation of the act of June, 1870, in employing an attorney or counselor-at-law to, conduct proceedings before a court-martial. Employment of Counsel in Naval Courts-Martial,* 14 Op. Att'y Gen'l, 13.

§ 186. Baring Brothers & Co., of London, having been confirmed as agents of the naval department, the secretary of that department has authority to arrange with them for the payment of drafts of disbursing officers attached to foreign squadrons. Disbursements to Foreign Squadrons,* 5 Op. Att'y Gen'l, 318.

§ 187. Secretary of war.—Congress has the power to control and regulate the building of bridges across the Mississippi river, and may delegate that power to the secretary of war. Under the acts of April 1 and June 4, 1872, he is vested with a discretion to forbid the erection of a bridge at any point where in his opinion it will have the effect to needlessly obstruct navigation; and inasmuch as such a determination involves the decision of questions of fact, it is not for the court to review his decision. And his disapproval is binding, though not expressed in the form and manner required by the act. *United States v. Milwaukee, etc., R. Co.*, 5 Biss., 410; *Same v. Same*, 5 Biss., 420.

§ 188. The order of the secretary of war of May 13, 1863, forbidding the exportation of horses, mules and live stock, and instructing department commanders to prohibit the purchase and sale of horses, mules and live stock intended for exportation, and to cause the same to be appraised and the articles to be reported to the quartermaster-general, and to be taken and appropriated to the use of the government; and also the order of May 19, 1863, directing collectors of customs to refuse clearances for the exportation of horses, mules and live stock, were invalid, as not being authorized by any act of congress. *The Matilda Lewis*, 5 Blatch., 520.

§ 189. The secretary of war has authority to withhold his signature from a requisition for an amount which he believes to be not properly due, though certified to by the accounting officers of the treasury department. Jurisdiction of Accounting Officers,* 12 Op. Att'y Gen'l, 43.

§ 190. Where a writ of *habeas corpus* was sued out against a military officer to produce the body of a prisoner in his charge, the secretary of war had full authority under the act of February, 1853 (10 U. S. Stats. at Large, 161), to employ special counsel to defend said officer, and to stipulate for the fee to be paid. Employment of Counsel by a Department,* 12 Op. Att'y Gen'l, 368.

§ 191. Under the act of March 3, 1819, the secretary of war had power in 1838, to sell or dispose of certain property of the United States held for military purposes, including the Harper's Ferry Armory. The power to sell in fee-simple included the power to grant an easement of right of way to a railroad company over the property. *United States v. Baltimore, etc., R. Co.*, 1 Hughes, 138.

§ 192. Orders and decisions within the lawful and proper competency of the secretary of war are conclusive upon the accounting officers of the treasury. Hence where the secretary ordered that certain officers, while holding special commands, should hold the same according to their brevet ranks, the comptroller of the treasury must allow them pay accordingly. Secretary of War and the Accounting Officers,* 5 Op. Att'y Gen'l, 386.

§ 193. There is but one grade of military storekeepers, and all such officers are subject, as to place of duty, to the orders of the secretary of war. Military Storekeepers,* 6 Op. Att'y Gen'l, 7.

§ 194. The secretary of war is not required by law to discharge minors from the army, whose parents or guardians were aliens and not residing in the United States at the time of enlistment. Enlistment of Minors in the Army,* 6 Op. Att'y Gen'l, 607.

§ 195. Postmaster general.—The power of the postmaster general, under the act of congress of June 27, 1848, to impose fines on the contractors for the carrying of the mails, is limited to cases and for causes specified in the act, and the power, though an administrative one, is so far judicial in its character that it must appear that the officer clothed with the power has assumed to exercise it, and has in fact done so. *United States v. Collins*,* 4 Blatch., 142. See POST OFFICE.

§ 196. Treasury department.—The sureties of an assistant treasurer of the United States are liable for moneys coming into the official custody of such officer and lost, though such loss is not due to his personal neglect, and the manner in which the money is lost is not explained and malfeasance is not attributed to any subordinate. *United States v. Butterfield*,* 7 Ben., 412.

§ 197. Under the one hundred and seventieth section of the act of June 30, 1864, an assistant treasurer of the United States was entitled to commissions upon revenue stamps placed in

his hands by the commissioner of internal revenue and sold by him, to the amount of five per cent. of their aggregate value. *Ibid.*

§ 198. The secretary of the treasury being so far disabled by disease that he is unable to sign his name, but still retains his eye-sight so that one paper cannot be passed upon him for another, may impress his name by the use of a stamp or copper-plate, if he does it himself or it is done in his presence. Signature of the Secretary of the Treasury,* 1 Op. Att'y Gen'l, 670.

§ 199. During the war of the rebellion, under the act of July 16, 1861, the president alone had power to license commercial intercourse with the states in insurrection. And when thus licensed such intercourse could be carried on only in conformity with regulations prescribed by the secretary of the treasury. The subject was wholly beyond the sphere of the power and duties of the military authorities. The general orders of the department commander could give no validity to such intercourse. *Coppell v. Hall*, 7 Wall, 542.

§ 200. An assistant secretary of the treasury is entitled to no commissions under act of June 30, 1864, sections 161 and 170, for his services in the sale of internal revenue stamps. *Folger v. United States*,* 13 Ct. Cl., 86.

§ 201. The comptroller of the treasury is authorized by law "to direct prosecutions to be commenced for all debts due to the United States." During such prosecutions he directs how they shall be conducted, and how the moneys recovered shall be paid. *United States v. Giles*, 9 Cr., 212.

§ 202. The secretary of the treasury is invested with no power to correct an alleged error in the judgment of a court of the United States. Congress is the only power that can redress such an injury. Power of Secretary of Treasury,* 1 Op. Att'y Gen'l, 405.

§ 203. The secretary of the treasury had power, under the act of July 5, 1832, entitled "An act for liquidating and paying certain claims of the state of Virginia," to authorize a state magistrate to administer oaths, and a prosecution would lie for making a false oath before such a magistrate acting under such authority. *United States v. Bailey*, 9 Pet., 238.

§ 204. While the construction given by the treasury department to any law affecting its business is certainly entitled to great respect, it is not binding on the courts. *United States v. Dickson*, 15 Pet., 141.

§ 205. The action of the treasury department is no authority for this court, and cannot change the rights of parties before it. *Reed v. United States*, 11 Wall., 591.

§ 206. Though the opinions of the head of the treasury department, expressed in letters and circulars, will be respected by this court, and though, as between the custom-house officers and the department, the latter controls the course of proceedings, yet as between them and the importers, the legality of all their acts may be revised in the judicial tribunals. *Greely v. Thompson*, 10 How., 225.

§ 207. Where the time limited by law for the payment to the respective governors of the states of the money appropriated by congress to reimburse the expenses incurred in raising troops to aid in suppressing the rebellion had expired before the demand for the same was made, it was held that the secretary of the treasury had no power to make such payment, and that a *mandamus* to compel him to do so would be refused. *Commonwealth v. Boutwell*, 13 Wall., 526.

§ 208. The secretary of the treasury has no power to direct that the appraisers of a certain class of imported goods shall not make an allowance from the invoice price of more than a particular per cent. And a duty exacted upon a valuation, pursuant to direction, greater than the appraiser's market valuation, can be recovered. *Gray v. Lawrence*, 3 Blatch., 117.

§ 209. The secretary of the treasury has power, under section 10, act of March 3, 1863 (12 U. S. Stat. at L., 740), to compromise claims in favor of the United States, but no power at all is conferred in regard to criminal prosecutions. Nor is the power of determining the extent of punishment to be inflicted in a criminal proceeding, nor the pardoning power, entrusted to the secretary or the solicitor of the treasury or the collector of revenue, by any statute. *United States v. George*, 6 Blatch., 406.

§ 210. Certificates of United States stock, transferrable by delivery, and with coupons of interest attached, having been lost, it is impossible for the secretary of the treasury to issue any other security which would be its representative or substitute or have any legal efficacy, without a legislative act authorizing what, in that case, would be equivalent to the issue of new stock. But in the case of a total destruction of the certificates, it is competent for the secretary of the treasury to furnish to the holder, at the time of the destruction thereof, new evidence of his claim. Concerning the Loss and Destruction of Certificates of Stock,* 5 Op. Att'y Gen'l, 66.

§ 211. Instructions were properly given by the president to the secretary of the treasury under the act of January 31, 1823, to make such advances from time to time to the marshals of the various districts, out of the public moneys, of such sums as were necessary to enable

them to execute their duties, and advances so made were legal, for which the sureties of the marshals were liable as for other moneys. *Williams v. United States*, 1 How., 290.

§ 212. Where an act of congress granting relief submitted the whole subject of the claim to the exclusive judgment of the second auditor, no other department has jurisdiction over it; and when he has once settled it, his successor has no right to disregard the decision, but is bound to consider it correct. *Decisions of Auditors*,* 5 Op. Att'y Gen'l, 97.

§ 213. When a claim has been finally disallowed by the treasury department, and subsequently rejected by congress, the comptroller can not rehear and reconsider the matter upon new testimony. *Accounts and Accounting Officers*,* 2 Op. Att'y Gen'l, 515.

§ 214. The power to remit forfeitures and penalties incurred by a breach of the act of July, 1838 (5 U. S. Stats. at Large, 804), rests solely with the secretary of the treasury, by virtue of section 1, act of March 3, 1797. *Case of Steamboat Minnesota*,* 11 Op. Att'y Gen'l, 122.

§ 215. The secretary of the treasury has no power to remit judgments of forfeiture pronounced against vessels for infractions of the slave-trade act of 1818. *Power of Executive to Remit Forfeitures*,* 4 Op. Att'y Gen'l, 573.

§ 216. The secretary of the treasury has power to remit forfeitures for the violation of the non-intercourse acts at any time before the payment of the money to the collector for distribution. The interest of the custom-house officers in a forfeiture upon a seizure is inchoate, and is entirely subordinate to the right of the secretary to remit. His power on the subject is absolute, and his decision is conclusive. *United States v. Morris*, 10 Wheat., 290.

§ 217. In a case of petition for remission of penalties and forfeitures incurred by violation of the revenue law, certified to the secretary of the treasury, and by stipulation returned to the commissioner for a revision of his findings of fact on the evidence already taken, a motion to dismiss by the district attorney, while the case is thus before the commissioner, will not be entertained by the district court, because the effect would be to oust the secretary of his jurisdiction. *In re Barnes*, 10 Ben., 79.

§ 218. The power entrusted to the secretary of the treasury to remit penalties and forfeitures under the acts of March 3, 1797, of June 3, 1864, and of March 3, 1865, is not a judicial power, but one of mercy to mitigate the severity of the law, and no appeal lies from his decision to the court of claims or any other court. *Dorsheimer v. United States*, 7 Wall., 166.

§ 219. The validity of the act of May 15, 1820, authorizing the issue by the agent of the treasury department of a distress warrant against delinquent public officers and their sureties, questioned. *United States v. Taylor*, 3 McL., 539.

§ 220. The settling of an account of a public officer, by the auditor of the United States treasury, and the issue by the solicitor of the treasury of a treasury warrant of *capias ad satisfaciendum* against him, for the balance due, is a ministerial and not a judicial function. *Ex parte Randolph*, 2 Marsh., 448.

§ 221. The act of congress, May 20, 1820, authorizing the issue of a treasury warrant of *capias ad satisfaciendum* against a delinquent public officer, for an unliquidated balance of an account settled by the auditor of the treasury, is applicable to those officers only whose regular duty it is to receive and disburse the public money, and who are appointed for that purpose, and does not include an acting purser of a ship of war. *Ibid.*

§ 222. The act of May 15, 1820, provided for the issue of a distress warrant by the treasury department against delinquent government officers, and for the application of any person who considers himself aggrieved by such warrant to the district court for an injunction. *Held*, that the adjudication of the court on the application for injunction was final as to the right of action on the account. *United States v. Nourse*, 9 Pet., 8.

§ 223. The law prescribing no form for the decisions of the secretary of the treasury, it rests in the sound discretion of that official whether they shall be given orally or in writing. *Power of Secretary of Treasury to Revise the Decisions of his Predecessor*,* 5 Op. Att'y Gen'l, 664.

§ 224. Instructions of the secretary of the treasury not given in accordance with the law do not afford a justification to a collector acting on them nor exonerate him from damages for an injury caused by his obedience. *Tracy v. Swartwout*, 10 Pet., 80.

§ 225. The secretary of the treasury has no power by his instructions to collectors of the port to repeal the rule of evidence established by section 43 of act of March 2, 1799, requiring collectors to give a certificate of lawful importation to accompany each cask of imported liquors to the importer thereof. *Foster v. Peaslee*,* 11 Law Rep., 341.

§ 226. The acts of July 13, 1861, and of May 20, 1862, prohibiting all trade and intercourse with the states declared to be in insurrection, conferred upon the secretary of the treasury power "to make such rules and regulations as may be necessary and proper to carry into effect the purpose of said acts." *Held*, that the power so conferred included the power to declare a forfeiture of a vessel violating such rules and regulations by transporting passengers and property into the insurgent territory, and that it was competent for congress to delegate such power

to the secretary of the treasury, although *quasi* legislative in its character. *United States v. Schooner Francis Hatch*,* 4 Am. L. Reg., N. S., 239.

§ 227. Regulations, made by the secretary of the treasury under Revised Statutes, section 251, authorizing him to make and issue instructions and regulations to the several collectors, calculated to promote public convenience and security, and to protect the United States, as well as individuals, in the collection of import duties and internal revenue, if they do not violate law and are fairly within the scope and purpose of the statute, and do not violate or infringe upon any existing legal rights of individuals, have the force of law. *United States v. Hutton*, 10 Ben., 263.

§ 228. The rules and regulations which the commissioner of internal revenue is authorized to make cannot have the effect of amending the law. They may aid in carrying the law, as it exists, into effect, but they cannot change its positive provisions. *United States v. Two Hundred Barrels of Whisky*, 5 Otto, 571.

§ 229. A regulation of the treasury department, in conformity to an act of congress, becomes a part of the law, and of as binding force as if incorporated in the body of the act itself. *United States v. Barrows*, 1 Abb., 351; 3 Pittsb. R., 151.

§ 230. Where the commissioner of customs differs from the secretary of the treasury as to the propriety of settlements and adjustments of accounts, and orders for their payment, he has no authority to review such decisions and orders, and to refuse to countersign the warrants drawn by the secretary, in pursuance of appropriations by law. *Jurisdiction of Accounting Officers*,* 5 Op. Att'y Gen'l, 630.

§ 231. Congress may confer on the secretary of the treasury the power, though *quasi* legislative, to make regulations imposing forfeiture on vessels engaged in a prohibited trade with insurrectionary districts. Thus, though the act of July 13, 1861, forfeited such a cargo only while *in transitu*, and the vessel only while the contraband cargo is on board, the regulations of the secretary of the treasury, pursuant to this and other acts, provided for forfeiture even after the termination of the prohibited voyage and the discharge of the contraband cargo. *Held* that he was authorized to do this. *United States v. Schooner Francis Hatch*,* 13 Am. L. Reg., 289.

§ 232. The authority of the accounting officers of the treasury is confined to the adjustment of accounts only, and does not extend to claims in favor of the government for damages occasioned by an alleged tort of a party whose account upon a contract is presented for adjustment. *Case of The Steamer Tappahannock*,* 12 Op. Att'y Gen'l, 431.

§ 233. The act of March 3, 1845, declares that no accounts which shall have been adjusted by the accounting officers of the treasury shall be reopened without authority of law, and the secretary of the interior acted rightly in declining to direct a readjustment of closed accounts. *Accounts of United States Marshals*,* 11 Op. Att'y Gen'l, 129.

§ 234. The accounting officers of the treasury, in settling the accounts of the vice-president, have a right to adopt the report of a congressional committee as establishing the principles which are to govern them in the examination and settlement thereof. They may receive, in evidence of the several items of account, depositions taken on notice. The accounting officers must act in the first instance. The power of the president is in its nature appellate, and he cannot put those officers aside and take the whole subject into his own hands. *Duties of Accounting Officers*,* 1 Op. Att'y Gen'l, 596.

§ 235. The treasury department acts in a judicial capacity in stating the charges to which a revenue officer is subject, in his account with the government, and will not be allowed to vary that adjudication subsequently to his prejudice. *United States v. Collier*, 3 Blatch., 325.

IV. CONGRESS.

[Legislative Powers, see CONSTITUTION AND LAWS.]

SUMMARY — *Power to punish for contempt*, §§ 236-238. — *Inquiry into affairs of a private person*, § 237.

§ 236. The house of representatives has implied power to punish for contempt others than its members. *Anderson v. Dunn*, §§ 239-45.

§ 237. The house of representatives has no authority to inquire into the affairs of a private individual, though he may be a debtor to the government. *Kilbourn v. Thompson*, §§ 246-53.

§ 238. The house of representatives has no jurisdiction to punish a person as for contempt for a refusal to testify before a committee charged by it with the investigation of matters outside the proper scope of its authority; and the resolution of the house and the warrant of the

speaker in such a case are not conclusive and are no justification. But the members of the committee are not liable for false imprisonment, though they reported and voted for the resolution ordering such punishment. *Ibid.*

[NOTES.—See §§ 254-258.]

ANDERSON v. DUNN.

(6 Wheaton, 204-235. 1821.)

ERROR to the Circuit Court for the District of Columbia.

STATEMENT OF FACTS.—This was an action of trespass, brought in the court below, by the plaintiff in error against the defendant in error, for an assault and battery and false imprisonment, to which the defendant pleaded the general issue, and a special plea of justification. The plaintiff demurred generally to the special plea, which was adjudged good, and the demurrer overruled, and judgment upon such demurrer was entered for the defendant, and a writ of error brought by the plaintiff. The plea set forth that defendant was sergeant-at-arms of the house of representatives, and that the arrest and imprisonment took place by the authority of a warrant issued by Henry Clay, speaker of the house.

Opinion of MR. JUSTICE JOHNSON.

Notwithstanding the range which has been taken by the plaintiff's counsel, in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down to the simple inquiry whether the house of representatives can take cognizance of contempts committed against themselves under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offense committed. Yet it cannot be denied, that the power to institute a prosecution must be dependent upon the power to punish. If the house of representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

§ 239. *Neither house of congress possesses by the terms of the constitution any express power to punish anyone for contempt except its own members.*

It is certainly true that there is no power given by the constitution to either house to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either house, or any one co-ordinate branch of the government. Shall we, therefore, decide that no such power exists? It is true that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate.

The idea is utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation.

Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger. No one is so visionary as to dispute the assertion that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion applied to the exigencies of the state as they arise. It is the science of experiment.

§ 240. *Public functionaries must have full liberty to exercise the powers with which they have been intrusted.*

But if there is one maxim which necessarily rides over all others in the practical application of government, it is that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less certain that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights.

That "the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries without which that safety cannot be guarded. On this principle it is that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates, and as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

§ 241. *Courts of justice have in express terms the power granted to them to punish for contempts; they would have had that power without such express grant.*

It is true that the courts of justice of the United States are vested by express statute provision with power to fine and imprison for contempts; but it does not follow from this circumstance that they would not have exercised that power without the aid of the statute or not in cases, if such should occur, to which such statute provision may not extend; on the contrary it is a legislative assertion of this right as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

§ 242. *The house of representatives has the power by implication and from necessity to punish for contempt.*

But it is contended that if this power in the house of representatives is to be asserted on the plea of necessity, the ground is too broad and the result too indefinite; that the executive and every co-ordinate, and even subordinate branch of the government may resort to the same justification, and the whole

assume to themselves, in the exercise of this power, the most tyrannical licentiousness. This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced. But what is the alternative? The argument obviously leads to the total annihilation of the power of the house of representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice or even conspiracy may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberative assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And accordingly, to avoid the pressure of these considerations, it has been argued that the right of the respective houses to exclude from their presence and their absolute control within their own walls, carry with them the right to punish contempts committed in their presence, while the absolute legislative power given to congress within this district enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed that so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor; for, *non constat*, from the pleadings, but that this warrant issued for an offense committed in the immediate presence of the house. Nor is it immaterial to notice what difficulties the negation of this right in the house of representatives draws after it, when it is considered that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit: the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the house be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls, any more than without them? If the analogy with individual right and power be resorted to, it will reach no further than to exclusion, and it requires no exuberance of imagination to exhibit the ridiculous consequences which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

Nor would their situation be materially relieved by resorting to their legislative power within the district. That power may, indeed, be applied to many purposes, and was intended by the constitution to extend to many purposes indispensable to the security and dignity of the general government; but they are purposes of a more grave and general character than the offenses which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet contempt might be reasonably applied.

§ 243. *Contempt, as an offense, is undefinable; its punishment, however, is not indefinite.*

But although the offense be held undefinable, it is justly contended that the

punishment need not be indefinite. Nor is it so. We are not now considering the extent to which the punishing power of congress, by a legislative act, may be carried. On that subject, the bounds of their power are to be found in the provisions of the constitution. The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?

§ 244. *Imprisonment is the punishment of contempt of legislative bodies; it must cease upon the adjournment or periodical dissolution of the legislative body which inflicts it.*

Analogy, and the nature of the case, furnish the answer: "The least possible power adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious. And even to the duration of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblies, when under the influence of strong passions, or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own. But the American legislative bodies have never possessed or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

If it be inquired, what security is there, that with an officer avowing himself devoted to their will, the house of representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech, and of the press? the reply is to be found in the consideration that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion. Melancholy, also, would be that state of distrust which rests not a hope upon a moral influence. The most absolute tyranny could not subsist where men could not be trusted with power because they might abuse it, much less a government which has no other basis than the sound morals, moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures but dissolve the very texture of society.

§ 245. *The express grant of power to congress to punish its own members for contempt does not exclude the right by implication to punish others for the like offenses.*

But it is argued that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the house of representatives; that the express grant of power to punish their members respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members. This argument proves too much; for its direct application would lead to the annihilation of almost every power of congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases, and one only; and all the punishing power exercised by congress in any cases, except those which relate to piracy and offenses against the laws of nations, is derived from implication. Nor did the idea ever occur to any one that the express grant in one class of cases repelled the assumption of the punishing power in any other.

The truth is that the exercise of the powers given over their own members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it. Constituted as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him.

In reply to the suggestion that on this same foundation of necessity might be raised a superstructure of implied powers in the executive and every other department and even ministerial officer of the government, it would be sufficient to observe that neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body. Even corruption anywhere else would not contaminate the source of political life. In the retirement of the cabinet it is not expected that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the house of representatives would have issued it without duly establishing the fact charged on the individual. And, as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitants of any other section of the Union. If the inconvenience be urged, the reply is obvious; there is no difficulty in observing that respectful deportment which will render all apprehension chimerical.

Judgment affirmed.

KILBOURN v. THOMPSON.

(13 Otto, 168-205. 1880.)

ERROR to the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Kilbourn, having refused to answer as a witness, certain questions propounded to him by a committee of the house of representatives in congress, was arrested by the sergeant-at-arms of the house by virtue of a warrant from the speaker. He was imprisoned forty-five days, and upon his release brought suit against the sergeant-at-arms, the speaker, clerk of the house and the members of the committee. The defendants, except the speaker, who had died in the interim, pleaded a justification under the speaker's warrant and the powers of the house of representatives. To this plea plaintiff filed a demurrer which was overruled and plaintiff brought up the case by a writ of error.

Opinion by MR. JUSTICE MILLER.

The argument before us has assumed a very wide range, and includes the discussion of almost every suggestion that can well be conceived on the subject. The two extremes of the controversy are the proposition on the part of the plaintiff, that the house of representatives has no power whatever to punish for a contempt of its authority; and on the part of defendants, that such power undoubtedly exists, and when that body has formally exercised it, it must be presumed that it was rightfully exercised. This latter proposition assumes the form of expression sometimes used with reference to courts of justice of general jurisdiction, that having the power to punish for contempts, the judgment of the house that a person is guilty of such contempt is conclusive everywhere.

Conceding for the sake of the argument that there are cases in which one of the two bodies that constitute the congress of the United States may punish for contempt of its authority, or disregard of its orders, it will scarcely be contended by the most ardent advocate of their power in that respect that it is unlimited.

§ 246. *No express power to punish for contempts is granted by the constitution to either house of congress.*

The powers of congress itself, when acting through the concurrence of both branches, are dependent solely on the constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are "reserved to the states respectively, or to the people." Of course neither branch of congress, when acting separately, can lawfully exercise more power than is conferred by the constitution on the whole body, except in the few instances where authority is conferred on either house separately, as in the case of impeachments. No general power of inflicting punishment by the congress of the United States is found in that instrument. It contains in the provision that no "person shall be deprived of life, liberty, or property, without due process of law," the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of congress which proposed to adjudge a man guilty of a crime, and inflict the punishment, would be conceded by all thinking men to be unauthorized by anything in the constitution. That instrument, however, is not wholly

silent as to the authority of the separate branches of congress to inflict punishment. It authorizes each house to punish its own members. By the second clause of the fifth section of the first article, "Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member," and by the clause immediately preceding, it "may be authorized to compel the attendance of absent members in such manner and under such penalties as each house may provide." These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either house of congress to punish for contempts.

The advocates of this power have, therefore, resorted to an implication of its existence, founded on two principal arguments. These are, 1, its exercise by the house of commons of England, from which country we, it is said, have derived our system of parliamentary law; and, 2, the necessity of such a power to enable the two houses of congress to perform the duties and exercise the powers which the constitution has conferred on them.

§ 247. *Argument for the power of one of the houses of congress to punish for contempt drawn from analogy of the powers of the English parliament.*

That the power to punish for contempt has been exercised by the house of commons in numerous instances is well known to the general student of history, and is authenticated by the rolls of the parliament. And there is no question but that this has been upheld by the courts of Westminster Hall. Among the most notable of these latter cases are the judgments of the court of king's bench, in *Brass Crosby's Case*, 3 Wils., 188, decided in the year 1771; *Burdett v. Abbott*, 14 East, 1, in 1811, in which the opinion was delivered by Lord Ellenborough; and *Case of the Sheriff of Middlesex*, 11 Ad. & E., 273, in 1840. Opinion by Lord Denman, chief justice. It is important, however, to understand on what principle this power in the house of commons rests, that we may see whether it is applicable to the two houses of congress, and if it be, whether there are limitations to its exercise.

§ 248. *Parliament a court.*

While there is, in the adjudged cases in the English courts, little agreement of opinion as to the extent of this power, and the liability of its exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the high court of parliament.

They were not only called so, but the assembled parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king in his court of parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the king, were recognized as valid. Upon the separation of the lords and commons into two separate bodies, holding their sessions in different chambers, and hence called the house of lords and the house of commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the house of lords, where it has been exercised without dispute ever since. To the commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are, in their nature, punishment for crime declared judicially by the high court of parliament of the kingdom of England.

It is upon this idea that the two houses of parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority that the power rests.

In the case of *Burdett v. Abbott*, already referred to as sustaining this power in the commons, Mr. Justice Bailey said, in support of the judgment of the court of king's bench: "In an early authority upon that subject, in Lord Coke, 4 Inst. 23, it is expressly laid down that the house of commons has not only a legislative character and authority, but is also a court of judicature; and there are instances put there in which the power of committing to prison for contempts has been exercised by the house of commons, and this, too, in cases of libel. If then, the house be a court of judicature, it must, as is in a degree admitted by the plaintiff's counsel, have the power of supporting its own dignity as essential to itself; and without power of commitment for contempts it could not support its dignity." In the opinion of Lord Ellenborough in the same case, after stating that the separation of the two houses of parliament seems to have taken place as early as the 49 Henry III, about the time of the battle of Evesham, he says the separation was probably effected by a formal act for that purpose by the king and parliament. He then adds: "The privileges which have since been enjoyed, and the functions which have been since uniformly exercised by each branch of the legislature, with the knowledge and acquiescence of the other house and of the king, must be presumed to be the privileges and functions which then, that is, at the very period of their original separation, were statuably assigned to each." He then asks, "Can the high court of parliament, or either of the two houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts which is acknowledged to belong, and is daily exercised as belonging, to every superior court of law of less dignity undoubtedly than itself?" This power is here distinctly placed on the ground of the judicial character of parliament, which is compared in that respect with the other courts of superior jurisdiction, and is said to be of a dignity higher than they.

In the earlier case of *Crossby*, lord mayor of London, De Gray, chief justice, speaking of the house of commons, which had committed the lord mayor to the tower of London for having arrested by judicial process one of its messengers, says: "Such an assembly must certainly have such authority, and it is legal because necessary. Lord Coke says they have a judicial power; each member has a judicial seat in the house; he speaks of matters of judicature of the house of commons." Mr. Justice Blackstone, in concurring in the judgment, said: "The house of commons is a supreme court, and they are judges of their own privileges and contempts, more especially with respect to their own members." Mr. Justice Gould also laid stress upon the fact that the "house of commons may be properly called judges," and cites 4 Coke's Inst., 47, to show that "an alien cannot be elected to parliament, *because such a person can hold no place of judicature.*"

In the celebrated case of *Stockdale v. Hansard*, 9 Ad. & E. 1, decided in 1839, this doctrine of the omnipotence of the house of commons in the assertion of its privileges received its first serious check in a court of law. The house of commons had ordered the printing and publishing of a report of one of its committees, which was done by Hansard, the official printer of the body.

This report contained matter on which Stockdale sued Hansard for libel. Hansard pleaded the privilege of the house, under whose orders he acted, and the question on demurrer was, assuming the matter published to be libelous in its character, did the order of the house protect the publication?

Sir John Campbell, attorney-general, in an exhaustive argument in defense of the prerogative of the house, bases it upon two principal propositions; namely, that the house of commons is a court of judicature, possessing the same right to punish for contempt that other courts have, and that its powers and privileges rest upon the *lex parliamenti*,—the laws and customs of parliament. These, he says, and cites authorities to show it, are unknown to the judges and lawyers of the common-law courts, and rest exclusively in the knowledge and memory of the members of the two houses. He argues, therefore, that their judgments and orders on matters pertaining to these privileges are conclusive, and cannot be disputed or reviewed by the ordinary courts of judicature.

Lord Denman, in a masterly opinion, concurred in by the other judges of the king's bench, ridicules the idea of the existence of a body of laws and customs of parliament unknown and unknowable to anybody else but the members of the two houses, and holds with an incontrovertible logic that when the rights of the citizen are at stake in a court of justice, it must, if these privileges are set up to his prejudice, examine for itself into the nature and character of those laws, and decide upon their extent and effect upon the rights of the parties before the court. While admitting, as he does in case of the Sheriff of Middlesex, 11 Ad. & E, 273, that when a person is committed by the house of commons for a contempt in regard to a matter of which that house had jurisdiction, no other court can relieve the party from the punishment which it may lawfully inflict, he holds that the question of the jurisdiction of the house is always open to the inquiry of the courts in a case where that question is properly presented.

But perhaps the most satisfactory discussion of this subject, as applicable to the proposition that the two houses of congress are invested with the same power of punishing for contempt, and with the same peculiar privileges, and the same power of enforcing them, which belonged by ancient usage to the houses of the English parliament, is to be found in some recent decisions of the privy council. That body is by its constitution vested with authority to hear and decide appeals from the courts of the provinces and colonies of the kingdom.

The leading case is that of *Kielley v. Carson and others*, 4 Moo. P. C. 63, decided in 1841. There were present at the hearing, Lord Chancellor Lyndhurst, Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, Vice-Chancellor Shadwell, the chief justice of the common pleas, Mr. Justice Erskine, Dr. Lushington, and Mr. Baron Parke, who delivered the opinion, which seems to have received the concurrence of all the eminent judges named. Measuring the weight of its authority by the reputation of the judges who sat in the case and agreed to the opinion, it would be difficult to find one more entitled on that score to be received as conclusive on the points which it decided.

The case was an appeal from the supreme court of judicature of Newfoundland. John Kent, one of the members of the house of assembly of that island, reported to that body that Kielley, the appellant, had been guilty of a contempt of the privileges of the house in using towards him reproaches, in gross

and threatening language, for observations made by Kent in the house; adding, "Your privilege shall not protect you." Kielley was brought before the house, and added to his offense by boisterous and violent language, and was finally committed to jail under an order of the house and the warrant of the speaker. The appellant sued Carson, the speaker, Kent, and other members, and Walsh, the messenger, who pleaded the facts above stated, and relied on the authority of the house as sufficient protection. The judgment of the court of Newfoundland was for the defendants, holding the plea good.

This judgment was supported in argument before the privy council on the ground that the legislative assembly of Newfoundland had the same parliamentary rights and privileges which belonged by usage to the parliament of England, and that, if this were not so, it was a necessary incident to every body exercising legislative functions to punish for contempt of its authority. The case was twice argued in the privy council, on which its previous judgment in the case of *Beaumont v. Barrett*, 1 Moo. P. C., 59, was much urged, in which both those propositions had been asserted in the opinion of Mr. Baron Parke.

§ 249. *The power of the house of representatives to punish for contempt is not sustained by the precedents and practices of the English house of commons.*

Referring to that case as an authority for the proposition that the power to punish for a contempt was incident to every legislative body, the opinion of Mr. Baron Parke in the later case uses this language: "There is no decision of a court of justice, nor other authority, in favor of the right, except that of the case of *Beaumont v. Barrett*, decided by the judicial committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and myself. Their lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their lordships, delivered by myself immediately after the argument was closed, though it clearly expressed that the power was incidental to every legislative assembly, was not the only ground on which that judgment was rested, and therefore was, in some degree, extra-judicial; but besides, it was stated to be and was founded entirely on the *dictum* of Lord Ellenborough in *Burdett v. Abbott*, which *dictum*, we all think, cannot be taken as authority for the abstract proposition that every legislative body has the power of committing for contempt. The observation was made by his lordship with reference to the peculiar powers of parliament, and ought not, we all think, to be extended any further. We all, therefore, think that the opinion expressed by myself in the case of *Beaumont v. Barrett* ought not to affect our decision in the present case, and, there being no other authority on the subject, we decide according to the principle of the common law, that the house of assembly have not the power contended for. They are a local legislature, with every power reasonably necessary for the exercise of their functions and duties, but they have not what they erroneously supposed themselves to possess,—the same exclusive privileges which the ancient law of England has annexed to the house of parliament." In another part of the opinion the subject is thus disposed of: "It is said, however, that this power belongs to the house of commons in England; and this, it is contended, affords an authority for holding that it belongs, as a legal incident by the common law, to an assembly with analogous functions. But the reason why the house of commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo parlia-*

menti, which forms a part of the common law of the land, and according to which the high court of parliament before its division, and the houses of lords and commons since, are invested with many privileges, that of punishment for contempt being one." The opinion also discusses at length the necessity of this power in a legislative body for its protection, and to enable it to discharge its law-making functions, and decides against the proposition. But the case before us does not require us to go so far, as we have cited it to show that the powers and privileges of the house of commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the house of representatives of the United States,—a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm, and whose functions, so far as they partake in any degree of that character, are limited to punishing its own members and determining their election. The case, however, which we have just been considering, was followed in the same body by *Fenton v. Hampton*, 11 Moo. P. C., 347, and *Doyle v. Falconer*, Law Rep., 1 P. C., 328, in both of which, on appeals from other provinces of the kingdom, the doctrine of the case of *Kielley v. Carson* and others is fully reaffirmed.

We are of opinion that the right of the house of representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two houses of the English parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either house of congress to exercise successfully their function of legislation. This latter proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function.

As we have already said, the constitution expressly empowers each house to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the house for the preservation of order.

So, also, the penalty which each house is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject. Each house is by the constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election for refusing to testify, that he would if the case were pending before a court of judicature.

The house of representatives has the sole right to impeach officers of the government, and the senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases. Whether the power of

punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which that house has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether state or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the constitution of the United States some important exceptions. One of these is, that the president is so far made a part of the legislative power that his assent is required to the enactment of all statutes and resolutions of congress.

This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the president to approve it, by a vote of two-thirds of each house of congress. So, also, the senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The senate also exercises the judicial power of trying impeachments, and the house of preferring articles of impeachment.

In the main, however, that instrument, the model on which are constructed the fundamental laws of the states, has blocked out with singular precision and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the constitution to one of these departments cannot be exercised by another.

It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of states, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the federal government, presents powerful and growing temptations to those to whom that exercise is intrusted to overstep the just boundaries of their own department and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.

The house of representatives having the exclusive right to originate all bills for raising revenue, whether by taxation or otherwise, having with the senate the right to declare war and fix the compensation of all officers and servants of the government, and vote the supplies which must pay that compensation,

and being also the most numerous body of all those engaged in the exercise of the primary powers of the government, is for these reasons least of all liable to encroachments upon its appropriate domain.

§ 250. *The house of representatives has no power to punish a witness for contempt in refusing to answer questions, when the house itself is usurping judicial functions.*

By reason, also, of its popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people,—the great source of all power in this country,—encroachments by that body on the domain of co-ordinate branches of the government would be received with less distrust than a similar exercise of unwarranted power by any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositaries of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it, that it should receive the most careful scrutiny.

In looking to the preamble and resolution under which the committee acted, before which Kilbourn refused to testify, we are of opinion that the house of representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial.

The constitution declares that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative.

The preamble to the resolution recites that the government of the United States is a creditor of Jay Cooke & Co., then in bankruptcy in the district court of the United States for the eastern district of Pennsylvania. If the United States is a creditor of any citizen, or of any one else on whom process can be served, the usual, the only legal mode of enforcing payment of the debt is by a resort to a court of justice. For this purpose, among others, congress has created courts of the United States, and officers have been appointed to prosecute the pleas of the government in these courts.

§ 251. *The house of representatives was usurping judicial functions in the investigation of the series of transactions concerning which a suit was then pending in a district court, and had no authority to compel answers to questions about it.*

The district court for the eastern district of Pennsylvania is one of them, and according to the recital of the preamble, had taken jurisdiction of the subject-matter of Jay Cooke & Co.'s indebtedness to the United States, and

had the whole subject before it for action at the time the proceeding in congress was initiated. That this indebtedness resulted, as the preamble states, from the improvidence of a secretary of the navy, does not change the nature of the suit in the court nor vary the remedies by which the debt is to be recovered. If, indeed, any purpose had been avowed to impeach the secretary, the whole aspect of the case would have been changed. But no such purpose is disclosed. None can be inferred from the preamble, and the characterization of the conduct of the secretary by the term "improvident," and the absence of any words implying suspicion of criminality repel the idea of such purpose, for the secretary could only be impeached for "high crimes and misdemeanors."

The preamble then refers to "the real estate pool," in which it is said Jay Cooke & Co. had a large interest, as something well known and understood, and which had been the subject of a partial investigation by the previous congress, and alleges that the trustee in bankruptcy of Jay Cooke & Co. had made a settlement of the interest of Jay Cooke & Co. with the associates of the firm of Jay Cooke & Co., to the disadvantage and loss of their numerous creditors, including the government of the United States, by reason of which the courts are powerless to afford adequate redress to said creditors. Several very pertinent inquiries suggest themselves as arising out of this short preamble.

How could the house of representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the congress of the United States to interfere with a suit pending in a court of competent jurisdiction? Again, what inadequacy of power existed in the court, or, as the preamble assumes, in all courts, to give redress which could lawfully be supplied by an investigation by a committee of one house of congress, or by any act or resolution of congress on the subject? The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative. If the settlement, to which the preamble refers as the principal reason why the courts are rendered powerless, was obtained by fraud, or was without authority, or for any conceivable reason could be set aside or avoided, it should be done by some appropriate proceeding in the court which had the whole matter before it, and which had all the power in that case proper to be intrusted to any body, and not by congress or by any power to be conferred on a committee of one of the two houses.

The resolution adopted as a sequence of this preamble contains no hint of any intention of final action by congress on the subject. In all the argument of the case no suggestion has been made of what the house of representatives or the congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the house of representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By "fruitless" we mean that it could result in no valid legislation on the subject to which the inquiry referred.

What was the committee charged to do? To inquire into the nature and history of the real estate pool. How indefinite! What was the real estate

pool? Is it charged with any crime or offense? If so, the courts alone can punish the members of it. Is it charged with a fraud against the government? Here again the courts, and they alone, can afford a remedy. Was it a corporation whose powers congress could repeal? There is no suggestion of the kind. The word "pool," in the sense here used, is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic; and the *gravamen* of the whole proceeding is that a debtor of the United States may be found to have an interest in the pool. Can the rights of the pool, or of its members, and the rights of the debtor, and of the creditor of the debtor, be determined by the report of a committee or by an act of congress? If they cannot, what authority has the house to enter upon this investigation into the private affairs of individuals who hold no office under the government.

The court of exchequer of England was originally organized solely to entertain suits of the king against the debtors of the crown. But after a while, when the other courts of Westminster Hall became overcrowded with business, and it became desirable to open the court of exchequer to the general administration of justice, a party was allowed to bring any common-law action in that court on an allegation that the plaintiff was debtor to the king, and the recovery in the action would enable him to respond to the king's debt. After a while the court refused to allow this allegation to be controverted, and so, by this fiction, the court came from a very limited to be one of general jurisdiction. Such an enlargement of jurisdiction would not now be tolerated in England, and it is hoped not in this country of written constitutions and laws; but it looks very like it when, upon the allegation that the United States is a creditor of a man who has an interest in some other man's business, the affairs of the latter can be subjected to the unlimited scrutiny or investigation of a congressional committee.

We are of opinion, for these reasons, that the resolution of the house of representatives authorizing the investigation was in excess of the power conferred on that body by the constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the house, and the warrant of the speaker under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority.

§ 252. *Case cited and in part overruled.*

At this point of the inquiry we are met by *Anderson v. Dunn*, 6 Wheat., 204 (§§ 239-45, *supra*), which in many respects is analagous to the case now under consideration. Anderson sued Dunn for false imprisonment, and Dunn justified under a warrant of the house of representatives directed to him as sergeant-at-arms of that body. The warrant recited that Anderson had been found by the house "guilty of a breach of the privileges of the house, and of a high contempt of the dignity and authority of the same." The warrant directed the sergeant-at-arms to bring him before the house, when, by its order, he was reprimanded by the speaker. Neither the warrant nor the plea described or gave any clue to the nature of the act which was held by the house to be a contempt. Nor can it be clearly ascertained from the report of the case what it was, though a slight inference may be derived from something in one of the arguments of counsel, that it was an attempt to bribe a member.

But, however that may be, the defense of the sergeant-at-arms rested on the

broad ground that the house, having found the plaintiff guilty of a contempt, and the speaker, under the order of the house, having issued a warrant for his arrest, that alone was sufficient authority for the defendant to take him into custody, and this court held the plea good.

It may be said that since the order of the house, and the warrant of the speaker, and the plea of the sergeant-at-arms, do not disclose the ground on which the plaintiff was held guilty of a contempt, but state the finding of the house in general terms as a judgment of guilty, and as the court placed its decision on the ground that such a judgment was conclusive in the action against the officer who executed the warrant, it is no precedent for a case where the plea establishes, as we have shown it does in this case by its recital of the facts, that the house has exceeded its authority.

This is, in fact, a substantial difference. But the court in its reasoning goes beyond this, and though the grounds of the decision are not very clearly stated, we take them to be: that there is in some cases a power in each house of congress to punish for contempt; that this power is analogous to that exercised by courts of justice, and that it being the well-established doctrine that, when it appears that a prisoner is held under the order of a court of general jurisdiction for a contempt of its authority, no other court will discharge the prisoner or make further inquiry into the cause of his commitment. That this is the general rule, though somewhat modified since that case was decided, as regards the relations of one court to another, must be conceded.

But we do not concede that the houses of congress possess this general power of punishing for contempt. The cases in which they can do this are very limited, as we have already attempted to show. If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing and the power omnipotent. The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry, when the judgment is relied on in any other proceeding. See *Williamson v. Berry*, 8 How., 495; *Thompson v. Whitman*, 18 Wall., 457; *Knowles v. The Gas-Light & Coke Co.*, 19 id., 58; *Pennoyer v. Neff*, 95 U. S., 714.

The case of *Anderson v. Dunn* was decided before the case of *Stockdale v. Hansard*, and the more recent cases in the privy council to which we have referred. It was decided as a case of the first impression in this court, and undoubtedly under pressure of the strong rulings of the English courts in favor of the privileges of the two houses of parliament. Such is not the doctrine, however, of the English courts to-day. In the case of *Stockdale v. Hansard*, 9 Ad. & E., 1, Mr. Justice Coleridge says: "The house is not a court of law at all in the sense in which that term can alone be properly applied here. Neither originally nor by appeal can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such power; powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts. . . . Considered merely as resolutions or acts, I have yet to learn that this court is to be re-

strained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, where the rights of third persons, in litigation before us, depend upon their validity." Again, he says: "Let me suppose, by way of illustration, an extreme case; the house of commons resolves that any one wearing a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the house is pleaded as a justification. . . . In such a case as the one supposed, the plaintiff's counsel would insist on the distinction between power and privilege; and no lawyer can seriously doubt that it exists; but the argument confounds them, and forbids us to inquire, in any particular case, whether it ranges under the one or the other. I can find no principle which sanctions this."

The case of *Kielley v. Carson and others*, 4 Moo. P. C., 63, from which we have before quoted so largely, held that the order of the assembly, finding the plaintiff guilty of a contempt, was no defense to the action for imprisonment. And it is to be observed that the case of *Anderson v. Dunn* was cited there in argument.

But we have found no better expression of the true principle on this subject than in the following language of Mr. Justice Hoar, in the supreme court of Massachusetts, in the case of *Burnham v. Morrissey*, 14 Gray, 226. That was a case in which the plaintiff was imprisoned under an order of the house of representatives of the Massachusetts legislature for refusing to answer certain questions as a witness and to produce certain books and papers. The opinion, or statement rather, was concurred in by all the court, including the venerable Mr. Chief Justice Shaw.

"The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies, officers and tribunals within the commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine, in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the constitution; and if they have not, to treat their acts as null and void. The house of representatives has the power, under the constitution, to imprison for contempt; but the power is limited to cases expressly provided for by the constitution, or to cases where the power is necessarily implied from those constitutional functions and duties, to the proper performance of which it is essential."

In this statement of the law, and in the principles there laid down, we fully concur. We must, therefore, hold, notwithstanding what is said in the case of *Anderson v. Dunn*, that the resolution of the house of representatives finding Kilbourn guilty of contempt, and the warrant of its speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the house was without authority in the matter.

§ 253. *A member of the house of representatives is not subject to be called to account in a court of justice for his votes, speeches or acts in the discharge of his duty as such member.*

It remains to consider the matter special to the other defendants set out in their plea, which claims the protection due to their character as members of the house of representatives. In support of this defense they allege that they did not in any manner assist in the arrest of Kilbourn or his imprisonment, nor did they order or direct the same, except by their votes and by their participation as members in the introduction of, and assent to, the official acts and proceedings of the house, which they did and performed as members of the house, in the due discharge of their duties, and not otherwise.

As these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him, they can only be held liable on the charge made against them as persons who had ordered or directed in the matter, so as to become responsible for the acts which they directed.

The general doctrine that the person who procures the arrest of another by judicial process, by instituting and conducting the proceedings, is liable to an action for false imprisonment, where he acts without probable cause, is not to be controverted. Nor can it be denied that he who assumes the authority to order the imprisonment of another is responsible for the acts of the person to whom such order is given, when the arrest is without justification. The plea of these defendants shows that it was they who initiated the proceedings under which the plaintiff was arrested. It was they who reported to the house his refusal to answer the questions which they had put to him, and to produce the books and papers which they had demanded of him. They expressed the opinion in that report that plaintiff was guilty of a contempt of the authority of the house in so acting. It is a fair inference from this plea that they were the active parties in setting on foot the proceeding by which he was adjudged guilty of a contempt, and in procuring the passage of that resolution.

If they had done this in any ordinary tribunal, without probable cause, they would have been liable for the action which they had thus promoted. The house of representatives is not an ordinary tribunal. The defendants set up the protection of the constitution, under which they do business as part of the congress of the United States. That constitution declares that the senators and representatives "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place."

Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a member, a speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the house of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the house? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet if a report, or a resolution, or a vote is not a speech or debate, of what value is the constitutional protection?

We may, perhaps, find some aid in ascertaining the meaning of this provision, if we can find out its source, and fortunately in this there is no difficulty.

For while the framers of the constitution did not adopt the *lex et consuetudo* of the English parliament as a whole, they did incorporate such parts of it, and with it such privileges of parliament, as they thought proper to be applied to the two houses of congress. Some of these we have already referred to, as the right to make rules of procedure, to determine the election and qualification of its members, to preserve order, etc. In the sentence we have just cited, another part of the privileges of parliament are made privileges of congress. The freedom from arrest and freedom of speech in the two houses of parliament were long subjects of contest between the Tudor and Stuart kings and the house of commons. When, however, the revolution of 1688 expelled the last of the Stuarts and introduced a new dynasty, many of these questions were settled by a bill of rights, formally declared by the parliament and assented to by the crown. 1 W. & M., st. 2, c. 2. One of these declarations is "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."

In *Stockdale v. Hansard*, Lord Denman, speaking on this subject, says: "The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth, and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete immunity. For every paper signed by the speaker by order of the house, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibility on the publisher. So if the speaker by authority of the house order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles' warrant for levying ship money could justify his revenue officer."

Taking this to be a sound statement of the legal effect of the bill of rights and of the parliamentary law of England, it may be reasonably inferred that the framers of the constitution meant the same thing by the use of language borrowed from that source. Many of the colonies, which afterwards became states in our Union, had similar provisions in their charters or in bills of rights, which were part of their fundamental laws; and the general idea in all of them, however expressed, must have been the same, and must have been in the minds of the members of the constitutional convention. In the constitution of the state of Massachusetts of 1780, adopted during the war of the Revolution, the twenty-first article of the bill of rights embodies the principle in the following language; "The freedom of deliberation, speech, and debate in either house of the legislature is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever."

This article received a construction as early as 1808, in the supreme court of that state, in the case of *Coffin v. Coffin*, 4 Mas., 1, in which Mr. Chief Justice Parsons delivered the opinion. The case was an action for slander, the offensive language being used in a conversation in the house of representa-

tives of the Massachusetts legislature. The words were not delivered in the course of a regular address or speech, though on the floor of the house while in session, but were used in a conversation between three of the members, when neither of them was addressing the chair. It had relation, however, to a matter which had a few moments before been under discussion. In speaking of this article of the bill of rights, the protection of which had been invoked in the plea, the chief justice said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

The report states that the other judges, namely, Sedgwick, Sewall, Thatcher, and Parker, concurred in the opinion. This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the constitution of the United States, is of much weight. We have been unable to find any decision of a federal court on this clause of section 6 of article 1, though the previous clause concerning exemption from arrest has been often construed.

Mr. Justice Story (sec. 866 of his Commentaries on the Constitution) says: "The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also is derived from the practice of the British parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every state in the Union as matter of constitutional right."

It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers; in short, to things generally done in a session of the house by one of its members in relation to the business before it.

It is not necessary to decide here that there may not be things done, in the one house or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the chief magistrate of the nation, or to follow the example of the French assembly in assuming the function of a court for capital punishment,

we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand, and we think the plea set up by those of the defendants who were members of the house is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings.

§ 254. The power of congress to pass laws for the punishment of military and naval offenses is unaffected by the eighth amendment requiring presentment of a grand jury in case of certain offenses. *Dynes v. Hoover*, 20 How., 65.

§ 255. Contempt.—The house of representatives of the congress of the United States has power to commit for contempt, and the resolution of the house is a defense to the speaker who issued the order for commitment when sued for trespass. *Stewart v. Blaine*, * 7 Ch. Leg. N., 36; 1 MacArth., 458.

§ 256. The journals of congress invoked to aid in the construction of the revenue act of July 14, 1870. *Blake v. National Banks*, 23 Wall., 807.

§ 257. Offenses by officers.—Congress has a wide discretion in the regulation of the discipline of government officials, and in declaring what infractions of discipline shall be treated as criminal offenses. It is only when congress has palpably transgressed the limits of its discretion that the judicial department will intervene. *Held*, that an act prohibiting co-operation between officials in the raising of funds for political purposes, and making it a criminal offense, was not beyond the power of congress. *United States v. Curtis*, 12 Fed. R., 824; *Ex parte Curtis*, 16 Otto, 371 (CONST., § 472).

§ 258. The privilege of members of congress from arrest on judicial and mesne process, and from the service of summons or other civil process, does not extend to the demand, as a matter of right, of a continuance in a cause which is set for trial. *Nones v. Edsall*, 1 Wall., Jr., 191.

V. DIVISION OF POWERS.

SUMMARY—*Enjoining execution of laws*, §§ 259, 260.

§ 259. The president cannot be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional, and it is immaterial whether the relief is sought against the holder of the office as president or as a citizen of a particular state. *State of Mississippi v. Johnson*, §§ 261-63.

§ 260. Under the constitution the supreme court of the United States is without jurisdiction to pass judgment upon a political question, and it was held that a bill, filed by the state of Georgia to enjoin the enforcement of the reconstruction acts, presented such a question and must be dismissed. *State of Georgia v. Stanton*, §§ 264-66.

[NOTES.—See §§ 267, 268.]

STATE OF MISSISSIPPI v. JOHNSON.

(4 Wallace, 475-501. 1866.)

Opinion by CHASE, C. J.

STATEMENT OF FACTS.—A motion was made, some days since, in behalf of the state of Mississippi, for leave to file a bill in the name of the state, praying this court perpetually to enjoin and restrain Andrew Johnson, president of the United States, and E. O. C. Ord, general commanding in the district of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of congress therein named. The acts referred to are those of March 2, and March 23, 1867, commonly known as the "Reconstruction Acts."

The attorney-general objected to the leave asked for, upon the ground that no bill which makes a president a defendant, and seeks an injunction against

him to restrain the performance of his duties as president, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it. We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the president of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

§ 261. *The president of the United States cannot be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional.*

The single point which requires consideration is this: Can the president be restrained by injunction from carrying into effect an act of congress alleged to be unconstitutional? It is assumed by the counsel for the state of Mississippi that the president, in the execution of the reconstruction acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

§ 262. *Ministerial duty defined.*

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. The case of *Marbury v. Madison*, Secretary of State, 1 Cranch, 137, furnishes an illustration. A citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed and sealed. Nothing remained to be done except delivery, and the duty of delivery was imposed by law on the secretary of state. It was held that the performance of this duty might be enforced by *mandamus* issuing from a court having jurisdiction.

So, in the case of *Kendall, Postmaster General, v. Stockton & Stokes*, 12 Pet., 527, an act of congress had directed the postmaster-general to credit Stockton & Stokes with such sums as the solicitor of the treasury should find due to them; and that officer refused to credit them with certain sums so found due. It was held that the crediting of this money was a mere ministerial duty, the performance of which might be judicially enforced. In each of these cases nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by *mandamus*.

Very different is the duty of the president in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the president as commander-in-chief. The duty thus imposed on the president is in no just sense ministerial. It is purely executive and political.

An attempt on the part of the judicial department of the government to enforce the performance of such duties by the president might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance." It is true that, in the instance before us, the interposition of

the court is not sought to enforce action by the executive under constitutional legislation; but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it. Had it been supposed at the bar that this court would in any case interpose, by injunction, to prevent the execution of an unconstitutional act of congress, it can hardly be doubted that applications with that object would have been heretofore addressed to it. Occasions have not been wanting.

The constitutionality of the act for the annexation of Texas was vehemently denied. It made important and permanent changes in the relative importance of states and sections, and was by many supposed to be pregnant with disastrous results to large interests in particular states. But no one seems to have thought of an application for an injunction against the execution of the act by the president. And yet it is difficult to perceive upon what principle the application now before us can be allowed and similar applications in that and other cases have been denied. The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that congress can interpose in any case to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished in principle from the right to such interposition against the execution of such a law by the president? The congress is the legislative department of the government; the president is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are in proper cases subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the president refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the president complies with the order of the court and refuses to execute the acts of congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the house of representatives impeach the president for such refusal? And in that case could this court interfere in behalf of the president thus endangered by compliance with its mandate, and restrain by injunction the senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.

§ 263. *No bill to enjoin the president in the performance of his official duties will be received by the supreme court.*

It is true that a state may file an original bill in this court. And it may be true in some cases that such a bill may be filed against the United States. But we are fully satisfied that this court has no jurisdiction of a bill to enjoin the president in the performance of his official duties, and that no such bill ought to be received by us.

It has been suggested that the bill contains a prayer that, if the relief

sought cannot be had against Andrew Johnson as president, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of congress by Andrew Johnson is relief against its execution by the president. A bill praying an injunction against the execution of an act of congress by the incumbent of the presidential office cannot be received, whether it describes him as president or as a citizen of a state. The motion for leave to file the bill is, therefore, denied.

STATE OF GEORGIA *v.* STANTON.

(6 Wallace, 50-78. 1867.)

The bill in this case was filed in the supreme court by the state of Georgia against Stanton, secretary of war, Grant, general of the army, and Major General Pope, to restrain the execution of certain acts of congress known as the "Reconstruction Acts."

Opinion by MR. JUSTICE NELSON.

A motion has been made by the counsel for the defendants to dismiss the bill for want of jurisdiction, for which a precedent is found in the case of *The State of Rhode Island v. The State of Massachusetts*, 12 Pet., 669. It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved and presented for adjudication are political and not judicial, and, therefore, not the subject of judicial cognizance. This distinction results from the organization of the government into the three great departments, executive, legislative and judicial, and from the assignment and limitation of the powers of each by the constitution.

§ 264. *The supreme court has no jurisdiction to adjudicate political questions in a suit by a state against executive officers of the United States.*

The judicial power is vested in one supreme court, and in such inferior courts as congress may ordain and establish; the political power of the government in the other two departments. The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. *Nabob of Carnatic v. The East India Co.*, 1 Ves. Jr., 375-393, S. C., 2 id., 56-60; *Penn v. Lord Baltimore*, 1 Ves., 446-7; *New York v. Connecticut*, 4 Dallas, 4-6; *Cherokee Nation v. Georgia*, 5 Pet., 1, 20, 29, 30, 51, 75; *The State of Rhode Island v. The State of Massachusetts*, 12 id., 657, 733, 734, 737, 738.

It has been supposed that the case of *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 657 (COURTS, §§ 746-56), is an exception, and affords an authority for hearing and adjudicating upon political questions in the usual course of judicial proceedings on a bill in equity. But it will be seen on a close examination of the case that this is a mistake. It involved a question of boundary between the two states. Mr. Justice Baldwin, who delivered the opinion of the court, states the objection, and proceeds to answer it. He observes (page 736): "It is said that this is a political, not civil, controversy between the parties, and so not within the constitution or thirteenth section of the judiciary act. As it is viewed by the court on the bill alone, had it been demurred to, a controversy as to the locality of a point three miles south of the southernmost point of Charles river is the only question that can arise under the charter. Taking the case on the bill and plea, the

question is whether the stake set up on Wrentham Plain by Woodward and Saffrey, in 1842, is the true point from which to run an east and west line as the compact boundary between the states. In the first aspect of the case it depends on a fact; in the second, on the law of equity, whether the agreement is void or valid; neither of which present a political controversy, but one of an ordinary judicial nature of frequent occurrence in suits between individuals." In another part of the opinion, speaking of the submission by sovereigns or states, of a controversy between them, he observes: "From the time of such submission the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power. It comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial powers, as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." And he might have added what, indeed, is probably implied in the opinion, that the question thus submitted by the sovereign or state to a judicial determination must be one appropriate for the exercise of judicial power, such as a question of boundary, or as in the case of *Penn v. Lord Baltimore*, a contract between the parties in respect to their boundary. Lord Hardwicke places his right in that case to entertain jurisdiction upon this ground.

The objections to the jurisdiction of the court in the case of *Rhode Island against Massachusetts* were that the subject-matter of the bill involved sovereignty and jurisdiction, which were not matters of property but of political rights over the territory in question. They are forcibly stated by the chief justice, who dissented from the opinion. 12 Pet., 752, 754. The very elaborate examination of the case by Mr. Justice Baldwin was devoted to an answer and refutation of these objections. He endeavored to show, and we think did show, that the question was one of boundary, which, of itself, was not a political question, but one of property, appropriate for judicial cognizance; and that sovereignty and jurisdiction were but incidental, and dependent upon the main issue in the case. The right of property was undoubtedly involved, as in this country, where feudal tenures are abolished, in cases of escheat the state takes the place of the feudal lord by virtue of its sovereignty as the original and ultimate proprietor of all the lands within its jurisdiction.

In the case of *The State of Florida v. Georgia*, 17 How., 478, the United States were allowed to intervene, being the proprietors of a large part of the land situated within the disputed boundary, ceded by Spain as a part of Florida. The state of Florida was also deeply interested as a proprietor.

The case bearing most directly on the one before us is *The Cherokee Nation v. The State of Georgia*, 5 Pet., 1. A bill was filed in that case and an injunction prayed for, to prevent the execution of certain acts of the legislature of Georgia within the territory of the Cherokee Nation of Indians, they claiming a right to file it in this court, in the exercise of its original jurisdiction, as a foreign nation. The acts of the legislature, if permitted to be carried into execution, would have subverted the tribal government of the Indians, and subjected them to the jurisdiction of the state. The injunction was denied on the ground that the Cherokee Nation could not be regarded as a foreign nation within the judiciary act; and that, therefore, they had no standing in court. But Chief Justice Marshall, who delivered the opinion of the majority, very strongly intimated that the bill was untenable on another ground, namely, that it involved simply a political question. He observed, "that the

part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the province of the judicial department." Several opinions were delivered in the case; a very elaborate one by Mr. Justice Thompson, in which Judge Story concurred. They maintained that the Cherokee Nation was a foreign nation within the judiciary act, and competent to bring the suit; but agreed with the chief justice that all the matters set up in the bill involved political questions, with the exception of the right and title of the Indians to the possession of the land which they occupied. Mr. Justice Thompson, referring to this branch of the case, observed: "For the purpose of guarding against any erroneous conclusions, it is proper I should state that I do not claim for this court the exercise of jurisdiction upon any matter properly falling under the denomination of political power. Relief to the full extent prayed for by the bill may be beyond the reach of this court. Much of the matters therein contained by way of complaint would seem to depend for relief upon the exercise of political power, and, as such, appropriately devolving upon the executive and not the judicial department of the government. This court can grant relief so far only as the rights of persons or property are drawn in question, and have been infringed." And in another part of the opinion he returns again to this question, and is still more emphatic in disclaiming jurisdiction. He observes: "I certainly do not claim, as belonging to the judiciary, the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." We have said Mr. Justice Story concurred in this opinion; and Mr. Justice Johnson, who also delivered one, recognized the same distinctions. 5 Pet., 29-30.

§ 265. *The jurisdiction conferred on the supreme court by the constitution extends only to rights of persons or property, and not to injunction against the exercise of political power.*

By the second section of the third article of the constitution, "the judicial power extends to all cases, in law and equity, arising under the constitution, the laws of the United States," etc., and as applicable to the case in hand, "to controversies between a state and citizens of another state,"—which controversies, under the judiciary act, may be brought, in the first instance, before this court in the exercise of its original jurisdiction, and we agree that the bill filed presents a case which, if it be the subject of judicial cognizance, would, in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irrepar-

able, or the remedy at law inadequate. But, according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be rights of persons or property, not merely political rights which do not belong to the jurisdiction of a court, either in law or equity.

The remaining question on this branch of our inquiry is, whether, in view of the principles above stated, and which we have endeavored to explain, a case is made out in the bill of which this court can take judicial cognizance. In looking into it, it will be seen that we are called upon to restrain the defendants, who represent the executive authority of the government, from carrying into execution certain acts of congress, inasmuch as such execution would annul and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the state by depriving it of all the means and instrumentalities whereby its existence might, and otherwise would, be maintained.

This is the substance of the complaint, and of the relief prayed for. The bill, it is true, sets out in detail the different and substantial changes in the structure and organization of the existing government, as contemplated in these acts of congress, which, it is charged, if carried into effect by the defendants, will work this destruction. But they are grievances because they necessarily and inevitably tend to the overthrow of the state as an organized political body. They are stated in detail as laying a foundation for the interposition of the court to prevent the specific execution of them, and the resulting threatened mischief. So in respect to the prayers of the bill. The first is that the defendants may be enjoined against doing or permitting any act or thing, within or concerning the state, which is or may be directed or required of them by or under the two acts of congress complained of; and the remaining four prayers are of the same character, except more specific as to the particular acts threatened to be committed.

§ 266. *The powers conferred upon the executive officers of the United States, by the reconstruction acts, are political and not a subject of adjudication at the suit of a state.*

That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions, and upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed or in danger of actual or threatened infringement is presented by the bill, in a judicial form, for the judgment of the court.

It is true the bill, in setting forth the political rights of the state and of its people to be protected, among other matters avers that Georgia owns certain real estate and buildings therein, state capitol, and executive mansion, and other real and personal property; and that putting the acts of congress into execution, and destroying the state, would deprive it of the possession and enjoyment of its property. But, it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the state, and in aggravation of it,

not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the state, and its main purpose and design given up, by restraining its remedial effect simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants.

CHASE, C. J.: Without being able to yield my assent to the grounds stated in the opinion just read for the dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill is one of which this court has no jurisdiction.

Bill dismissed for want of jurisdiction.

§ 267. The judiciary cannot interfere either by *mandamus* or injunction with executive officers in the discharge of their official duties, unless those duties are of a character purely ministerial and involving no exercise of judgment or discretion. *Litchfield v. Register and Receiver*, 9 Wall., 575.

§ 268. Regarding an appeal from the decision of a "prize court," i. e., the United States district court sitting as such, to the state department, the doctrine was clearly enunciated that where one department of the government has rightfully assumed jurisdiction of a cause, it is *ultra* the power of a co-ordinate department to interfere with such jurisdiction, but must postpone all consideration until after a final determination of that cause. *Captures on the Rio Grande*,* 11 Op. Att'y Gen'l, 117.

VI. SUITS BY AND AGAINST THE UNITED STATES.

[See ACTIONS; COURTS.]

SUMMARY—*Cannot be sued without consent; estopped by judgment*, § 269.—*Submission of rights to decision of state court*, § 270.—*Not liable to money judgment; must be sued in court of claims*, § 271.—*Effect of appearance by receiver of suspended national bank*, § 272.—*Power of the comptroller of the currency*, § 273.

§ 269. The United States cannot be sued without its consent; it is not estopped by a judgment in ejectment in a state court against its tenant, notwithstanding a state law making such a judgment final as against those in privity with the tenant. *Carr v. United States*, §§ 274-77.

§ 270. The secretary of the treasury has no power to waive any rights of the government to the land occupied by it for public purposes, and the employment of counsel in a state court to defend an action of ejectment against a tenant of the United States is not a submission of the rights of the United States to the decision of such court. *Ibid.*

§ 271. No money judgment can be rendered against the United States in any court. Nor can its rights growing out of its relations to national banks be determined in courts other than the court of claims. *Case v. Terrell*, §§ 278-80.

§ 272. A receiver of a suspended national bank represents the bank and not the government, and his appearance in a court confers no jurisdiction as against the United States. *Ibid.*

§ 273. The comptroller of the currency has no authority to subject the United States to the jurisdiction of any court, or to submit the rights of the government to litigation in any court, unless authorized by law to do so. *Ibid.*

[NOTES.—See §§ 281-313.]

CARR v. UNITED STATES.

(8 Otto, 433-439. 1878.)

APPEAL from U. S. Circuit Court, District of California.

Opinion by MR. JUSTICE BRADLEY.

STATEMENT OF FACTS.—This case arises upon a bill to quiet title, filed by the United States against the appellant, Carr, and various other persons, upon which a decree was rendered by the court below in favor of the plaintiff. Carr appealed from this decree. The controversy relates to certain lands at San Francisco, being two lots, each fifty varas square, on Rincon Point, which are claimed by the government as having, with other adjoining lands, been set apart and reserved for public use in 1847, and as having been conveyed to the United States by the city of San Francisco in 1852. The appellant claims the lots in question under one Thomas White, alleging that said White occupied the same in 1849, and that he and his grantees continued to occupy the same until June, 1855, when the Van Ness ordinance was passed.

It is conceded that the premises in question were once pueblo lands, belonging to the municipality of San Francisco; but as such lands, until conveyed to private parties, were subject to the public uses of the government, both before and after the conquest of the country by the United States, it is evident that the latter had the undoubted right to make such appropriation thereof for public use as it might see fit. It is denied, however, that any such appropriation was ever made by the proper authority. It appears, from the pleadings and evidence in the case, that from the first occupation of San Francisco by the United States, in 1847, the military authorities of the government set apart Rincon Point (including the premises in question) for the use of the government; but that after the discovery of gold, in 1849, the officers had much ado to keep them clear of trespassers, who entered upon, and endeavored to appropriate the same. In November, 1849, a lease of this tract, with others, was given by the officer in command at San Francisco to one Thomas Shillaber, apparently for the purpose of keeping possession on behalf of the government. This lease was approved by the secretary of the interior. About 1852, a marine hospital was built by the government on the southeast half of the block on Rincon Point, bounded by Folsom, Harrison, Spear and Main streets. The whole block was five hundred and fifty feet in length from Harrison to Folsom street, and two hundred and seventy-five feet in width from Main to Spear street. The southeast half was two hundred and seventy-five feet square, forming four lots, each fifty varas, or one hundred and thirty-seven and one-half feet, square, numbered 1, 2, 3 and 4. Numbers 1 and 2 adjoined Harrison street; 3 and 4 adjoined 1 and 2. Lots 3 and 4 are the premises in controversy. The hospital building was actually constructed on lots 1 and 2, standing within four or five feet of lots 3 and 4; and the latter were occupied by buildings or for yard room, as accessory to the hospital.

As before stated, however, different parties attempted to possess themselves of portions of the property; and amongst others, White, under whom the appellant claims, made such an attempt in 1849, in reference to the whole block which includes the lots in question, but was ejected, as appears by the orders and correspondence set out in the complaint.

§ 274. *A grant to the United States of land by the city of San Francisco in 1852 prevents the operation of any claim to it under the Van Ness ordinance of 1855.*

The consequence of White's attempt was that adverse claims to the prop-

erty under him were afterwards preferred from time to time. For the purpose of quieting these claims, when the hospital was being erected, a conveyance to the government was procured from the city authorities. On the 10th of December, 1852, the common council of the city passed a resolution that the mayor be directed to convey to the United States all its right, title and interest to six fifty-vara lots, bounded on the east by Spear street, on the south by Harrison street, on the west by Front street, and on the north by the beach; which description includes the four lots above referred to. Such a conveyance was accordingly made by the mayor, by deed dated the 11th of December, 1852; and from thenceforward the United States claimed the property in question, as well by virtue of the said deed as by right of original appropriation for public uses.

The appellant, as before stated, claims the property by virtue of the Van Ness ordinance, passed June 20, 1855, by which, amongst other things, the city of San Francisco did relinquish and grant all the right and claim of the city to the lands within the corporate limits to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance in the common council.

Now, it is too evident to require discussion that the city of San Francisco could not, in 1855, make a valid grant of property which it had already granted in 1852, and which the grantee (in this case the United States) constantly claimed as part and parcel of premises which were in its undoubted possession. The weight of the evidence in the case is, that the government was in actual possession of lots 3 and 4 as appendant to the hospital, from 1852 to the passage of the ordinance. This would bring it within the terms of the ordinance itself. But we do not deem this material. It had a clear title from the city before, even if the action of the military authorities in 1847 and 1849 was not sufficient to effect an appropriation for public uses.

§ 275. *The United States are not estopped by judgments in forcible entry and detainer and ejectment rendered against their tenants.*

But the appellant relies on certain judgments rendered in the state courts in actions brought against the agents of the government having possession of the lands in question, which judgments he contends estop the government from claiming any title therein.

The first of these actions was an action for forcible entry and detainer brought in a justice's court in December, 1857, by one Edward Barry against one McDuffie and one Palmer for ejecting him (Barry) from lot No. 4, which lies on Main street. The defendants justified under an order of President Pierce, requiring the marshal of the district of California to remove all persons trespassing on said lot. The county court, to which the cause was appealed, found for the plaintiff, and reinstated him in the possession. The only question made in the case was whether the justification was sufficient for ousting a person who was in peaceable possession. This judgment would not have been decisive upon the title, even if the defendants themselves had been the true owners of the land, and had claimed to eject the plaintiff by virtue of said ownership.

The next action was an ejectment brought in the state district court in February, 1865, by one Wakeman and others (under whom the appellant claims title), against one Hastings and others, to recover possession of the same lot No. 4. The defendants, besides the general issue, pleaded that the premises

were the freehold of the United States, and that they as its officers and employes, and by its authority, entered, etc. The question of title was gone into, and decided against the defendants. A similar action of ejectment was brought in the same court in April, 1865, by one Volney Cushing (under whom the appellant also claims), against the said Hastings and others, to recover possession of the lot numbered 3, situated on Spear street. The defendants pleaded the general issue and the statute of limitations. The title was also contested in this case, and the judgment was for the plaintiff.

It is proved that the person who was district attorney of the United States for the district of California at the time when said actions were brought and tried, appeared as attorney for the defendants therein; and that Nathaniel Bennett, Esq., attended the trial of one of said causes as counsel for the defendants, being employed and paid by the secretary of the treasury of the United States; and, not being able to attend the trial of the other cause, he procured another person to attend in his place.

§ 276. *The United States cannot be sued except by their own consent, signified by act of congress.*

The appellant contends that this was sufficient to make the United States a virtual party to said actions, and to conclude them by the judgment therein; that by the law of California a judgment in ejectment is an estoppel; and that where a tenant, or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action; and to this point the counsel of the appellant cited *Douglas v. Fulda*, 45 Cal., 592; *Russell v. Mallon*, 38 id., 259; and *Valentine v. Mahonoy*, 37 id., 389, as well as various cases decided in other states.

Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the government of the United States. We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no state can pass a law, which would have any validity, for making the government suable in its courts. It is conceded in *The Siren*, 7 Wall., 152, and in *The Davis*, 10 id., 15, that without an act of congress no direct proceeding can be instituted against the government or its property. And in the latter case it is justly observed that "the possession of the government can only exist through its officers; using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with actual possession." If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a postoffice or a customhouse, a prison or a fortification.

In some cases (perhaps it was so in the present case), it might not be apparent until after suit brought that the possession attempted to be assailed was that of the government; but when this is made apparent by the pleadings, or the proofs, the jurisdiction of the court ought to cease. Otherwise, the government could always be compelled to come into court and litigate with private parties in defense of its property.

§ 277. *The secretary of the treasury has no power to put the title to lands of the United States in issue in a suit between private persons.*

It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the district attorney and additional counsel to aid in the defense.

But we do not think that any such inference can be legally deduced from the action of the secretary of the treasury. He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the government. And, in fact, he had no authority to waive those rights. In England it is usual, in the admiralty courts, in proceedings *in rem*, when it is made to appear that property of the government ought, in justice, to contribute to a general average, or to salvage, for the proper officer of the government to consent in court that it may take jurisdiction of the matter. As stated by this court in *The Davis*, *supra*, "this consent is given by authority of the king, who thus submits to be sued in his own courts. The liberal exercise of this authority [there] removes the difficulty presented here, where no power to do this exists in any officer of the government, and prevents any apprehension of gross injustice in such cases in England."

The cases like *The Siren* and *The Davis*, already referred to, and many others therein cited, in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the government itself seeks its rights at the hands of the court, equity requires that the rights of other parties interested in the subject-matter should be protected. The "*Siren*" was brought into the port of Boston as a prize, was libelled, condemned, and sold, and the proceeds paid into court. In distributing these proceeds amongst those who had claims against the vessel, an allowance was awarded for damages to the owner of another vessel which had been sunk by collision with the "*Siren*" during her voyage subsequent to the capture. It was held that, inasmuch as the United States had resorted to the aid of the court to procure the condemnation of the "*Siren*," and had thus placed her proceeds in the course of judicial administration, any proper claims against the vessel itself, prior to that of the government, might well be satisfied out of such proceeds. At the same time, it was conceded that neither the government nor its property can be subjected to direct legal proceedings without its consent; and that whosoever would institute such proceedings must bring his case within the authority of some act of congress. 7 Wall., 154. The "*Davis*" and her cargo were seized for salvage services. Part of the cargo was cotton belonging to the United States, but not in its actual possession, it being in the possession of the master of the ship under a contract of affreightment. The government appeared as claimant; and it was held that the cotton like other cargo, was justly liable to pay its proportion of the salvage services; the court, at the same time, as before stated, holding that even for salvage services the property of the government could not be taken out of its own possession by any direct proceeding.

Without discussing the matter further, we are clearly of opinion that the judgments in the cases relied on by the appellant constitute no estoppel against the United States. And being of opinion that the title of the United States to the premises in question is undoubted, our conclusion is that the decree of the circuit court must be affirmed; and it is so ordered.

CASE v. TERRELL.

(11 Wallace, 199-203. 1870.)

APPEAL from U. S. Circuit Court, District of Louisiana.

STATEMENT OF FACTS.—A bill was filed against the receiver of a suspended bank, the comptroller of the currency, and others, to recover debts due from

the bank, the United States being a creditor of the bank, but not a party to the suit. Other facts appear in the opinion.

§ 278. *No money judgment can be rendered against the United States in any court except the court of claims.*

Opinion by MR. JUSTICE MILLER.

It is seen from the bill and decree that while the United States was not made a defendant, and while it is well settled that it could not be sued in the court below, the only relief prayed by the bill was relief against the United States, and the only decree rendered which was not merely formal was a decree against the United States for over \$200,000, and a further decree barring the right to assert her priority as a creditor of the bank in the distribution of its funds.

It is strange that in any court professing to administer the English system of equitable jurisprudence such a decree could be rendered against any one not made a party to the suit, and who had in no manner appeared in the case; and it is almost incredible that in any federal court of this Union, except the court of claims, a moneyed judgment could be rendered against the United States.

The contrary has been so repeatedly decided that it is a waste of time to reargue the proposition, which will be found fully asserted in the recent cases of *De Groot v. United States*, 5 Wall., 419; *United States v. Eckford*, 6 id. 484; *The Siren*, 7 id., 152; and *The Davis*, 10 id., 15. In the case of *United States v. Eckford*, it was held that, although in a suit in which the United States was plaintiff, a set-off could be pleaded and allowed, yet no judgment could be rendered for a balance found to be due to the defendant by the verdict of the jury, either in the circuit court where the case was tried, or in the court of claims where suit had been brought on the verdict. It is true, that in the two last cases cited above it was held that in a case in admiralty, where the *res* was rightfully before the court, and was taken into possession by its officer, without the necessity of suit or process against the United States, it could be subjected to certain maritime liens, though the ownership was in the government. But in these cases the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others.

We are quite at a loss to know on what principle the jurisdiction in the present case is asserted, for the briefs for the appellees are devoted wholly to the merits of the controversy. But we must suppose that it is claimed on the ground that the receiver and comptroller, both of whom appeared and answered the bill, represent the United States, and can subject the government to the jurisdiction of the court.

§ 279. *A receiver of a suspended national bank represents the bank, not the United States.*

As to the receiver, the claim, if any such be made, is not worth serious consideration. He represents the bank, its stockholders, its creditors, and does not in any sense represent the government.

§ 280. *The comptroller of the currency has no right to subject the United States to the jurisdiction of any court.*

Nor can such authority be conceded to the comptroller of the currency. It may very well admit of doubt whether it is within his competency to submit himself, in the exercise of duties specially confided to him by acts of congress, to the control of the courts, and especially of those which can assert no such jurisdiction by reason of their territorial limits. We are not called

upon here to decide this question. But we have no hesitation in holding that however he may submit himself to the jurisdiction of those courts, and consent to be governed in his official action by their decrees, so far as they affect rights of parties who may come into court and be impleaded in the same suit, he has no authority to subject the United States to such jurisdiction, and to submit the rights of the government to litigation in any court, without some provision of law authorizing him to do so.

There is no analogy in the case before us to suits against officers of the customs or of the internal revenue to recover for illegal assessments or collections of taxes or duties, for they are suits against the officer for a tort or for money had and received, and when a judgment is rendered against him the government protects him by paying it, because the money was received for its use. But this is by virtue of statute, and the mode of proceeding is pointed out and well defined, and the remedy is limited to cases where the mode is strictly pursued.

In the answer filed for the comptroller in this case he says, or is made to say (for it is neither signed nor sworn to by him), that he "submits, on behalf of the United States, to the decision of the court, the claims of the United States to priority of payment over the alleged claims of the creditors of said bank that are not disputed."

We have already said that the comptroller has no power to subject the United States to such jurisdiction. But he here seems only to submit the question of the government's claim to priority of payment, while the court not only decides against this priority, but renders a further decree requiring repayment of money had and received from the bank, and the payment of money which the United States is supposed to have assumed to pay in a contract with private parties not before the court. If the government is liable to the bank or its receiver or its creditors for either of these claims, it would seem that it would be, in the first case, on an implied contract for money had and received, and in the second, on the express contract to pay as alleged. When such liability is denied, or payment is refused, the court of claims has jurisdiction, and no other court has. The United States cannot be subjected to litigation growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy.

But it is useless to pursue the matter further. The only substantial relief asked by the bill or granted by the decree is against the United States. The manifest purpose of the proceeding was to subject the government to a tribunal which could rightfully exercise no jurisdiction in the premises. It was no party to the suit, nor did any party represent its interests who had authority to bind it. Decree reversed with directions to the court below to dismiss the bill.

§ 281. **Cannot be sued without consent.**—The government of the United States cannot be sued without its consent. *De Groot v. United States*, 5 Wall., 419.

§ 282. The United States government is not liable to be sued, except with its own consent given by law. Nor can a decree or judgment be entered against it for costs. *United States v. McLemore*, 4 How., 286.

§ 283. The exemption of the United States from suits extends to claims set up by way of reconvention or set-off. No judgment can be rendered on such demands against the government. *Reeside v. Walker*, 11 How., 272.

§ 284. The judiciary act does not authorize suit against the United States in any of the federal courts. *United States v. Eckford*, 6 Wall., 484.

§ 285. Every government has the inherent right to protect itself against suits, and if in the liberality of legislation they are allowed, it is only on such terms and conditions as are prescribed by the statute. *Nichols v. United States*, 7 Wall., 122; *The Siren*, 7 Wall., 152.

§ 286. But where the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property. *The Siren*, 7 Wall., 152.

§ 287. The United States cannot be made directly a party defendant in any action except by its own consent, given generally by statute, or specially by its authorized law-officer. But it may be indirectly made a party defendant in a statutory action of ejectment, brought against tenants or public officers occupying lands, the record title to which is in the government, whether the occupation be for public purposes or not, where, under the provisions of the statute, such action can be prosecuted without intrusion upon the possession of the government, though the effect of the execution of the judgment be to dispossess the government. *The Arlington Case*, 3 Hughes, 86.

§ 288. Under the rule that the United States cannot be sued, the lien of an inn-keeper for feeding horses engaged in carrying the mail cannot be enforced in such a way as to obstruct the passage of the mails. *United States v. Barney*, 3 Hughes, 545; 14 N. B. R., 189.

§ 289. A court of the United States cannot entertain a bill in equity, praying that the United States be perpetually enjoined from proceeding upon a judgment obtained by them, as the government is not liable to be sued except by its own consent given by law. *Hill v. United States*, 9 How., 386.

§ 290. Where a fund is placed in the United States treasury, merely as in a place of deposit, the United States are merely trustees, and there is no reason why the payment of the money out of the treasury may not be enjoined. *Ridgway v. Hays*, 5 Cr. C. C., 23.

§ 291. Evidence.—A duly authenticated transcript from the books of the treasury department is admissible evidence for the defendants in a suit on the bond of a public officer, though the credits therein allowed have not been presented at the treasury department and refused. *Cox v. United States*, 6 Pet., 172; *United States v. Kuhn*, 4 Cr. C. C., 401.

§ 292. In a suit by the United States, on the official bond of a public officer, treasury transcripts showing the condition of the account of such officer as it appears upon the books of the government are *prima facie* evidence against the defendants. *United States v. Corwin*, 1 Bond, 149.

§ 293. In an action against a delinquent public officer, an authenticated transcript from the treasury department showing a statement of his account is competent evidence against him under sections 2 and 4, act of March 3, 1797. *Walton v. United States*, 9 Wheat., 651.

§ 294. A certified transcript of the account of a delinquent officer, as adjusted by the accounting officers of the treasury, is evidence in an action by the government against him, and his private books are inadmissible to control that official adjustment. *Strong v. United States*, 6 Wall., 788.

§ 295. Set-off.—In actions by the United States, the rule as to set-off is that the extent of the authority conferred by the act of 1797 is that the defendant, when sued, may exhibit his claims for credit, if they come within the prescribed conditions, but they can only be admitted as claims for credit, and not as demands for judgment. The circuit court possesses no jurisdiction to render judgment for any excess of set-off over plaintiff's claim. *Adams v. United States*,* 3 Ct. Cl., 312. See SET-OFF.

§ 296. Liability of property.—Notwithstanding the sovereign is not subject to be sued, it does not follow that the property of government is not subject to proceedings *in rem*, and is not liable to a lien for contribution under general average. *United States v. Wilder*, 8 Sumn., 308.

§ 297. Property of the United States on board a vessel, for transportation from one point to another, is subject to a lien for salvage services rendered in saving the property. Such lien cannot be enforced by suit against the government nor by action *in rem* against the property where it would be necessary to jurisdiction to take such property out of the possession of the government by any writ or process of the court. But where an action *in rem* against the property of the United States can be sustained without invading the possession of the United States under the process, such a salvage claim can be enforced by its means. Goods of the government in the hands of a common carrier for transportation under a contract to deliver to the agent of the government in New York may be levied on in such an action, after arrival at New York and before delivery to the government agent. *The Davis*, 10 Wall., 15.

§ 298. Counsel.—The United States, being a party to a cause, is properly represented by the attorney-general or his assistant, or counsel employed by him, and no counsel can be heard in opposition, on the behalf of any other department of the government. In this case, owing to special circumstances, the rule was relaxed. *The Gray Jacket*, 5 Wall., 370.

§ 299. The federal government may maintain a bill for injunction in the United States circuit court of the appropriate district to restrain the placing of obstructions in its navigable waters, and to compel their removal. *United States v. Milwaukee, etc. R. Co.*, 5 Bias., 420.

§ 300. *Costs.*—The United States are not liable for costs, and a judgment against them for costs must be reversed. *United States v. Boyd*, 5 How., 29; *United States v. McLemore*, 4 How., 286.

§ 301. *Suits on bills indorsed to officers.*—Under the rule that the principal may sue on a bill of exchange indorsed to his known agent, the United States may sue in their own name on a bill indorsed to the treasurer. It is particularly proper for a government to exercise this power so as to obviate the danger of a set-off being pleaded against the agent. An act of congress is not necessary to enable the United States to maintain a suit. *United States v. Barker*, 1 Paine, 156.

§ 302. The United States may sue in their own name upon a note given to an agent for their benefit. *United States v. Boice*, 2 McL., 352.

§ 303. *Practice.*—It is the rule that all actions instituted on behalf of the federal government must be brought in the name of the United States, subject to such exceptions as congress may create. And by the act of 1828, the form of and procedure in such actions shall be adapted to the practice of the state in which such action may be brought. Actions by the United States, * 7 Op. Att'y Gen'l, 50.

§ 304. When the United States enters a court of chancery as a litigant, it waives its exemption from legal proceedings, and, with reference to rules of procedure, stands upon the same footing as an individual. *United States v. Flint*, 4 Saw., 42.

§ 305. *Instructions of attorney-general.*—A motion of defendant to dismiss in a confiscation case, pending on writ of error, cannot be sustained on the ground that the district attorney representing the United States has been instructed to dismiss by the attorney-general. The correspondence between these officers is confidential in its nature, and cannot be cited by third persons. *United States v. Six Lots of Ground*, 1 Woods, 284.

§ 306. *Settling aside patents.*—Where the agents of the government have been imposed upon and fraudulently induced to grant a patent to public lands to a party not entitled to receive it, it can maintain a bill to set it aside as an individual might. *United States v. Hughes*, 11 How., 552.

§ 307. *Suits in state courts.*—The United States are a body corporate, having a capacity to contract, to take and hold property as other corporate bodies. If they prosecute their suits in the state courts, availing themselves of the state law for this purpose, there is no reason why such state process as they use for the purpose of enforcing their right is not subject to state law. Therefore, where one committed to jail under a judgment at the suit of the United States is discharged under the state law, such discharge is a bar to an action by the United States on a bond for jail liberties. *Stearns v. United States*, 2 Paine, 300.

§ 308. *The practice of entering judgment at the return term against debtors of the United States*, under the act of March 3, 1797, must be confined to cases where the principal debtor is party to the action. *United States v. Lyon*, 2 McL., 249.

§ 309. *Appearance.*—The district attorney is not so far an officer of the court that it can compel him to enter the appearance of the United States; but the court may order that the United States shall enter its appearance in the case and direct that a copy of the order shall be served upon the district attorney, and also upon the attorney-general or some other government officer. *Fifth National Bank v. Long*, 7 Biss., 502.

§ 310. *Cases given precedence.*—*Held*, to be reasonable and proper in practice, that cases in which the United States are concerned should take precedence of all others upon the docket. *Penn v. Butler*, Wall. C. C., 4, note.

§ 311. *Lapse of time.*—No presumption of payment from lapse of time can be indulged in as against the government. Laches cannot be charged to it under the statute or in any other form. *United States v. Williams*, * 4 McL., 567.

§ 312. The statute of limitations is no defense to an action by the United States upon a contract. *Ibid.*; S. C., 5 McL., 133.

§ 313. *Whether, in foreclosure, a federal court could, on final hearing, pronounce a decree against the United States without an authorized appearance by the attorney-general*, *quære*. *Meier v. Kansas Pacific R'y*, * 4 Dill., 878.

VII. PROPERTY RIGHTS.

SUMMARY—*May accept conveyance of land in discharge of a debt*, § 814; *rights of persons claiming liens on such lands*, § 815.—*Lands ceded by state; jurisdiction*, § 816.—*Remedies for injuries to property*, § 817.—*Submission to arbitration*, § 818.

§ 814. The United States as an incident to its sovereignty may accept a conveyance of lands in discharge of an indebtedness to it, and may sell such lands upon credit, and maintain an action for the purchase money. *United States v. Lane*, §§ 819-20.

§ 315. When the government, in the exercise of the rights and functions of a civil corporation, purchases land to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands. *Elliot v. Van Voorst*, §§ 321-24.

§ 316. Where jurisdiction over land belonging to the United States has been ceded to the United States by the state in which it is situated, such lands are subject to the laws of congress in every case in which they in any way conflict with the laws of the state. *United States v. Ames*, §§ 325-31.

§ 317. Besides the statutory remedies given for injuries committed on some public property the United States possesses those common to other holders of property in the courts of the Union, whether of common law origin or otherwise. *Ibid*.

§ 318. No officer of the United States has authority, without a statute authorizing it, to submit any controversy, to which the United States is a party, to arbitration. *Ibid*.

[NOTES.— See §§ 332-347.]

UNITED STATES v. LANE.

(Circuit Court for Indiana: 3 McLean, 365-367. 1844.)

Opinion of the COURT.

STATEMENT OF FACTS.—Several years ago I. T. Canby, being indebted to the government in a large amount of money as receiver of public moneys, agreed, in discharge of his indebtedness, to convey to the United States certain lands. The district attorney, T. A. Howard, for Indiana, was directed to sell those lands by the solicitor of the treasury; they were accordingly sold for cash, payable in instalments. The obligation for \$998, on which the present action is brought, was given on the purchase of a part of these lands. And the defendants set up in defense that the obligation is without consideration, and void in law. That the United States had no power to purchase lands except under an act of congress, and that they cannot sell without the authority of law.

The third section of the fourth article of the constitution declares, "the congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States." By the seventh section of the act of May 1, 1820, it is provided, "that no land shall be purchased on account of the United States, except under a law authorizing such purchase." The sixth section of the same act declares, "that no contract shall be made by the secretary of state, or of the treasury, or of the department of war, or of the navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment," etc.

§ 319. *Power of the solicitor of the treasury to sell lands received by the United States in payment of debts.*

The first section of the "act for the appointment of a solicitor of the treasury," passed May 20, 1830, provides "that the solicitor shall have charge of all lands and other property which have been or shall be assigned, set off or conveyed to the United States in payment of debts; and of all trusts created for the use of the United States, in payment of debts due them; and to sell and dispose of lands assigned or set off to the United States in payment of debts, or being vested in them by mortgage or other security for the payment of debts; and in cases where real estate hath already become the property of the United States by conveyance," etc., the solicitor is to release, etc.

This provision, it is contended, refers to lands previously obtained under laws of the United States, and not to those which might afterwards be acquired. That the act gives no new power to the government, through the solicitor, to acquire lands. And it is urged that unless under an express law of

congress, through any of the agencies of the government, lands cannot be purchased. That the lands now referred to were not taken, under the laws of the state, in payment of a debt, or where the party was insolvent.

There can be no doubt that the act regulating the duties of solicitor had a reference to existing laws in some of the states, which authorize the debtor to set off his real estate on execution; and in other cases where he surrenders all his property to the United States, on which he is released; but all the provisions are not limited to these cases. Some of them are general, and apply to cases of "trusts created for the benefit of the United States, in payment of debts due them." But, independently of this provision, we think there was power in the government to receive the lands in question.

§ 320. *Powers of the United States under the constitution to contract, to receive lands by compromise or otherwise in payment of debts, and to dispose of the same.*

In the case of the *United States v. Tingey*, 5 Pet., 115 (Bonds, §§ 181-82), the court, in considering the powers of the government to make contracts, say, "upon full consideration of the subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts, not prohibited by law, and appropriate to the just exercise of those powers."

As a party to a suit, no one doubts the power of the government, through its properly authorized agent, to direct the course of the suit as shall best advance the public interest. And if a compromise be necessary for that interest, it may be made. And that is what was done in the present case. The lands were taken, not as a purchase, but to secure the debt of the late receiver. And these lands were sold on a credit, in order that the sum due by the receiver might be paid. It was a case of trust, recommended by the public interest, and opposed to no law or public policy. The action is sustained. Judgment.

ELLIOT v. VAN VOORST.

(Circuit Court for New Jersey: 8 Wallace, Jr., 299-305. 1880.)

STATEMENT OF FACTS.—This is a bill to redeem a lot of land sold under a mortgage. The complainant claims to hold the equity of redemption. The defendants hold under a judicial sale made by order of the chancery court of New Jersey in a case in which the attorney of the United States for New Jersey appeared and answered for the government, and submitted its interest to the protection of the court. In the proceedings which followed, the property was duly sold and bought by respondents. The question is whether this judicial sale is valid.

§ 321. *An action cannot be maintained against the United States.*

Opinion by GRIER, J.

It is undoubtedly true that no action can be sustained against the government of the United States for any supposed debt or claim, unless by its own consent, or some special statute allowing it. 11 How., 290. The sovereign himself being the source of justice and power, exercising the same through his courts, is always presumed to be ready to do justice. It is, therefore, part of his prerogative that he cannot be sued in his own courts. Nevertheless, the subject is en-

titled, when he claims anything from the crown, to have his "petition of right." Upon such petition the crown ordinarily directs that right to be done to the party; and the petition is then referred to the chancellor to be executed according to law, and directions are given that the attorney-general be made a party to the suit. In other cases where the crown is not in possession, and its rights are only incidently concerned, it is generally considered that the attorney-general may be made a party in respect of these rights, and the practice has been accordingly. In the United States the proceeding by petition of right is unknown. The government of the United States, though limited in its powers, is supreme in its sphere of action. But its rights as a sovereign, and its prerogatives as such, are co-extensive with the functions of government committed to them, and extend no farther. Its position as to prerogative is anomalous, owing to our peculiar institutions.

§ 322. *Distinction between the United States as a sovereign and as in certain respects a corporation.*

It is part of the functions committed to this government to build forts, arsenals, navy yards, etc., etc. It may purchase and hold land for these purposes, yet it cannot exercise exclusive legislation over such lands, although used for national purposes, without the consent of the legislature of the state where the land lies. A state has no power, by taxation or otherwise, to retard, impede, burthen or control the operation of the constitutional laws passed by congress to carry into effect powers vested in the national government. Hence she may not have power to tax navy yards, or other property of the United States held within its bounds for public or national uses. But it does not follow that when the government officers purchase land in the name of the United States to secure a debt, as any individual or private corporation might do, that it thus ousts the jurisdiction of the state to tax it, or in any manner affects the liens or rights of mortgagees in such lands. In the mere exercise of a corporate right, the government of the United States cannot claim the prerogatives or immunities of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to congress to redeem. The courts of New Jersey cannot thus be ousted of their jurisdiction and duty to assist the mortgagee to have his mortgage satisfied, and the mortgaged premises sold for that purpose.

§ 323. *The rights, duties and liabilities of the government as a proprietor of lands, etc.*

When the government, in the exercise of the rights and functions of a civil corporation, purchases lands to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands. Thus, when the government of the United States became a partner in a trading corporation, such as the United States Bank, it divested itself, so far as concerned the transactions of that company, of its sovereign character, and took that of a citizen; consequently, its property and interests were subject to the decrees and judgments of courts, equally with that of its copartners.

§ 324. *A mortgagor may have his remedy in a case where the United States holds the equity of redemption, upon giving such notice as the court may prescribe.*

When Van Voorst came into the court of chancery, he had a clear right to have the mortgaged land sold to satisfy his mortgage. The court was bound to furnish him a remedy. The land mortgaged was within the jurisdiction of the court. The only difficulty in the case was, that the title of the mortgagor,

who should be made a party to the proceeding and have an opportunity to show that lien was paid or discharged, was vested in the United States, *quoad hoc*, a foreign corporation, and not within the jurisdiction of the court. It could not be compelled to appear or submit itself to such jurisdiction, so neither could any non-resident individual or corporation. The usual way to warn such absent parties is by advertisement. When such absentee does not choose to come in voluntarily and appear and make defense, he is made a party without his knowledge or consent. The jurisdiction of the court over the land decreed to be sold is sufficient to justify the decree and validate the sale, as regards the property sold, but no decree could be made against the person not within the jurisdiction, that could bind him or be regarded as valid in another tribunal. In this case the court of chancery of New Jersey had jurisdiction over the thing or land mortgaged; it could not compel the United States government to appear and submit itself to the judgment, or render any judgment that it should pay money; but it can prescribe what notice should be given to the mortgagor or owner of the equity of redemption, and how it should be given. In analogy to the proceedings in the court of chancery in England, it was ordered that the subpoena be served on the representative of the government, who, *quoad hoc*, might be treated as the attorney-general. The attorney appeared and answered on behalf of the government. The presumption is that he was duly authorized so to do. Through him the government had notice, and might redeem if it saw fit. The decree demanded nothing of the United States. It is only for a sale of the mortgaged premises, to satisfy a legal lien. After thus refusing to redeem, after full notice, the government ought to be estopped. Its vendee, with full notice of this judicial sale, has no equity—nor should he now be allowed to wrong *bona fide* purchasers under the cover of the sovereign prerogatives of the United States.

I am of opinion, therefore, that the court of chancery of New Jersey had jurisdiction to effect a sale of these mortgaged premises, in satisfaction of the lien; that its decree and the sale under it, are not void for want of jurisdiction—and that their regularity cannot be called in question in a collateral suit. If irregular and erroneous, the decree might have been set aside on writ of error. *Grignon v. Astor*, 2 How., 319 (COURTS, §§ 496–500); *Griffith v. Bogart*, 18 How., 164.

It may be said there is no precedent in this country for precisely such a case as that before the chancellor. The answer to this may properly be, “It is time there was one.”

Bill dismissed, with costs.

UNITED STATES v. AMES.

(Circuit Court for Massachusetts: 1 Woodbury & Minot, 76–80. 1845.)

STATEMENT OF FACTS.—Trespass for overflowing lands belonging to the United States, of which jurisdiction had been ceded by the state of Massachusetts. There had been a reference to arbitrators and an award. The validity of the reference was one of the questions in the case.

§ 325. *An award pleaded in bar may be examined by the court, if it was intended by the referees to conform to the law.*

Opinion by WOODBURY, J.

It was admitted in the argument of this case that the referees intended to decide the claims of the parties according to law. In that event, the award

can probably be examined and its legality be considered by courts of law, when it is pleaded in bar to an action, as is done in the present instance. *Boston Water Power Co. v. Gray*, 6 Met., 131; *Kyd on Awards*, 351; *Jones v. Frazier*, 1 Hawks, 379; *Greenough v. Rolfe*, 4 N. H., 357.

The objections, relied on chiefly against the validity of the award, are: First, that the referees conform their decisions to the special laws of Massachusetts, rather than those of a general character, or those of the United States, applicable to their public domain, or to property they own for public purposes, such as arsenals or armories, and over which jurisdiction has been ceded to them. Secondly, that if their rights and remedies as to such property as this are to be regulated by the laws of Massachusetts, the special statutes as to damages for flowing by mill-owners are not designed for machinery or property used for such purposes as that at the Springfield armory. And lastly, that no authority exists by the laws of the United States for any officer to enter into a submission, so as to bind the government to fulfill any award made thereon.

In relation to the first objection, it is material to notice that not only the title to the soil where the injury has been done by the defendant, of which the United States complain, is in the latter, but the jurisdiction over it. Some of the deeds of the land were executed as early as September 19, 1798; and the cession of jurisdiction of a mile square, including the premises, was made by the State of Massachusetts in the same year. See Stat. of Mass., 1798, ch. 13, § 2. It is to be observed further, that the purchase, cession and use of this land have been for a peculiar and exclusive public object, namely, the manufacture of arms. The acts of congress have authorized such establishments to make fire-arms; and the use of the latter for the public troops as well as for "arming" the militia of the states, is an important and constitutional object, and one that should be under the control of the United States. See Constitution, art. 1, § 8. Congress, as early as April 20, 1794, authorized the erection of arsenals and magazines connected with this object. In 1796 the president was expressly empowered to purchase *lands* for armories; and all the purchases at Springfield, and the deeds of cession, with their dates, will be found enumerated in the *Commonwealth v. Clary*, 8 Mass., 72.

§ 326. *The United States, as mere proprietors of lands within a state, are subject to the laws of property of that state. Exception to this rule.*

Where the United States own land situated within the limits of particular states, and over which they have no cession of jurisdiction, for objects either special or general, little doubt exists that the rights and remedies in relation to it are usually such as apply to other land-owners within the state. It may be considered a general axiom in the title and transfers of real estates that the *lex rei sitæ* governs as to non-residents, no less than residents and citizens. *United States v. Crosby*, 7 Cranch, 115; *Kerr v. Moon*, 9 Wheat., 565; 10 Wheat., 192. It governs, also, as to remedies. *Robinson v. Campbell*, 3 Wheat., 212, 219. So the government, as a mere proprietor, must in most respects be treated like other proprietors, as to all servitudes, easements and other charges. Story's Conf. of Laws, § 447. The laws of each state, too, so far as applicable, govern the decision, whoever may be the parties, in trials at common law, of questions in this court as well as in the several state courts, with an exception, which is pointed out in the judiciary act of 1789. See 34th section, 20th chapter. The exception is "where the constitution, treaties

or statutes of the United States shall otherwise require or provide." And it is by force of these principles and analogies that the United States, if holder of a bill of exchange, must, in the absence of any law of congress on the subject, use the diligence and comply with the forms that are required of other parties. *United States v. Barker*, 4 Wash., 464; *S. C.*, 12 Wheat., 561. So in its liability to damages on foreign bills of exchange. *Bank of the United States v. United States*, 2 How., 711 (BILLS AND NOTES, §§ 1624-29). So in respect to its bonds (3 Story on Const., 200), and suits on the same. *Dixon v. United States*, 1 Brock., 177. And also its liability to a general average, when having property on board a vessel where a loss occurs, to save the cargo. *United States v. Wilder*, 3 Sumn., 308. So in respect to alluvion or land deposits. *New Orleans v. United States*, 10 Pet. 662, 717-719 (DEDICATION, §§ 32-51). So as to a set-off against and suit by the United States. *United States v. Bank of the Metropolis*, 15 Pet., 377 (BILLS AND NOTES, §§ 127-34). So in suing on bills of exchange, without any special act of congress regulating the subject. *Dugan v. United States*, 3 Wheat., 172.

§ 327. *Lands within a state, to which the United States have both title and jurisdiction, are controlled by acts of congress when they conflict with state laws.*

By a careful discrimination it will be seen that all these rest on a principle not inconsistent with the idea that the territory belonging to the United States, not situated within the limits of a state, and that which is within those limits, but over which jurisdiction has been ceded to the United States, and which is used for exclusive and constitutional objects, are subject to the laws of congress, and not to those of the state, when conflicting in any degree with what has been required or provided by the general government. The exception in the judiciary act seems introduced to meet such changes as congress might from time to time prescribe, either for others or the United States. It was a knowledge that new laws by congress, and that general rather than local principles must be made applicable to protect and govern such public property, in many cases, that probably led to the express provision in the constitution, that "the congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." Constitution, art. 4, § 3, ch. 2. This, of course, means rules or regulations by legislation. Baldwin's Views, 85, 86. The laws of the general government, therefore, punish offenses committed within such a jurisdiction, ceded to the United States, and not the state laws; and state process cannot run there at all, in civil or other cases, but by a special exception or reservation in the cession. The acts of congress also authorize, in certain cases, the removal of intruders on their lands by the marshal of the United States; and these acts have often been sanctioned by high law officers, as lawful on the part of congress. Opinions of Attorneys-General, p. 107, by Rodney; p. 123, by Rush; and p. 1344, by Gilpin. Many will recollect the celebrated exercise of this power by Mr. Jefferson against Mr. Livingston, as to the batture in New Orleans. It is reported in Hall's Law Journal, and an action of trespass for it against Mr. Jefferson may be seen in 1 Brock. C. C., 211. The conveyance of lands by Indians, when under the jurisdiction of the United States, if made without their consent, is rendered void by the United States laws. See Intercourse Law of 1802, March 30; 2 Stat. at Large, 139. The removal of live-oak and cedar from lands reserved for public use for the navy, is likewise prohibited and punished by extraordinary provisions in

acts of congress that have been long approved, and their extension to other subjects is recommended by one of the ablest of our attorneys-general. Opinions, 367, by Mr. Wirt.

All these laws are to be vindicated, and are to control any state laws over the territory, though jurisdiction of the particular lands in question has not always been ceded to the United States by the states in which they lie. Opinions of Attorneys-General, 1397-1399. Because the public lands, held for sale, are held for that special purpose, and can be protected and regulated by congress by removing intruders, so as to secure that purpose as a public and general one. It is the same in respect to those held for live-oak, etc. They are held or are reserved for another specific public object, which might be defeated without particular and controlling legislation by the general government. And as to the Indians within particular states, and on lands the fee of which belongs to the general government, they and their title are under our protection rather than that of the states. All these rights exist in the United States for constitutional purposes, and without a special cession of jurisdiction; though it is admitted that other powers over the property and persons on such lands will, of course, remain in the states till such a cession is made. Nothing passes without such a cession, except what is an incident to the title and purpose of the general government; but that passes which is an incident, though a special jurisdiction may not have been transferred in so many words. Again, pre-emption rights are not allowed on lands reserved for forts or as lead mines, or for cultivating the vine and olive, because they have been appropriated to specific public objects, and are thus taken out of the operation of other laws than those of congress as to such objects. The case of the Baubine claim at Chicago, recently, is well known over the country. See *Wilcox v. Jackson*, 13 Pet., 498; and *United States v. Gear*, 3 How., 120, 132.

§ 328. *The United States as landed proprietors are entitled to all the remedies, by common law or statute, which other holders of property possess.*

Next, as to the general remedies for injuries to such property. Besides the statutory remedies given for injuries committed on some public property, the United States possess those common to other holders of property in the courts of the Union, whether of common law origin or otherwise. Opinion of Mr. Wirt, 366, 367. Their remedies in all these cases may be those specially provided by congress, or any others suitable to the case itself, and not conflicting with "the constitution, treaties, or statutes of the United States." And when these last are not full or exclusive in their design, as well as when their absence or inapplicability to the subject render a resort to others expedient, the remedies to be pursued are those given by the laws of the several states. See the act before cited, and opinion of Wirt, 1388, 1150. Hence trespass, waste and injunction, as well as the power to remove intruders, given by special acts of congress, exist for remedies.

In the case now under consideration a cession of jurisdiction is superadded; and the state laws are to aid and not defeat the protection of the title of the United States, and to secure the object of the cession, rather than thwart or embarrass it; and whenever they do the latter, they are controlled by the acts of congress and the constitution, obtaining and setting apart this property for special public purposes, which the laws of the state, whether as to remedies or rights, must not be permitted to apply to, so as to destroy or injure. See the opinion of Mr. Butler, 1150, as to West Point. Such places are under the exclusive legislation of congress, and that legislation controls

so far as it goes. But remedies can be sustained under state laws where congress has not acted so as to take them away, though state laws cannot be interposed to defeat the objects of the reservation. *Id.*, 1151, 1152.

If the United States could not enforce these objects in their own courts, and without being subject to defeat or restriction by provisions made in particular states, either as to the damages or use, the whole object in the reservation, or the special use of such property, might be nullified. Thus, in this case, if the defendant can be protected under the laws of Massachusetts, in overflowing the lands or machinery of the United States, and in paying damages therefor only as those laws require, the design in the purchase and cession of jurisdiction for an armory is exposed to be entirely frustrated, and the whole establishment destroyed.

But, it has been held, even in the courts of Massachusetts, that the ordinary laws of the state do not prevail within the territory ceded to the general government. *Commonwealth v. Clary*, 8 Mass., 72. And see *The People v. Godfrey*, 17 John., 225; *United States v. Bevans*, 3 Wheat., 336, 388; (CRIMES, §§ 1616-19); *Cohens v. Virginia*, 6 Wheat., 264, 364 (COURTS, §§ 734-55). The states wherein such establishments exist, if jurisdiction over them has been ceded away, do not regard them or their occupants as subject to state control. They cannot vote or be taxed; nor are they "bound by any of its laws." 8 Mass., 77. It is, in most respects, left to congress, and congress alone, to legislate for those territories and districts, and places within its exclusive jurisdiction, and provide for its own rights, as well as the rights and duties of others within that jurisdiction, whether in territories or forts, or public vessels, or any other public establishment. *United States v. Cornell*, 2 Mason, 60.

So congress, being general in its powers over certain specified objects, can, through the courts of the United States, enforce all rights acquired for those objects, and can redress wrongs inflicted within its exclusive jurisdiction. *Ch. J. Marshall*, in *Cohens v. Virginia*, 6 Wheat., 264, 428. Indeed, it has been adjudged, that congress alone can punish crimes committed in such places. *United States v. Cornell*, 2 Mason, 60, 66; 8 Mass., 72. So it has been considered, that states cannot assess and collect taxes within the jurisdiction, or on property ceded to the United States. *Wirt's Opinion*, September 8, 1823; *Attorney-General's Opinion*, p. 469. Nor can they tax the property (*id.*, p. 101) of the United States situated within their territory, according to another opinion. *Id.*, p. 101, and *semb.*; *Dobbins v. Commissioners of Erie County*, 16 Pet., 435, though that question is now before the supreme court of the United States, to be settled judicially, in a case from the state of Maine. Nor can the states pass statutes of limitation affecting the property of the United States held for special purposes. *Jourdan v. Barrett*, 4 How., 169.

In one class of cases, as to forms of process, writs, executions, etc., at common law, in the United States courts, it is true that the laws and forms of the states were expressly adopted in most respects, at first, in 1789, by the act to regulate processes. But they were left subject to change by congress afterwards, and when, in 1792 (1 Stat. at Large, 226, 1792, ch. 36), they were made perpetual as then existing, it was with an exception of changes that might afterwards be made, from time to time, by said courts, or by the supreme court of the United States. *Wayman v. Southard*, 10 Wheat., 1, 31. And several changes have since been made by congress as to some writs and imprisonment for debt, appraisers of property, etc. In all these cases, the state

laws must yield to those made by congress, if any are so made, whether as to forms or remedies, when actions are brought in the courts of the United States. 1 Brock. C. C., 211. Nor is this conclusion at all inconsistent with the general axiom, that the *lex rei sitæ*, whether as to rights or remedies, governs as to real estate; for here the land is situated not within the jurisdiction and control or government of Massachusetts, but within that of the United States. In another view, as an exception to the general principle, if necessary to establish an exception, it seems highly reasonable, and is sustained by various analogies, that no special law of a state shall be applied to property so situated, if at all endangering the use or object for which it is held by the United States.

§ 329. *Lands belonging to the United States of which they have jurisdiction are not affected by local laws of the state in which they are situated, so as to interfere with the uses for which such lands are designed by the government.*

The inclination of my mind would, therefore, be strong against the legality of applying the special act of Massachusetts, for flowing land, to this case, if it had been allowed by the arbitrators to remain flowed, so as to impair at once and in any degree the use of the machinery on these premises for an armory. But as it does not remain so under the award, I do not feel justified in holding the award void on account of this reason; yet as it is supported under the next head by other reasons, which seem to exempt the whole cession from the operation of any peculiar local laws, and to protect any public privilege or right from the flowing acts, it is very questionable whether the arbitrators should have allowed any encroachment whatever in this case, even on the land, to have been continued by virtue of those acts. My impression is, they should not, and I have examined this point at more length than would otherwise have been done, as the case can be disposed of on the last point alone, because, if not settled now, it must be at the trial of this very cause on the general issue, where the flowing acts would be probably urged as furnishing the guide and rule in respect to damages.

Let us then proceed to the second objection, and in the course of it, see more as to the force of the other considerations in favor of the first objection. The second is that the laws of Massachusetts, as to flowing, do not in their spirit apply to cases like this. The origin of those laws was, doubtless, to encourage and sustain grist and saw mills and not other machinery, moved by water, for other purposes. But by chapter 116, section 1, of the Revised Statutes, the owner of any "water mill" is invested with those rights, and it may not be certain that, with the greater demand and increase of machinery of all kinds, the words should not have a broader construction than the original subject-matter. I have been referred to no adjudged case other than grist or saw mills, except under a special law as to the Roxbury Mill-dam, in 12 Pick., 467. There can be little doubt, however, that if the act extended to all flowing, and allowed it for the use of any machinery whatever, persons ought to be limited to flowing land alone, and not be permitted to flow so as to obstruct other machinery higher up. Hence the second section prohibits flowing on other machinery. And such would be the construction without that prohibition, or the law would prove suicidal. It would encourage and sustain one set of machinery, not so as to add more to the whole already in existence, but to overflow and drown out another set.

The award in this case, therefore, avoids that consequence and absurdity, by requiring the dam to be lowered, so far as it floods the machinery of the United States. But it still allows it to flow back the water on the land of the

§ 300. *Costs.*—The United States are not liable for costs, and a judgment against them for costs must be reversed. *United States v. Boyd*, 5 How., 29; *United States v. McLemore*, 4 How., 286.

§ 301. *Suits on bills indorsed to officers.*—Under the rule that the principal may sue on a bill of exchange indorsed to his known agent, the United States may sue in their own name on a bill indorsed to the treasurer. It is particularly proper for a government to exercise this power so as to obviate the danger of a set-off being pleaded against the agent. An act of congress is not necessary to enable the United States to maintain a suit. *United States v. Barker*, 1 Paine, 156.

§ 302. The United States may sue in their own name upon a note given to an agent for their benefit. *United States v. Boice*, 2 McL., 352.

§ 303. *Practice.*—It is the rule that all actions instituted on behalf of the federal government must be brought in the name of the United States, subject to such exceptions as congress may create. And by the act of 1828, the form of and procedure in such actions shall be adapted to the practice of the state in which such action may be brought. Actions by the United States, * 7 Op. Att'y Gen'l, 50.

§ 304. When the United States enters a court of chancery as a litigant, it waives its exemption from legal proceedings, and, with reference to rules of procedure, stands upon the same footing as an individual. *United States v. Flint*, 4 Saw., 42.

§ 305. *Instructions of attorney-general.*—A motion of defendant to dismiss in a confiscation case, pending on writ of error, cannot be sustained on the ground that the district attorney representing the United States has been instructed to dismiss by the attorney-general. The correspondence between these officers is confidential in its nature, and cannot be cited by third persons. *United States v. Six Lots of Ground*, 1 Woods, 284.

§ 306. *Setting aside patents.*—Where the agents of the government have been imposed upon and fraudulently induced to grant a patent to public lands to a party not entitled to receive it, it can maintain a bill to set it aside as an individual might. *United States v. Hughes*, 11 How., 552.

§ 307. *Suits in state courts.*—The United States are a body corporate, having a capacity to contract, to take and hold property as other corporate bodies. If they prosecute their suits in the state courts, availing themselves of the state law for this purpose, there is no reason why such state process as they use for the purpose of enforcing their right is not subject to state law. Therefore, where one committed to jail under a judgment at the suit of the United States is discharged under the state law, such discharge is a bar to an action by the United States on a bond for jail liberties. *Stearns v. United States*, 2 Paine, 300.

§ 308. *The practice of entering judgment at the return term against debtors of the United States*, under the act of March 3, 1797, must be confined to cases where the principal debtor is party to the action. *United States v. Lyon*, 2 McL., 249.

§ 309. *Appearance.*—The district attorney is not so far an officer of the court that it can compel him to enter the appearance of the United States; but the court may order that the United States shall enter its appearance in the case and direct that a copy of the order shall be served upon the district attorney, and also upon the attorney-general or some other government officer. *Fifth National Bank v. Long*, 7 Biss., 502.

§ 310. *Cases given precedence.*—*Held*, to be reasonable and proper in practice, that cases in which the United States are concerned should take precedence of all others upon the docket. *Penn v. Butler*, Wall. C. C., 4, note.

§ 311. *Lapse of time.*—No presumption of payment from lapse of time can be indulged in as against the government. Laches cannot be charged to it under the statute or in any other form. *United States v. Williams*, * 4 McL., 567.

§ 312. The statute of limitations is no defense to an action by the United States upon a contract. *Ibid.*; S. C., 5 McL., 188.

§ 313. *Whether, in foreclosure, a federal court could, on final hearing, pronounce a decree against the United States without an authorized appearance by the attorney-general*, *quære*. *Meier v. Kansas Pacific R'y*, * 4 Dill., 378.

VII. PROPERTY RIGHTS.

SUMMARY—*May accept conveyance of land in discharge of a debt*, § 814; *rights of persons claiming liens on such lands*, § 815.—*Lands ceded by state; jurisdiction*, § 816.—*Remedies for injuries to property*, § 817.—*Submission to arbitration*, § 818.

§ 814. The United States as an incident to its sovereignty may accept a conveyance of lands in discharge of an indebtedness to it, and may sell such lands upon credit, and maintain an action for the purchase money. *United States v. Lane*, §§ 319-20.

§ 815. When the government, in the exercise of the rights and functions of a civil corporation, purchases land to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands. *Elliot v. Van Voorst*, §§ 321-24.

§ 816. Where jurisdiction over land belonging to the United States has been ceded to the United States by the state in which it is situated, such lands are subject to the laws of congress in every case in which they in any way conflict with the laws of the state. *United States v. Ames*, §§ 325-31.

§ 817. Besides the statutory remedies given for injuries committed on some public property the United States possesses those common to other holders of property in the courts of the Union, whether of common law origin or otherwise. *Ibid.*

§ 818. No officer of the United States has authority, without a statute authorizing it, to submit any controversy, to which the United States is a party, to arbitration. *Ibid.*

[NOTES.— See §§ 332-347.]

UNITED STATES v. LANE.

(Circuit Court for Indiana: 3 McLean, 365-367. 1844.)

Opinion of the COURT.

STATEMENT OF FACTS.—Several years ago I. T. Canby, being indebted to the government in a large amount of money as receiver of public moneys, agreed, in discharge of his indebtedness, to convey to the United States certain lands. The district attorney, T. A. Howard, for Indiana, was directed to sell those lands by the solicitor of the treasury; they were accordingly sold for cash, payable in instalments. The obligation for \$998, on which the present action is brought, was given on the purchase of a part of these lands. And the defendants set up in defense that the obligation is without consideration, and void in law. That the United States had no power to purchase lands except under an act of congress, and that they cannot sell without the authority of law.

The third section of the fourth article of the constitution declares, "the congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States." By the seventh section of the act of May 1, 1820, it is provided, "that no land shall be purchased on account of the United States, except under a law authorizing such purchase." The sixth section of the same act declares, "that no contract shall be made by the secretary of state, or of the treasury, or of the department of war, or of the navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment," etc.

§ 319. *Power of the solicitor of the treasury to sell lands received by the United States in payment of debts.*

The first section of the "act for the appointment of a solicitor of the treasury," passed May 20, 1830, provides "that the solicitor shall have charge of all lands and other property which have been or shall be assigned, set off or conveyed to the United States in payment of debts; and of all trusts created for the use of the United States, in payment of debts due them; and to sell and dispose of lands assigned or set off to the United States in payment of debts, or being vested in them by mortgage or other security for the payment of debts; and in cases where real estate hath already become the property of the United States by conveyance," etc., the solicitor is to release, etc.

This provision, it is contended, refers to lands previously obtained under laws of the United States, and not to those which might afterwards be acquired. That the act gives no new power to the government, through the solicitor, to acquire lands. And it is urged that unless under an express law of

congress, through any of the agencies of the government, lands cannot be purchased. That the lands now referred to were not taken, under the laws of the state, in payment of a debt, or where the party was insolvent.

There can be no doubt that the act regulating the duties of solicitor had a reference to existing laws in some of the states, which authorize the debtor to set off his real estate on execution; and in other cases where he surrenders all his property to the United States, on which he is released; but all the provisions are not limited to these cases. Some of them are general, and apply to cases of "trusts created for the benefit of the United States, in payment of debts due them." But, independently of this provision, we think there was power in the government to receive the lands in question.

§ 320. *Powers of the United States under the constitution to contract, to receive lands by compromise or otherwise in payment of debts, and to dispose of the same.*

In the case of the *United States v. Tingey*, 5 Pet., 115 (BONDS, §§ 181-82), the court, in considering the powers of the government to make contracts, say, "upon full consideration of the subject, we are of opinion that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States, being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts, not prohibited by law, and appropriate to the just exercise of those powers."

As a party to a suit, no one doubts the power of the government, through its properly authorized agent, to direct the course of the suit as shall best advance the public interest. And if a compromise be necessary for that interest, it may be made. And that is what was done in the present case. The lands were taken, not as a purchase, but to secure the debt of the late receiver. And these lands were sold on a credit, in order that the sum due by the receiver might be paid. It was a case of trust, recommended by the public interest, and opposed to no law or public policy. The action is sustained. Judgment.

ELLIOT v. VAN VOORST.

(Circuit Court for New Jersey: 8 Wallace, Jr., 299-305. 1860.)

STATEMENT OF FACTS.—This is a bill to redeem a lot of land sold under a mortgage. The complainant claims to hold the equity of redemption. The defendants hold under a judicial sale made by order of the chancery court of New Jersey in a case in which the attorney of the United States for New Jersey appeared and answered for the government, and submitted its interest to the protection of the court. In the proceedings which followed, the property was duly sold and bought by respondents. The question is whether this judicial sale is valid.

§ 321. *An action cannot be maintained against the United States.*

Opinion by GRIER, J.

It is undoubtedly true that no action can be sustained against the government of the United States for any supposed debt or claim, unless by its own consent, or some special statute allowing it. 11 How., 290. The sovereign himself being the source of justice and power, exercising the same through his courts, is always presumed to be ready to do justice. It is, therefore, part of his prerogative that he cannot be sued in his own courts. Nevertheless, the subject is en-

titled, when he claims anything from the crown, to have his "petition of right." Upon such petition the crown ordinarily directs that right to be done to the party; and the petition is then referred to the chancellor to be executed according to law, and directions are given that the attorney-general be made a party to the suit. In other cases where the crown is not in possession, and its rights are only incidently concerned, it is generally considered that the attorney-general may be made a party in respect of these rights, and the practice has been accordingly. In the United States the proceeding by petition of right is unknown. The government of the United States, though limited in its powers, is supreme in its sphere of action. But its rights as a sovereign, and its prerogatives as such, are co-extensive with the functions of government committed to them, and extend no farther. Its position as to prerogative is anomalous, owing to our peculiar institutions.

§ 322. *Distinction between the United States as a sovereign and as in certain respects a corporation.*

It is part of the functions committed to this government to build forts, arsenals, navy yards, etc., etc. It may purchase and hold land for these purposes, yet it cannot exercise exclusive legislation over such lands, although used for national purposes, without the consent of the legislature of the state where the land lies. A state has no power, by taxation or otherwise, to retard, impede, burthen or control the operation of the constitutional laws passed by congress to carry into effect powers vested in the national government. Hence she may not have power to tax navy yards, or other property of the United States held within its bounds for public or national uses. But it does not follow that when the government officers purchase land in the name of the United States to secure a debt, as any individual or private corporation might do, that it thus ousts the jurisdiction of the state to tax it, or in any manner affects the liens or rights of mortgagees in such lands. In the mere exercise of a corporate right, the government of the United States cannot claim the prerogatives or immunities of a sovereign. She cannot compel a mortgagee to the hopeless remedy of a petition to congress to redeem. The courts of New Jersey cannot thus be ousted of their jurisdiction and duty to assist the mortgagee to have his mortgage satisfied, and the mortgaged premises sold for that purpose.

§ 323. *The rights, duties and liabilities of the government as a proprietor of lands, etc.*

When the government, in the exercise of the rights and functions of a civil corporation, purchases lands to secure a debt, the accident of its sovereignty in other functions cannot be set up to destroy or affect the rights of persons claiming a title or lien on the same lands. Thus, when the government of the United States became a partner in a trading corporation, such as the United States Bank, it divested itself, so far as concerned the transactions of that company, of its sovereign character, and took that of a citizen; consequently, its property and interests were subject to the decrees and judgments of courts, equally with that of its copartners.

§ 324. *A mortgagor may have his remedy in a case where the United States holds the equity of redemption, upon giving such notice as the court may prescribe.*

When Van Voorst came into the court of chancery, he had a clear right to have the mortgaged land sold to satisfy his mortgage. The court was bound to furnish him a remedy. The land mortgaged was within the jurisdiction of the court. The only difficulty in the case was, that the title of the mortgagor,

extra pay. *Held*, that he could recover only the contract price, because the assistant superintendent had no authority to vary the contract, and because there being an express contract, none could be implied. *Hawkins v. United States*, §§ 385-89.

§ 361. The war department may enter into a contract for preparing and curing pork for the use of the army when no other sufficient means of supply is at hand. *United States v. Speed*, §§ 390-94.

§ 362. A contract entered into by officers of the war department for a definite amount of work is valid, although it contains no provisions for terminating it at the discretion of the commissary general. *Ibid*.

§ 363. Where an officer who, in general, is obliged to advertise for proposals to contract, is nevertheless permitted to contract without such advertising when, in his opinion, the exigencies of the case demand it, the validity of a contract made by such officer in the exercise of such discretion, cannot depend on the degree of wisdom or skill which may have accompanied its exercise. *Ibid*.

§ 364. No action can be maintained against the government on a contract for secret services. The disclosure of the existence of such a contract is itself against public policy. *Totten v. United States*, §§ 395-96.

[NOTES.— See §§ 397-631.]

UNITED STATES v. CORLISS STEAM-ENGINE COMPANY.

(1 Otto, 331-323. 1875.)

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This case comes before us on appeal from the court of claims, and involves a consideration of the validity and binding character of a settlement, made between the secretary of the navy and the claimant, for work performed by the latter upon contracts with the navy department. There is no dispute about the facts of the case (they are fully and clearly stated in the findings of the court of claims); and it would seem that there ought not to be any dispute as to the law applicable to them. The validity of the contracts is not questioned. The work upon them was done under the supervision of an inspector of the navy department, and no complaint is made of the manner in which it was done. When, in 1869, the department, upon the recommendation of a board of officers of the navy appointed by it, suspended the further progress of the work under the contracts, the claimant made a written proposition, in the alternative, either to take all the machinery and receive \$150,000, or to deliver it in its then incomplete condition at the navy yard at Charlestown for \$259,068, payable on delivery there. The department accepted the latter proposition, recognizing the amount specified as the balance due on settlement of the contracts; stating, however, that, in consequence of the very limited appropriations, only a partial payment would be made on delivery of the machinery at the Charlestown navy yard, and that the balance could not be paid until congress should make a further appropriation, but that a certificate for the amount due would be given to the claimant.

The machinery was accordingly delivered at the navy yard, with the exception of a few articles, for which a deduction from the amount of the settlement was allowed, and the certificate stipulated was given to the claimant. Previous to this, however, the chief engineer of the navy, under direction of the department, examined the machinery and made a detailed report, by which the department was fully informed of its condition, the progress made in its construction, and what remained to be done for its completion under the contracts. There is no allegation or suggestion that the claimant was guilty of any fraud, concealment, or misrepresentation, on the subject; but on the contrary, it is clear that every fact was known to both parties, and that the

whole transaction, as stated by the court below, was unaffected by any taint or infirmity. If such a settlement, as the chief justice of the court of claims very justly observes, accompanied by the giving up by one, and the taking possession by the other, of the property involved, cannot be judicially maintained, it would seem that no settlement by any contractor with the government could be considered a finality against the government.

§ 365. *Power of the secretary of the navy to suspend work contracted for.*

The duty of the secretary of the navy, by the act of April 30, 1793, creating the navy department, extends, under the orders of the president, to "the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." 1 Stat., 553. The power of the president in such cases is, of course, limited by the legislation of congress. That legislation existing, the discharge of the duty devolving upon the secretary necessarily requires him to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As, in making the original contracts, he must agree upon the compensation to be made for their entire performance, it would seem that when these contracts are suspended by him he must be equally authorized to agree upon the compensation for their partial performance. Contracts for the armament and equipment of vessels of war may, and generally do, require numerous modifications in the progress of the work, where that work requires years for its completion. With the improvements constantly made in ship-building and steam-machinery and in arms, some parts originally contracted for may have to be abandoned, and other parts substituted, and it would be of serious detriment to the public service if the power of the head of the navy department did not extend to providing for all such possible contingencies by modification or suspension of the contracts, and settlement with the contractors.

§ 366. *Parties bound by a settlement.*

When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation or fraud, it must be equally binding upon the government as upon the contractor; at least, such a settlement cannot be disregarded by the government without restoring to the contractor the property surrendered as a condition of its execution.

But aside from this general authority of the secretary of the navy, under the orders of the president, he was, during the rebellion, specially authorized and required by acts of congress, either in direct terms or by specific appropriations for that purpose, to construct, arm, equip and employ such vessels of war as might be needed for the efficient prosecution of the war. In the discharge of this duty he made the original contracts with the claimant. The completion of the machinery contracted for having become unnecessary from the termination of the war, the secretary, in the exercise of his judgment, under the advice of a board of naval officers, suspended the work. Under these circumstances we are of the opinion that he was authorized to agree with the claimant upon the compensation for the partial performance, and that the settlement thus made is binding upon the government.

Decree affirmed.

UNITED STATES v. CHILD & CO.

(12 Wallace, 232-246. 1870.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—The claim in this case is for an alleged balance over and above an allowance made by a commission appointed by the president to investigate claims. Some of the material facts are thus stated by the court of claims in their finding:

“After the committee had entered upon its investigations the provost-guard of St. Louis forcibly entered the office of the claimants, and, against their consent, seized and carried before the commission their vouchers, business papers and private books of account. The commission examined them all, and, at the conclusion of its investigations, indorsed upon the vouchers the amounts allowed by it, and ordered that the sum of \$163,111 be deducted from the vouchers. The commission also withheld all of the vouchers until the claimants signed a receipt or agreement, *not under seal and without consideration*, which provided that when the reduced amounts allowed by the commission should be paid, the payment should be in full of all the claimants’ demands against the United States. The claimants on their part *never submitted their vouchers to the arbitration or decisions of the commission*, and did not sign the receipt voluntarily, but under protest and to obtain possession of their vouchers withheld until they should do so.”

The amount allowed by the commission was paid, the claimants making no formal protest and giving a receipt.

Opinion by MR. JUSTICE MILLER.

The claim of the appellees for the sum of \$478,119.62 was examined by the special commission appointed by the president. It allowed the sum of \$315,008.15 on the demand, and rejected the remainder of \$163,111.47. The claimants accepted the sum so allowed by the commission, gave receipts in full of the accounts included in the demand, and have brought this suit to recover the amount rejected by the commission.

§ 367. *The principles decided in United States v. Adams affirmed, applied and explained.*

These facts are undisputed, and part of the findings of the court of claims in the case. If they stood alone they would bring it within the principles laid down by this court in the case of the United States against Adams. That case was twice argued before us and affirmed by a full bench, and as we are satisfied with the principles on which it was decided, they must govern us in passing on subsequent cases, so far as they fall within its rulings. But the claimants contend that other facts found by the court of claims take this case out of the propositions laid down for the government of that case, and entitle them to an affirmance of the judgment rendered in their favor by the court of claims. An important difference between the two is said to exist in the fact that Adams voluntarily submitted his claim to the commission we have mentioned, and the claimants in this case did not. And it is insisted that this submission constituted an important, if not a controlling, element in the decision of the Adams case.

§ 368. *Settlement of claims, and giving receipt, binding on claimants.*

The court, in discussing the question of the conclusiveness of a receipt which Adams had given in order to obtain possession of his vouchers, and

which he asserted to have been obtained by duress, says: "In the view we have taken of the case, the giving of the receipt is of no legal importance. The bar to any further legal demand against government does not rest upon this acquittance, but upon the voluntary submission of the claims to the board; the hearing and final decision thereon; the receipt of the vouchers containing the sum or account found due to the claimant, and the acceptance of the payment of that amount under the act of congress providing therefor."

Counsel for the claimants construing the phrase "voluntary submission," here used, to mean such a submission as would constitute the commissioners a board of arbitrators, or at all events, such a submission as would render their decision legally conclusive, deny that the parties in the present case ever made such a submission. As much importance seems to have been given to this question by both parties, an order was obtained from this court on motion of the appellants directing the court of claims to make a more specific finding of facts on that subject. Such a supplementary finding is in the present record, and that court says, among other things, that the claims of the claimants were never submitted to said commission. But they further say, in this supplementary finding, that the claimants had, in some manner not shown to the court, presented or given notice of their claim against the United States to the said commission, but that they had not presented their *original vouchers*, or any proofs, to the said commission. They also find that the claimants appeared before said commission with witnesses, but what they testified to is not shown.

Taking these findings together, it seems to us that the court of claims meant to say that the claimants did not submit their claims to the commission as arbitrators, or with intent that their decision should be conclusive, but that they did present their claims and did appear to support them with witnesses. This view of their meaning is confirmed by reference to their original finding, in which it is said that "claimants on their part never submitted their *vouchers* to the *arbitration* or *decision* of the commission." No doubt these were the facts of the case; and as to this part of it, they come fairly within the decision of the court in Adams' case.

In the opinion of the court then delivered, it is held that this board had no authority to compel parties to submit their claims to it, and that its decisions were not conclusive when they did submit them. The court, referring to the various ways open to claimants to obtain satisfaction of their demands, and after speaking of an application to congress, a suit in the court of claims, and a submission to this special commission, adds: "This tribunal afforded an additional advantage over others, namely, that if, after the hearing and adjustment of the claims, the claimants were not satisfied, they were free to dissent and look for redress to the only legal tribunals provided in such cases." And to the application of Adams to remand the case to the court below, founded on the allegation that the court of claims had made a mistake in finding that he had submitted his claim to the board, this court responds (9 Wall., 554): "Though it is true that the appellee did not present his claim to the board, *as stated in the finding in the record on appeal*, it cannot, in view of the original record of the evidence before the court of claims, be denied that he made himself a party to the proceedings and took the benefit of the adjustment of his accounts by them, which brings the case within the principle decided in 7 Wallace."

But though the claimants might have refused to abide by the decision

of the board and sought relief from the court of claims or from congress, they did not do so. We lay out of view in this case as in the Adams case the receipts which they gave under protest, in order to regain possession of their vouchers. But we cannot disregard the finding of the court of claims that, after congress had appropriated money to pay the sums found due by the commissioners, the claimants received the amount so allowed, and signed upon each voucher a receipt whereby they acknowledged having received said reduced amount "in full of the above account." And that at the time of receiving this payment they made no formal objection or protest, but were required to and did sign the receipt above described.

Although it is found by the court that these receipts were not under seal and were without consideration, the latter statement must have some meaning not apparent to us, in view of the other fact found also, that over \$315,000 was paid to the claimants on those accounts at the time they gave the receipts.

§ 369. — *what not duress in such case.*

To avoid the legal effect of these facts it is argued that not only in giving the receipts above mentioned, but also in accepting the money for which they were given, the complainants acted under duress.

We can hardly conceive of a definition of duress that would bring this case within its terms. Authorities are cited to show that where, under peculiar circumstances, property is withheld from the owner and he is forced to pay some unjust demand to obtain possession of it, he can afterwards maintain a suit for the money so paid. But no case can be found, we apprehend, where a party who, without force or intimidation and with a full knowledge of all the facts of the case, accepts on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid his act on the ground that this is duress. If the principle contended for here be sound, no party can safely pay by way of compromise any sum less than what is claimed of him, for the compromise will be void as obtained by duress. The common and generally praiseworthy procedure by which business men every day sacrifice part of claims which they believe to be just to secure payment of the remainder would always be duress, and the compromise void.

But it is argued that the government should be held to a different rule than that which applies to private parties. It is said that the amount in dispute here was so large that the claimants were compelled to accept what was offered, to avoid bankruptcy. No fact found by the court of claims, or otherwise presented by the record, justifies us in supposing that the claimants were threatened with insolvency, and the circumstance that the claim which was the subject of the compromise was a very large one can hardly be accepted in a court of law or equity as a reason for setting it aside. If indeed there was any such pressing motive in the minds of the claimants arising out of the condition of their private affairs as influenced them strongly to accept the offer of the government, it cannot, in the absence of fraud or constraint on its part, invalidate the settlement.

It seems to us that this case, under the ordinary principles of law applicable to its class, is free from embarrassment.

If there had been no reference to, and no finding by, the commission, it would still remain true, but here was a claim, the justice of which had been denied and the amount that was due on it had been in dispute for nearly two years. The government finally says to the claimants: "We will pay you a

certain sum on this disputed claim, provided you will take it in full satisfaction of the whole;" when, without intimidation, without fraud or concealment on the part of the government, without protest or objection on their part, the claimants accept the money offered and sign a receipt acknowledging it to be in full of the whole claim. Is not this a legal and binding compromise of the disputed demand? Is it not a voluntary adjustment of the matter in dispute between the parties? And we think that it is a strong additional argument in favor of the validity of this settlement, when it is called in question in court, that the sum so agreed upon was found to be a balance justly due on the claim by a commission of three capable and honest men, appointed by the government to ascertain what was due, and that before this commission the other party presented his claim and produced his witnesses, and was allowed a full and fair hearing to any extent that he desired.

In this view of the case it is of no avail to urge that the court of claims has found that the whole claim was just and ought to be paid. After the compromise that question was no longer open to inquiry. It is of the very essence of such adjustments of disputed rights that the contest shall be closed; and whatever consideration might be given the finding of the court of claims on that subject in another department of the government, this department, which sits to administer the law, must be governed by its recognized principles.

Judgment reversed and the case remanded to the court of claims, with directions to render judgment in favor of the United States. (*a*)

Dissenting opinion by MR. JUSTICE CLIFFORD, CHASE, C. J., concurring.

The court of claims having found that the claim in this case was never submitted to the commission appointed by the direction of the president to examine such claims, I am unable to concur in the conclusion of the court that the case is controlled by the decision of the court in the case of *United States v. Adams*, in 7th Wallace, and for the reason that the claim was never so presented.

JUSTICES DAVIS and FIELD, absent.

PIATT v. UNITED STATES.

(22 Wallace, 496-513. 1874.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—Piatt was a contractor during the war of 1812, and engaged to furnish rations at twenty cents per ration. After the banks suspended specie payments, the price of provisions rose so high that he notified the secretary of war, Mr. Monroe, that he would be obliged to throw up his contract, as he could not furnish the subsistence he had engaged to do at the stipulated rates. Mr. Monroe agreed with him verbally that he should be paid whatever was right, it being a time of great emergency, and accordingly Piatt went on with his contract and paid out considerable sums outside of it for relief of refugees and in aid of friendly Indians, etc., which were afterwards repaid.

In 1819 Piatt was arrested for a debt he owed the United States of \$48,230.77, but had at the same time a claim on the government based upon his parol contract with the secretary of war of about \$180,000. This claim

was afterward reduced by an allowance made under an act of congress of the \$48,230.77 which he owed the United States, leaving his claim \$131,508.90, and for this sum his administrator filed this petition in the court of claims. The court decided that Piatt was entitled to the amount claimed under the verbal contract with Mr. Monroe, but that the settlement under the act of congress by which he was allowed only \$48,230.77 was a final settlement, and that he was entitled to nothing further. The petition was dismissed and Piatt's administrator appealed.

Opinion by MR. JUSTICE CLIFFORD.

Attempt is made, chiefly on two grounds, to vindicate the conclusion of the court of claims, that the cause of action is barred by the allowance reported by the accounting officers of the treasury. The grounds are:

(1) That the auditor passed to the credit of the deceased claimant the amount claimed by the United States as due from him as commissary of subsistence, and that he, the claimant, accepted the settlement without protest.

(2) That congress intended by the act directing the adjustment of his accounts that the settlement should be final and conclusive; that the act was in the nature of an offer for a disputed claim, and that the acceptance of the adjustment is a bar to the claim.

§ 370. *A new agreement upon a distinct consideration may be proved by parol evidence as a substitute for a written contract.*

1. Verbal agreements between the parties to a written contract made before or at the time of the execution of the contract are, in general, inadmissible to vary its terms or to affect its construction, as all such agreements are considered as merged in the written contract. Both parties admit that proposition, nor is it denied by the defendants that oral agreements subsequently made, on a new and valuable consideration, before the breach of the contract, may have the effect to enlarge the time of performance of the contract, if it is not one within the statute of frauds, or that such an oral agreement may have the effect to vary any of the terms of the written contract or to waive or discharge it altogether.

Exceptions, it is everywhere admitted, exist to the rule that parol evidence is not admissible to contradict or vary the terms of a written instrument. Most of such exceptions are enumerated by Mr. Greenleaf, and in the course of that enumeration he says: "Neither is the rule infringed by the admission of oral evidence to prove a *new and distinct agreement* upon a new consideration, whether it be as a substitute for the old or in addition to and beyond it; and if subsequent and involving the same subject-matter it is immaterial whether the new agreement be entirely oral or whether it refers to and partially or totally adopts the provisions of the written contract, provided the old agreement be rescinded and abandoned." 1 Greenleaf on Evidence, 12th edition, § 303; 2 Taylor on Ev., 6th ed., § 1044; Goss v. Nugent, 5 Barn. & Ad., 65; Nelson v. Boynton, 3 Met., 400; Leonard v. Vredenburg, 8 Johns., 39; Marshall v. Lynn, 6 Mees. & W., 109; Stead v. Dawber, 10 Ad. & Ell., 57; Stowell v. Robinson, 3 Bing. N. C., 927.

Sufficient appears in the very nature of the new arrangement to show that the promise of the United States was made upon a good and valid consideration, as nothing is better settled than the rule that if there is a benefit to the defendant and a loss to the plaintiff consequent upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an ac-

tion upon the promise to recover compensation. 1 Parsons on Contracts, 6th edition, 431.

Other authorities state the rule much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising by the party in whose favor the promise is made, is sufficient to constitute a good and valuable consideration for the support of an action of assumpsit. *Violet v. Patton*, 5 Cranch, 150; *Chitty on Contracts*, 28; *Townsley v. Sumrall*, 2 Pet., 182 (BILLS AND NOTES, §§ 142-50).

Modern authorities supporting the proposition that parol evidence is admissible to prove such a new agreement, under the circumstances disclosed in this case, are very numerous and are quite sufficient to show that the proposition may be regarded as an established rule of decision. *Cummings v. Arnold*, 3 Met., 489; *Bank v. Woodward*, 5 N. H., 99; *Blood v. Goodrich*, 9 Wend., 75; *Lindley v. Lacey*, 17 Common Bench, N. S., 584.

Apply that rule to the case and it is quite clear that the whole amount claimed by the plaintiff was due to the deceased claimant at the time his accounts were adjusted by the accounting officers of the treasury in addition to the amount claimed by the United States in set-off for balance due from him as commissary of subsistence. Well-founded doubt upon that subject cannot be entertained, as it satisfactorily appears that in order to reduce his claim to an amount not exceeding the claim of the United States, those officers found it necessary to deduct from the aggregate estimate of the value of the rations furnished under the parol agreement an amount exactly equal to the balance found due to the claimant by the subordinate court from whose judgment the appeal is prosecuted in this case.

Nothing was paid to the claimant under that private act except what was allowed to the claimant for services and expenses in furnishing transportation and rations for the use of Indians and indigent citizens. He was discharged from arrest and the balance due from him to the United States for the moneys in his hands as commissary of subsistence was also discharged, but nothing was paid to him for the large balance now found to be due by the court below. Argument to show that such a settlement is not a bar to the residue of the claim is unnecessary, as the proposition is utterly destitute of merit and repugnant to the plainest dictates both of law and justice.

§ 371. *Acceptance by a party of part of a demand from officials who are not authorized to give more does not conclude the whole demand.*

2. Opposed to that is the suggestion, in behalf of the United States, that the act of congress was in the nature of an offer of compromise, and that the acceptance of the adjustment is a bar to the claim.

Support to that proposition is attempted to be drawn from the decision of this court in the case of *Mason v. United States*, 17 Wall., 70 (§ 372, *infra*), but the court here is very clearly of the opinion that the case cited affords no countenance whatever to any such conclusion. Muskets were wanted by the United States in that case, and it appears that the plaintiff in that controversy contracted to manufacture and deliver at a specified time large quantities of such arms at the price specified in the contract. Arms of the kind were delivered and paid for and the plaintiff was notified by order of the secretary of war that a larger quantity would be received. Preparations were accordingly made by the plaintiff to fill the second order, but the secretary of war subse-

quently appointed a special commission to audit and adjust all such orders and claims. They reported that the contract should be confirmed to a certain extent upon the condition that the contractor should, within fifteen days after notice of their decision, execute a bond, with good and sufficient sureties, for the performance of the modified contract, and the case shows that he executed the modified contract and gave the required bond. By that contract he engaged to manufacture thirty thousand muskets, and the finding of the subordinate court showed that the contract was fulfilled by both parties.

What the court decided in that case was that the claimant voluntarily accepted the modification of the contract as suggested by the commissioners and and that he executed the new contract in the place of the one superseded, which new contract he must have understood was intended to define the obligations of all concerned. Beyond all doubt the new contract in that case was substituted for the old one, and the court held that no party, after accepting such a compromise and executing such a discharge, could be justified in claiming damages for a breach of the prior contract which had been voluntarily modified and surrendered.

Other cases to the same effect have been decided by this court. *United States v. Child*, 12 Wall., 232 (§§ 367-69, *supra*); *United States v. Justice*, 14 id., 535 (§ 380, *infra*). None of those cases, however, proceed upon the ground that such a commission possesses any judicial power to bind the parties by their decision or to give the decision any conclusive effect. Claimants in such cases may appear before the commission or not, as they choose; but the decision is, if they do appear and accept the terms awarded as a final settlement of the controversy, without protest, they must be understood as having precluded themselves from further claim and litigation.

Where a party accepts the amount awarded in such a case it is just to conclude that he acquiesces in the decision of the tribunal by which a part of the claim is rejected as well as in the finding in his favor; but the accounting officers in this case were forbidden by law to allow the claimant anything beyond the amount in his hands as commissary of subsistence, and they obeyed the directions given in the act of congress. Manifestly the claimant had no option upon the subject, and in the opinion of the court it would be an unreasonable construction of the act of congress to suppose that its framers intended that the claimant should relinquish the large balance found to be due him in consideration of his discharge from arrest and the discontinuance of the suit against him for the recovery of the amount due from him to the United States.

Certain cases from the state reports are referred to which it is supposed assert a different rule, but the court here is of a different opinion. *Sholes v. State*, 2 Chand., 182; *Baxter v. State*, 9 Wis., 44; *Calkins v. State*, 13 id., 389.

Suffice it to say that in the case before the court no appropriation whatever was made in favor of the claimant. Where the claim is disputed and an appropriation is made in favor of the claimant for an amount less than the amount claimed, and appropriation purports to be in full payment of the demand, the rule may be different; but it is sufficient to say in response to those authorities that nothing was appropriated in this case, and the accounting officers of the treasury were forbidden to allow anything beyond what was involved in the pending suit against the claimant.

Judgment reversed, and the cause remanded with instructions to render judgment in favor of the petitioner for \$131,508.90, the amount found to be due him in the findings of the court of claims.

JUSTICES BRADLEY, SWAYNE, DAVIS and HUNT dissented, on the ground that the claim had been decided and settled in 1820.

MASON v. UNITED STATES.

(17 Wallace, 67-75. 1872.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Parties having claims against the United States for labor or service, or for personal property or materials furnished, which are disputed by the officers authorized to adjust the accounts, may compromise the claim and may accept a smaller sum than the contract price; and where the claimant voluntarily enters into a compromise and accepts a smaller sum and executes a discharge in full for the whole claim, he cannot subsequently recover in the court of claims for any part of the claim voluntarily relinquished in the compromise.

Mason contracted to manufacture and deliver fifty thousand muskets, with appendages, of the Springfield pattern. They were to be in all respects identical with the standard rifle-musket made at the National armory, with the regular appendages, and were to be so constructed as to interchange with that pattern and with each other in all their parts, and they were to be subject to inspection in the same manner as the arms are which are manufactured at the National armory; and the stipulation was that none should be received except such as passed inspection and were approved by the regular inspectors. Deliveries were to be made at the times and in the quantities therein specified, and payments were to be made in such funds as the treasury department should provide, on certificates of inspection and receipt by the inspectors, at the rate of \$20 for each arm, including appendages. Information was also communicated to the contractor by the war department that double the number specified in the contract would be received, if manufactured at the contractor's establishment and delivered at the times specified for the delivery of the first fifty thousand arms, upon the same terms and conditions as those specified in that contract.

On the 20th of January, 1862, the claimant accepted the offer to manufacture and deliver the second fifty thousand muskets and appendages, as proposed in that offer, and duly notified the chief of ordnance of his acceptance of the same in writing. Pursuant to that arrangement the claimant proceeded to make changes in his machine works, and to do whatever was necessary to enable him to perform his agreement, and the court of claims finds that he was able and willing to perform the same, and that he expended \$75,000 in changing his machine works into an armory for that purpose, and that if he had been allowed to fulfill the agreement his profits would have amounted to \$5.25 per musket.

Complaint is made that the officers of the United States prevented the claimant from performing his contract, and it appears that the secretary of war, on the 13th of March, 1862, by an order of that date, appointed a special commission, consisting of two members, to audit and adjust all orders and

claims on the war department in respect to ordnance, arms and ammunition, providing in the same order that their decisions should be final and conclusive upon the department on all questions touching the validity and execution of the contracts, and the sums due or to become due upon the same, and upon all other questions arising out of the contracts between the contractors and the government. Whether the claimant ever appeared before the commission does not appear, but it does appear that the commissioners, on the 15th of May in the same year, without the consent and against the remonstrance of the claimant, decided and reported to the chief of ordnance that the contract of the claimant be confirmed, subject to all its terms, to the extent of thirty thousand muskets, upon the condition that he, the claimant, shall, within fifteen days after notice of the decision, execute a bond, with good and sufficient sureties, in the form and with the stipulations prescribed by law and the regulations in such cases, for the performance of the contract as thus modified, and that the contract shall be declared null and of no effect in case he fails or refuses to execute such a bond. Due notice was given of the decision to the claimant, and the chief of ordnance transmitted to him the draft of the contract and bond contemplated by the decision, with the request that he would execute and file the same within fifteen days from their receipt *if he should accept the contract as confirmed by the commission*, and the finding of the court of claims shows that he executed the written contract whereby he contracted and engaged to furnish to the United States thirty thousand muskets of the Springfield pattern; and the court of claims also finds that the contract was performed by both parties, and that no other muskets were ever furnished to the United States by the claimant.

§ 372. *When a party voluntarily and without duress accepts a compromise of a dispute with the government, he is bound by it and cannot recover damages in the court of claims.*

Much discussion of the case is certainly unnecessary, as it is as clear as any proposition of fact well can be, that the claimant voluntarily accepted the modification of the contract as suggested by the commissioners, and that he executed the new contract in its place, which he must have understood was intended to define the obligations of both parties. His counsel suggest that he accepted the new contract without relinquishing his claim for damages, arising from the refusal of the United States to allow him to furnish the whole one hundred thousand muskets, but the court is unable to adopt that theory, as it is quite clear that he could not have acted with any such motives consistent with good faith towards the war department, as he must have known that the chief of ordnance supposed when he, the claimant, returned the written contract duly executed, that the whole matter in difference was adjusted to the satisfaction of all concerned. Parties are bound to good faith in their dealings with the United States as well as with individuals, and the court is of the opinion that no party in such a case could be justified, after accepting such a compromise and executing such discharge, in claiming damages for a breach of the prior contract which had been voluntarily modified and surrendered, unless the new contract was accepted under protest or with notice that damages would be claimed for the refusal of the United States to allow the claimant to fulfill the contract which was modified in the new arrangement.

It is contended by the appellant that the case is different in principle from the case of *United States v. Adams*, 7 Wall., 463 (§§ 373-76, *infra*), and the other

cases, *United States v. Child*, 12 Wall., 232 (§§ 367-69, *supra*); *United States v. Justice*, 14 id., 535 (§ 380, *infra*), of a corresponding character decided by this court, and the court is inclined to the same opinion, as it is a plain case of voluntary adjustment between the parties, which all courts hold is final and conclusive. None of those cases proceed upon the ground that such a commission possessed any judicial power to bind the parties by their decision, or to give the decision any conclusive effect. Nor can such a commission compel a claimant to appear before them and litigate his claim; but if he does appear and prosecute it, or subsequently accepts the terms awarded as a final settlement of the controversy, without protest, he must be understood as having precluded himself from further litigation.

Attempt is made in argument to show that the adjustment in this case, so far as the claimant is concerned, was the result of duress; but the charge is wholly unsupported by evidence of any kind, except that the United States proposed to annul the old contract if the claimant refused to accept the modification, which is wholly insufficient to establish such a charge.

Apart from that, it is also suggested that the claimant at that time could have no remedy by suit against the United States, as the transaction preceded the passage of the law establishing the court of claims. But he might have applied to congress for relief, as all other claimants were compelled to do from the organization of the government until the law was passed allowing such parties to prosecute suits against the United States.

Duress, if proved, may be a defense to an action, and it would doubtless be sufficient to relieve a party from the effect of compromise which was procured by such means; but the burden of proof to establish the charge, in every such case, is upon the party making it, and if he fails to introduce any such evidence to support it, the presumption is that the charge is without any foundation. *United States v. Hodson*, 10 Wall., 409 (BONDS, §§ 195-99); *Brown v. Pierce*, 7 id., 214 (EQUITY, §§ 793-800); *Baker v. Morton*, 12 id., 157. Acceptance from the government of a smaller sum than the one claimed, even in a case where the amount relinquished is large, does not leave the government open to further claim on the ground of duress, if the acceptance was without intimidation and with a full knowledge of all the circumstances; and the case is not changed because the circumstances attending the transaction were such that the claimant was induced from the want of the money to accept the smaller sum in full, which is not proved in this case. *United States v. Child*, 12 Wall., 232 (§§ 367-69, *supra*). Examined in any point of view we think the decision of the court of claims is correct.

Decree affirmed.

CHASE, C. J., dissented.

UNITED STATES v. ADAMS.

(7 Wallace, 468-482. 1868.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—Adams petitioned for a balance against the government on contracts with General Fremont for constructing a certain number of mortar boats and steam tugs to be used on the western rivers in the late civil war. After the construction of the boats by order of the secretary of war, they were received into the service of the government. The contracts were

made about the 24th of August, 1861, for the boats, at a cost of \$8,250 each, and about the 10th of September following, for the tugs, at a cost of \$2,500 each. On the 14th of October General Fremont was superseded. Afterwards the secretary of war, in consequence of charges of frauds committed by General McKinstry, who had charge of making contracts for supplies, etc., who made the contracts in question, suspended payments upon all contracts within the department. After the dismissal of General McKinstry, on the 25th of October, the secretary appointed a board of commissioners to examine and report upon all claims against the military department of the west, originating prior to the 14th of October, 1861. This board met and gave notice to all claimants to produce their claims. Adams presented his claims, and the board gave vouchers for the sums of \$75,959.24 and \$20,196.00 as due from the government, taking from him a receipt in full of all demands, which he signed under protest. Under a resolution of congress claimant and petitioner presented his vouchers and received payment. The court of claims decided that petitioner was entitled to the balance and gave him judgment for \$112,748.76.

Opinion by MR. JUSTICE NELSON.

There has been a good deal of discussion between the learned counsel upon the questions whether or not General Fremont possessed competent power, as commander of the military department, to make a valid contract with the petitioner for the construction of the boats, in the absence of any authority from the quartermaster-general or secretary of war; and if not, whether the delivery of the boats, acceptance by the secretary, and employment in the service of the government, did not operate as a ratification of the same. In the view the court have taken of the case, it is not material how these questions are answered. For the purposes of the decision, we may admit the competency of the power.

§ 373. *Duty of the secretary of war in reference to contracts made by him or his subordinates.*

The secretary of war, subject to the authority of the president, is at the head of the department of the government on whom the duty devolved to provide these boats for the military expedition in contemplation by General Fremont, after their construction had been determined on. The head of the appropriate bureau of this branch of the service is the quartermaster-general, who is under the direction of the secretary. 1 Stat. at Large, 696; 4 id., 173; 5 id., 257; Regulations of 1861, art. 1064. And whether the contracts for the construction were made by General Fremont or by the quartermaster-general, the source of the authority is the head of the war department. And whether he makes the contracts himself, or confers the authority upon others, it is his duty to see that they are properly and faithfully executed; and if he becomes satisfied that contracts which he has made himself are being fraudulently executed, or those made by others were made in disregard of the rights of the government, or with the intent to defraud it, or are being unfaithfully executed, it is his duty to interpose, arrest the execution, and adopt effectual measures to protect the government against the dishonesty of subordinates. This duty is too plain and imperative to call for comments. As the head of the department under whose charge the contracts were made and were being carried into execution, and over which he had the superintendence and control, he was responsible to the government for any detriment to its interests which it was reasonably within his power to prevent or remedy.

§ 374. *If the secretary of war has well-grounded suspicions that contracts had been entered into and debts incurred in violation of the rights of the government, it is his duty to suspend the payment of all claims.*

We do not agree, therefore, that there was anything unusual, harsh, or unjustifiable on the part of the secretary, if there existed well-grounded suspicions, or facts unexplained, tending strongly to the conclusion that contracts had been entered into and debts incurred within this military district, in disregard of the rights of the government, in issuing the order to suspend the payment of all claims against it. This was a proper if not an indispensable step to prevent the consummation of the frauds. He would have been recreant to his duty if he had acted otherwise; and after having thus suspended these claims upon grounds and for the reason stated, which we are of opinion fully justified him, unless some provision had been made affording an immediate opportunity to the claimants to exhibit their claims, and establish their justice and integrity, their only remedy would have been an appeal to congress or to the court of claims, which, as then organized, had no power to render judgment against the government.

§ 375. — *as to appointment of commissioners to investigate claims.*

Both these bodies were soon to be in session at Washington, so that, without any great delay, they could have been presented there, examined, and allowed or rejected. But these tribunals were distant from the place where these contracts had been made and were being carried into execution, and a resort to them would have occasioned delay and involved much expense. Under these circumstances, although they were the appropriate and, we may say, only legal tribunals to investigate and adjust claims that the heads of departments had felt it their duty to suspend or reject, it was fit, and commendable in the secretary to appoint this board of commissioners to meet at once at a place where all the transactions had occurred out of which the claims and demands in dispute originated. It was impracticable for the secretary himself to hear and adjust them, even if the parties had desired it. The only immediate relief, therefore, within his power to provide, consistent with his duty under the circumstances, was to appoint persons to represent him.

We agree that this board possessed no authority, nor would the secretary, if he had appeared in person, have possessed any, to compel a hearing and adjustment of the claims, nor did they hold themselves out as possessing any such authority. The board were constituted for the simple purpose of affording to such claimants as might desire a tribunal to speedily hear and decide upon their claims, without the delay and expense of resorting to those which the law had recognized or provided. It was to relieve them from the hardship resulting from the suspension of the payment, as far as was in the power of the secretary; a suspension which he had felt compelled to order, under the circumstances, from a sense of duty to government. We cannot, therefore, appreciate the force of the argument that has been urged on behalf of these claimants that the facility thus furnished by the board to hear and pass upon their claims in some way operated compulsorily to submit them for investigation; not legally, but morally; and that their necessities compelled them to seek this early opportunity to have them heard and adjusted. This we think a misapprehension. It was not so much the presence of this board that compelled the submission, if any compulsion existed, but the certainty, if the opportunity was not accepted, they would be obliged to encounter the delay and expense of an application to congress or the court of claims. The

constitution of the board presented simply a choice of tribunals to hear these claims. It was their preference for the tribunal sitting in their midst, and the high character of its members, that controlled the choice. This tribunal also afforded an additional advantage over the others, namely, that if after the hearing and adjustment of the claims the claimants were not satisfied, they were free to dissent and look for redress to the only legal tribunals provided in such cases.

It has been strongly argued that the receipt in full of all demands which the board exacted from the claimant before the delivery of the vouchers or finding was unauthorized; or, if authorized, that it is no bar to that portion of the original claim rejected by the board, as it is an instrument subject to explanation; that a receipt for payment in full, when only part of the debt is paid, is no defense to an action for the balance; and, further, that it was signed under protest. In the view we have taken of the case, the giving of this receipt is of no legal importance. The bar to any further legal demand against the government does not rest upon this acquittance, but upon the voluntary submission of the claims to the board; the hearing and final decision thereon; the receipt of the vouchers containing the sum or amount found due to the claimant; and the acceptance of the payment of that amount, under the act of congress providing therefor. From the time the secretary issued his order suspending the payment, and which we have held was well justified under the circumstances, they must be regarded as claims disputed by the government, and, unless this board had been constituted, could have been adjusted only by congress or the court of claims. They fell within that mass of claims which the heads of the several departments had refused to adjust according to the views of the claimants, and this was the character that attached to them when presented before the board. We do not doubt but that there have been, and may be hereafter, cases where payments have been mistakenly or wrongfully withheld and the claimant compelled either to give up his claim or seek redress before the appropriate tribunals, existing at the time, to hear and determine them. But this is no argument against the power or right of the heads of the departments to refuse the payment. What other remedy has the government to arrest the execution of fraudulent contracts, made by its subordinates, or the unfaithful execution of them? In such cases the courts are open to protect the rights of private individuals, but this remedy is unavailable to the government. The multitude of agents, official and otherwise, which it is obliged to employ in conducting its affairs, render this remedy utterly impracticable. Unless, therefore, some power exists in the government summarily to interfere and arrest the frauds and irregularities committed against it, they must be allowed to go on to consummation. No one, we think, on reflection, will deny this power.

A good deal of the argument on the part of the claimant in support of the right to recover the contract price of these boats is placed upon the ground of the absence of any authority in the board of commissioners to pass, *in invitum*, upon the claims. We have conceded this want of authority. They possessed no judicial power; nor did they claim to exercise any. The government having suspended all payment upon the contracts, upon allegations of frauds and irregularities, until an inquiry could be had in respect to them, appointed this board as a favor to its creditors to enable those who might desire it to have an immediate investigation. It was an act of kindness to them. They were left free, however, to present or withhold their claims. But we find nothing in the

constitution of the board, or in its proceedings, or in the proceedings on the part of the government, indicating expressly or by implication, that when the investigation was thus voluntarily submitted to, the amount adjusted, and the acceptance of payment by the claimant, the proceeding was not to be final. It could hardly have been supposed or believed by the claimants themselves, that the government would have gone to the expense of furnishing them a tribunal in their midst for this investigation, and subject itself also to the expense of carrying it on in the cases submitted to its cognizance, as a matter of mere preliminary inquiry, to adjust parts or portions of a contract, and make advances thereon, leaving the residue for further litigation before congress or the court of claims. This is not the course of litigation between private parties; they are not allowed to split up an entire contract or demand into several parts; and we are not aware of any reason for an exception to the rule in a proceeding against the government. We cannot think that a further hearing before any other tribunal of the same matters was within the contemplation of either party.

§ 376. *Finding of board of commissioners, so far as respects cases of voluntary submission, followed by acceptance of payment, is conclusive upon the claim.*

The hearing before this board was had more than a year before the present court of claims was established, under the act of congress of March 3, 1863, which authorizes suits and judgments against the government. Previously, the only remedy of the creditor was by an application to congress, or to the court of claims, which was established in 1855, but possessed no authority to render judgment against it. It was but a commission appointed by the government to hear and pass upon claims, but whose determination had no force till confirmed by congress. It differed from the commission in the present case, as it was established by law, and had general authority to hear all claims; but so far as respects the cases of voluntary submission before the board, we regard the finding, followed by acceptance of payment, as conclusive upon the claim as if it had been before this first court of claims, and heard and decided there, and the amount found due paid by the government. Now, we suppose that it would be an error in the court of claims, as at present constituted, with power to render judgment against the government, to hear and revise the allowance of a claim already heard and decided upon by congress, or by the former court of claims, and payment made, even if the claimant was not satisfied. And, we think, it is equally error in the present case, upon the same principle and for the same reasons.

Indeed, unless the claimant is barred, under the circumstances stated, it would be difficult for the government to determine when there would be an end to claims put forth against it, as there is no statute of limitations, of which we are aware, applicable to them before this court.

The judgment of the court is that the decree must be reversed, the cause remanded, with directions to enter a decree dismissing the petition.

GIBBONS v. UNITED STATES.

(8 Wallace, 269-276. 1868.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—The facts found by the court of claims show that under the original contract between the plaintiff and the United States, the

plaintiff had delivered part of the two hundred thousand bushels of oats which he had agreed to deliver, and had tendered the remainder, and that the quartermaster to whom they were properly tendered had refused to receive them. If the plaintiff suffered any loss by that refusal, he is entitled to recover for it in this action. But the only items of his account which refer to this part of the transaction were allowed to him by the court, except the claim of \$400 damages for failure to accept the oats, and there is no evidence that he lost anything by this refusal. On the contrary, it appears that oats had risen in the market above the contract price, so that the presumption is that he was benefited instead of injured by the refusal of the officer to accept the oats when offered.

But after all this had passed and the time for delivering the oats had expired, the quartermaster in charge of the matter demanded of the plaintiff that he should still furnish the quantity of oats necessary, with what had been received, to complete the two hundred thousand bushels, at the price stipulated in the original agreement. The plaintiff objected to this at first, but finally yielded and delivered the remainder of the oats. Not content, however, with the price fixed by the contract, he now claims that oats had advanced in the market, and were worth, at the time of this latter delivery, eight and three-fourths and twelve cents per bushel more than that price, and for the amount of this difference, with some other matters, he asks judgment.

§ 377. *The obligation of a contract to receive is as strong as that to deliver. A refusal to receive absolves the other party.*

It is very clear that but one contract was ever made in this case, and that the plaintiff was absolved from this by the refusal of the quartermaster to receive the oats when tendered. But from whatever motive he may afterwards have consented to renew that agreement and proceed to its fulfillment, its terms were the same. If such pressure was brought to bear on him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort for which the officer may have been personally liable. If the plaintiff's consent was voluntary, then the contract to which he assented was binding, and must control the case. The quartermaster treated the contract as still in force, and his demand on the plaintiff was made under that idea. In this he was wrong. But the plaintiff had his option to concur in this view and deliver the balance of the oats, or to refuse to deliver any more.

Though the court of claims finds that the plaintiff, when he consented to deliver, had gone to that officer's quarters in company with an orderly, which he considered as an arrest, the court does not find an arrest, nor the use of any force against his person. Nor does the petition of the plaintiff say anything about an arrest, or force, or duress. That he feared the officer might buy the oats in the market, and hold back the difference in price from the money due for oats already delivered, does not invalidate the contract which he consented to fulfill to avoid that result. He could still have refused, and the government would have paid him what it owed him.

The supposition that the government will not pay its debts, or will not do justice, is not to be indulged. Still less can it be made the foundation for a claim of indemnity against loss incurred by an individual by acting on such a suggestion.

§ 378. *The government is not responsible for the unauthorized torts of its officers.*

But it is not to be disguised that this case is an attempt, under the assump-

tion of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story (Story on Agencies, § 319), "it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." *United States v. Kirkpatrick*, 9 Wheat., 720 (Bonds, §§ 419-22); *Dox v. Postmaster-General*, 1 Pet., 318 (Bonds, §§ 769-71); *Conwell v. Voorhees*, 13 Ohio, 523.

§ 379. *The jurisdiction of the court of claims is limited to cases of contracts.*

The creation by act of congress of a court in which the United States may be sued presents a novel feature in our jurisprudence, though the act limits such suits to claims founded on contracts, express or implied, with certain unimportant exceptions. But in the exercise of this unaccustomed jurisdiction the courts are embarrassed by the necessary absence of precedent and settled principles by which the liability of the government may be determined. In a few adjudged cases where the United States was plaintiff, the defendants have been permitted to assert demands of various kinds by way of set-off, and these cases may afford useful guidance where they are in point. The cases of *United States v. Kirkpatrick*, 9 Wheat., 720; and *Dox v. The Postmaster-General*, 1 Pet., 318, are of this class, and establish the principle that even in regard to matters connected with the cause of action relied on by the United States, the government is not responsible for the laches, however gross, of its officers. *Nichols v. United States*, 7 Wall., 122.

The language of the statutes which confer jurisdiction upon the court of claims excludes, by the strongest implication, demands against the government founded on torts. The general principle, which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

In the absence of adjudged cases determining how far the government may be responsible on an implied assumpsit for acts which, though unauthorized, may have been done in its interest, and of which it may have received the benefit, the apparent hardships of many such cases present strong appeals to the courts to indemnify the suffering individual at the expense of the United States.

These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the court of claims, of all wrongs done to individuals by the officers of the general government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the court of claims.

Judgment affirmed.

UNITED STATES v. JUSTICE.

(14 Wallace, 535-550. 1871.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.— Philip S. Justice offered, in 1861, by letter, to furnish to the government certain arms similar in style to a sample arm which Lieutenant Treadwell, a purchasing agent of the government, described as a serviceable arm to his superiors in the ordnance department. Treadwell accepted the offer. The remaining facts are stated in the opinion.

Opinion by MR. JUSTICE DAVIS.

It is impossible to escape the conclusion, after reading the evidence which the court of claims incorporates with its finding of facts in this case, that the arms obtained by the government from Justice were unserviceable and even unsafe for the troops to handle, whether they were equal to the sample arm furnished by him or not. It is true they had been accepted by Lieutenant Treadwell, with whom the contract of purchase was made, after inspection by subordinates appointed by him; but when difficulty arose in relation to them, he said, in justification of his conduct, and to show his interpretation of the contract, that he had instructed these inspecting officers to reject all the arms that, in their opinion, were not good and in all respects fit for use in the field. That the duty with which these officers were charged was, to say the least, negligently performed, is evident from the result of the subsequent inspection which was ordered. This inspection was in response to serious complaints from three regiments of Pennsylvania volunteers which had been armed with the muskets in controversy. The arms of each regiment were inspected by a separate commissioned officer of experience, and all united in condemning them as worthless, and, indeed, dangerous to those using them.

In this state of case, the chief of the ordnance bureau informed the secretary of war that he deemed it his duty to withhold payment of one of the vouchers given for these arms until the matter could be further investigated, and recommended reference of the entire subject to the commission then sitting in Washington, which had been constituted by the proper authority "to audit and adjust all contracts, orders and claims on the war department in respect to ordnance, arms and ammunition." In accordance with this recommendation the case was referred to this commission, which, after full investigation, and a patient hearing given to Justice, reported that he had not fulfilled his obligation to furnish "a serviceable arm" to the government, and fixed a basis on which the account should be settled. This basis of settlement was adopted, and in accordance with it the secretary of the treasury, on the 8th of December, 1862, pursuant to a requisition of the war department, drew his warrant on the treasurer of the United States in favor of Justice for the amount found due by the accounting officers, which was transmitted to him, and receipt of it acknowledged by letter. After waiting until the five years' limitation to actions of this kind had nearly expired, he brings this suit to recover the balance of the claim, according to the original contract price, and the question is, can he maintain it?

§ 880. *Conclusiveness of finding and settlement by commission.*

In the nature of things, during such a war as we have just passed through, contracts would in many instances be made by some of the numerous subordinates intrusted with that duty, in disregard of the rights of the government, or, if properly made, would be so unfaithfully executed that the public

service would suffer unless their further execution were arrested. Although every just government is desirous of making full compensation to its creditors in all cases of fair dealing, it cannot afford to recognize this rule where an imposition has been practiced upon it. Of necessity it acts through agents and cannot, therefore, assure its own protection as natural persons in dealing with each other. What, then, was the proper course for the government to pursue in relation to these disputed claims? To pay them, in the existing condition of the country, would set a bad example and lead to the most ruinous consequences; and to withhold payment altogether until congress or the court of claims should act, would be, in case the claim should prove to be meritorious, a hardship. Common fairness required that some mode should be adopted for the speedy adjustment of these differences between the creditor and the government, and what better mode for the accomplishment of this object than the appointment of a commission of intelligent and disinterested persons to hear the respective parties and to settle the allowance to be made? We know by the history of the times, that several commissions for this purpose were appointed during the war, and the record discloses the fact that when this controversy arose there was one sitting in this city, constituted by the secretary of war under the authority of the president, to audit and adjust claims of like character. It is fair to presume, in the absence of anything in the record to the contrary, that the creation of this commission was a necessity produced by the number and magnitude of the claims presented to the ordnance bureau which the head of it deemed unjust, and was, therefore, unwilling to pay. This commission, like all others with similar authority, possessed no judicial power, nor did it attempt to exercise any. It could not compel a claimant to appear before it and submit to its action, nor would its decision, in case there were no adversary party, have any conclusive effect. If, on the contrary, the party whose claim was disputed went before it, participated in its proceedings, and took the sum found to be due him without protest, he cannot afterwards be heard to say that he did not accept this in full satisfaction of his demand. This voluntary submission and reception of the money is an acceptance on the part of the claimant of the mode tendered him by the government for the settlement of his disputed claim, and precludes him from any further litigation.

It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators, mutually chosen; but from such submission neither party is at liberty to withdraw after the award is made. The condition of the government creditor is better than this, for, if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to take it, with a proper protest. This protest is necessary to inform the government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the court of claims. If with this knowledge and under these circumstances the money is paid, there can be no just cause of complaint on either side, and the status of the parties is not affected by anything which transpired before the commission.

These views dispose of this case. If it be conceded that the guns obtained from Justice were equal to the sample furnished, still it is manifest they were not a serviceable arm, and were besides unsafe, and that the government withheld the payment of the voucher because the contract, in the opinion of the ordnance bureau, was unfaithfully executed. The contract, with the accompanying papers, was referred to the ordnance commission. Justice appeared

before it to contest the position of the government, and, although he offered no evidence, argued his case in writing. And, as if to leave no doubt of his intention to abide the result, he succeeded, two weeks after the commission had reported on the matter to the chief of ordnance, in getting an error against him corrected. And when this was done, and the account stated in conformity with this correction, he receives the amount allowed him without an intimation of dissatisfaction. It is difficult to suppose that at this time he had any other purpose than to acquiesce in the decision which was made. If his purpose were different, why the long delay in instituting suit? It is hard to believe that the course subsequently taken was not the result of an afterthought.

The recent cases in this court of the *United States v. Adams* (§§ 373-76, *supra*), and the *United States v. Child* (§§ 367-69, *supra*), are like this in principle, although they contain some elements not applicable here.

Judgment reversed and the cause remanded to the court of claims, with instructions to dismiss the petition.

BRAWLEY v. UNITED STATES.

(6 Otto, 168-174. 1877.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—Brawley contracted with a United States quartermaster to deliver at a military post eight hundred and eighty cords of wood, "more or less," as might be required for the use of the post. The commanding officer notified him, four days after the contract was signed, that only forty cords would be needed; but, having done a good deal of the work in anticipation, he claimed payment for the whole eight hundred and eighty cords. His petition was dismissed.

§ 381. *The rule of construction of a contract in which there are such words of limitation as "about," "more or less," or the like.*

Opinion by MR. JUSTICE BRADLEY.

From an examination of the authorities, it seems to us that the general rules which must govern this case may be expressed as follows:

Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named, with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity.

But when no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material and governs the contract. The addition of the qualifying words "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations aris-

ing from slight and unimportant excesses or deficiencies in number, measure or weight.

§ 382. *The rule of construction of a contract, when qualifying words are supplemented by other conditions.*

If, however, the qualifying words are supplemented by other stipulations or conditions which give them a broader scope or a more extensive significancy, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. So where a manufacturer contracts to deliver at a certain price all the articles he shall make in his factory for the space of two years, "say a thousand to twelve hundred gallons of naphtha per month," the designation of quantity is qualified not only by the indeterminate word "say," but by the fair discretion or ability of the manufacturer, always provided he acts in good faith. This was the precise decision in *Gwillim v. Daniell*, 2 Crompton, M. & R., 61, where Lord Abinger says: "The agreement is simply this, that the plaintiff undertakes to accept all the naphtha that the defendant may happen to manufacture within the period of two years. The words, 'say from one thousand to twelve hundred gallons [per month],' are not shown to mean that the defendant undertook, at all events, that the quantity manufactured should amount to so much. If by fraud the defendant manufactured less than he ought to have done, the breach should have been shaped accordingly. Here it does not appear that, in the ordinary course of his manufacture, the defendant ought to have produced a larger quantity than he has done; and we cannot, therefore, say that he has broken his contract."

We think that there is manifest reason in this decision, and that the present case is within it. The contract was not for the delivery of any particular lot, or any particular quantity, but to deliver at the post of Fort Pembina eight hundred and eighty cords of wood, "more or less, as shall be determined to be necessary by the post-commander for the regular supply, in accordance with army regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 1, 1871." These are the determinative words of the contract, and the quantity designated, eight hundred and eighty cords, is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post-commander for the regular supply for the year, in accordance with army regulations. The post-commander, as soon as he learned of the contract, and within four days after it was signed, informed the claimant that but forty cords of wood would be required thereon, and forbid his hauling any more to the government yard. About a fortnight later, on the 1st of July, 1871, written notice to the same effect was served on the claimant, signed by the post-commander. And the court of claims finds, as a fact, that the post of Fort Pembina did not need for the fiscal year in question more than the forty cords of wood which were accepted by the defendants, thus precluding any plea that, in fixing and determining the amount required, the post-commander was actuated by any want of good faith.

§ 383. *The effect upon a contract of previous and contemporary facts and transactions.*

Reference is made to the previous negotiations which led to the making of the contract, the bid of the claimant, the fact that the contract was awarded to him on his bid as early as May, and that, on the faith and expectation that the quantity named would be wanted, he had cut the eight hundred and eighty cords of wood before the contract was signed.

All this is irrelevant matter. The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.

Judgment affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY v. UNITED STATES.

(14 Otto, 680-687. 1881.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—The Chicago & Northwestern Railway Company made a contract in 1875 to carry the mails at a price conforming to statutes then in force. This contract was made for the term of four years. In October, 1876, the postmaster-general, acting under the act of July 12, 1876, chapter 179, notified the company that he would reduce their compensation twenty per cent. from the 1st of July, 1876. The railroad company protested against this reduction.

Under an act passed in June, 1878, the postmaster-general reduced the compensation of the company five per cent. more. The company protested, but continued to perform the mail service, until the expiration of its contract, and brought this suit to recover the difference. The court of claims rejected the claim, and the company appealed.

Opinion by MR. JUSTICE MATTHEWS.

The power of congress to direct by law the price at which the mail service here in question should be performed was expressly reserved as a condition of the land grants, which formed, in part, their motive and consideration. But when congress authorized the postmaster-general to fix the price by contract, within specified maximum rates, and for a period of four years, it was an agreement on the part of the United States that the stipulated compensation should not be withheld during that period, which it could not refuse to perform without a breach of the public faith. The contract was an exercise of the reserved power, with an added obligation not to exercise it otherwise for the period agreed on, and we are unable to perceive any ground on which its validity can be denied. The stipulations in the contract on the part of the railroad company transcend its necessary obligations, growing out of the acceptance of the conditions of the land grant, and furnish a sufficient and distinct consideration for the promise of the government not to disturb the rates of the contract during the period of its existence; for there are several stipulations collateral to the service to be rendered, which the government

could not have exacted as due by previous obligation, and irrespective of the assent of the company.

The power to establish the price includes the power also to declare the period of its duration; and if it be said that any contract which fixes both the price and its duration must be construed as subject to the continuous control of the power which made it, it must also be admitted that no change can be made without the abrogation of the contract. The government, whatever power it may reserve over its own agreements, cannot impose new contracts upon those with whom it deals. It might, by a repeal of the contract expressly stipulated, restore the previous state, and claim the bare rights it had before; but it cannot do more than that. It certainly cannot retain the obligation of the contract as against the company, and at the same time vary its own, unless it has reserved the right to do so in the contract itself.

Some claim of this kind is put forward in the present case, and the ninth clause in the contract is referred to as containing such a reservation. Clearly this confers power upon the postmaster-general to discontinue or curtail the service, in whole or in part, he allowing, as an indemnity to the contractor, a month's extra pay on the amount of service dispensed with, and a *pro rata* compensation for that retained and continued. But this is not a power to reduce the compensation for the full service performed, or to alter the terms of the contract. It is true that under this reservation the postmaster-general would be authorized to discontinue the entire service contemplated by the contract, and the practical effect of that would be to terminate the contract itself, on making the indemnity specified. But in that event, the contract being at an end, the company would no longer be under any obligation except that imposed by the original conditions accepted with the land grants, and the government could rightfully impose upon it no others. There is, therefore, in the contract itself, no power reserved to alter the amount of compensation, except by a reduction of the required service. If the government insists upon full performance of that, it can be only upon the terms fixed by the contract.

It is argued, however, on the part of the government, that the legal effect of what was done was to abrogate the old contracts and make new ones. It is claimed that the passage of the acts of congress of July 12, 1876, chapter 179, and of June 17, 1878, chapter 259, and the notices from the postoffice department that the reductions assumed to be contemplated by them would be insisted on; the fact that they were made in the adjustment of accounts, and that the railroad company, notwithstanding its protest, continued to perform the service,—had the effect to supersede the contracts of 1875 and substitute new ones in their stead on the basis of the reduced compensation. Such, in substance, was the view taken by the court of claims.

§ 384. *Where a contract for mail service is made for a term of years at a price in conformity with the then existing laws, congress cannot by subsequent legislation modify the contract or reduce the compensation.*

In our opinion, that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid, and binding on the United States as well as upon the railroad company. They contained within themselves a mode for lessening, or, if deemed best, for discontinuing entirely, the described service, and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any

change attempted by either, otherwise, would have been merely a breach of the agreement, and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the courts of claims. In this respect, the relation between the parties was that of perfect equality in right.

If, in these circumstances, the government not merely accepted, but demanded, the performance of the contract service, the presumption is that it meant to pay the contract price. It would require positive and express words to negative that presumption. We find none such in the statutes of 1876 and 1878. Their language may be well satisfied by confining them to cases where no time contracts for service were then in existence, and to contracts thereafter to be entered into. They do not legitimately apply to contracts then existing, whose terms had not expired, such as those in the present case.

Such was the opinion of Mr. Attorney-General Taft, to whom the postmaster-general submitted one of the contracts on which this suit is founded, for his opinion, whether it was affected by the act of 1876. He replied in the negative, saying:

"In my opinion, congress did not intend it to have this effect. The contracts, of which that with the Chicago & Northwestern Railway, submitted by you for inspection, is a sample, were authorized by the law in force at the dates of their execution. They bound both parties. A breach of them by either would subject the delinquent to a claim for damages. The act of July 12, 1876, was apparently passed with a view to reduce the public expenses. But it would not have this effect if an equivalent to the reduction of pay were recoverable under the name of damages, with, perhaps, the expenses of litigation added. Therefore I conclude that the construction most consistent with justice and fair dealing is the true one, viz., that, as to existing contracts, the rate remains as stipulated in the agreement during the term therein mentioned, but that in those cases where no contract prevailed the reduction should be made." 15 Op. Att'y Gen'l, 182.

Of course, if it was not the intention of the acts of congress referred to, to affect the contracts of the company, the erroneous interpretation of them by the postmaster-general, and his action under it, cannot give to them any different effect, for the rights of the parties depend on the law itself. And the performance by the company of the service required by its contract, notwithstanding the notice of the intended reduction of the compensation by the postmaster-general, cannot be construed as a waiver of its rights or an acquiescence in new proposals; and that whether it had protested against the erroneous construction of the law or not. For it had no option. It was bound by its contract to perform the service, and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it had the right to do so, without prejudice to its lawful claims, leaving the ultimate right to future and final decision. It was not the case of a voluntary payment of an illegal exaction, where the maxim, *consensus tollit errorem*, prevents a recovery; because in such case there is the legal presumption of an abandonment of the claim. *Volenti non fit injuria*. But here the service was to be performed, at all events, just as it was performed, but under which of two claims was in dispute. Its performance was a condition of both, and cannot, therefore, be a bar to either.

We are of opinion, for these reasons, that the court of claims should have rendered judgment in favor of the appellant for its whole claim.

Judgment reversed, and cause remanded with instructions to render a judgment in conformity with this opinion.

HAWKINS v. UNITED STATES.

(6 Otto, 689-698. 1877.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Verbal agreements between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to vary its terms or to affect its construction, the rule being that all such verbal agreements are to be considered as merged in the written instrument. But oral agreements subsequently made, on a new and valuable consideration, and before the breach of the contract, in cases not falling within the statute of frauds, stand upon a different footing; as such agreements may, if not within the statute of frauds, have the effect to enlarge the time of performance, or may vary any other of its terms, or may waive and discharge it altogether. *Emerson v. Slater*, 22 How., 28; *Goss v. Nugent*, 5 Barn. & Ad., 58; *Nelson v. Boynton*, 3 Met. (Mass.), 396; *Harvey v. Graham*, 5 Ad. & E., 61; *Leonard v. Vredenburg*, 8 Johns. (N. Y.), 28; *Chitty, Contr.* (10th ed.), 105.

Authority was conferred upon the secretary of the treasury by the act of the 10th of June, 1872; and he was therein directed, to cause to be erected a suitable building at Raleigh, North Carolina, for the use and accommodation of the courts of the United States, postoffice, and other offices of the government, with fire-proof vaults extending to each story of the building. 17 Stat., 390.

Pursuant to that authority, the contract in question was made by the superintendent, appointed for the purpose, with the plaintiff, to furnish and deliver, on the site for the building, one thousand cubic yards, more or less, of rubble-stone, on his bid for the same; it being covenanted and agreed between the parties that the "contract shall be valid and binding when approved by the secretary of the treasury, and not otherwise, and that no departure from its conditions shall be made without his written consent."

By the terms of the contract, the rubble-stone was to be in every way equal to the sample furnished with his bid: one-quarter to be bond-stones, of a length equal to the thickness of the walls, and to contain not less than ten cubic feet; and no stone to contain less than one and one-half cubic feet, or to be less than twelve inches thick; to be delivered at such times and in such quantities as may be deemed necessary by the superintendent. Monthly payments were to be made, as the work progressed, for ninety per cent. of the stone delivered, at \$5 per cubic yard; it being stipulated that ten per cent. should be retained until the completion of the contract and the approval and acceptance of the same by the superintendent.

Leave to amend having been granted, the petitioner enlarged his charge for work done, and claimed that there was a balance due to him of \$8,962.50, after deducting cash paid, and the rubble-stone quarried and rejected before it was shipped. Hearing was had and the court rendered judgment for the plaintiff in the sum of \$1,566.50, as appears by the transcript. Immediate ap-

peal was taken to this court by the plaintiff; and he assigned the errors following: 1. That the court below erred in the measure of damages which they adopted in the case. 2. That the court erred in not holding that the claimant is entitled to recover the fair value of the material delivered and accepted, without regard to the price prescribed by the contract. 3. That the court should have computed the stone furnished as nine hundred and fifty-eight and three-fourths cubic yards, at \$12.50 per yard, as the value of the stone delivered.

Congress directed the secretary of the treasury to cause the building to be erected, and appropriated \$100,000 to accomplish the object, the same act providing that the money appropriated should be expended under the direction of the secretary, and that he should cause proper plans and estimates to be made, so that the whole expenditure for the construction and completion of the building should not exceed the amount of the appropriation. Neither limitations nor precautions are always effectual in such cases, and congress, at the next session, found it necessary to make another appropriation of the same amount for the same object; but the provision that the secretary of the treasury should cause the building to be erected, and that the money appropriated should be expended under his direction, was never repealed or modified. 17 Stat., 524; 18 id., 228.

§ 885. *Individuals must take notice of the powers of government officials.*

Such being the state of congressional legislation, it necessarily follows that the contractor as well as the superintendent knew that the appropriations were to be expended by the secretary, and that no one else was authorized to direct as to the character and construction of the building. Individuals as well as courts must take notice of the extent of the authority conferred by law upon a person acting in an official capacity; and the rule applies, in such a case, that ignorance of the law furnishes no excuse for any mistake or wrongful act. *State, ex rel. etc. v. Hayes*, 52 Mo., 578; *Delafield v. The State of Illinois*, 26 Wend. (N. Y.), 91; *The People v. The Phoenix Bank*, 24 id., 430; *The Mayor and City Council of Baltimore v. Reynolds*, 20 Md., 1; *Whiteside v. United States*, 93 U. S., 247.

§ 886. *Distinctions between public and private agents.*

Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals in the latter category are in many cases bound by the acts and declarations of their agents, even where the act or declaration was done or made without any authority, if it appear that the act was done or the declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act or make the declaration for or on behalf of the public authorities. *Story, Agency*, 307a; *Lee v. Munroe*, 7 Cranch, 366.

Fifty cubic yards of rubble-stone were quarried, shipped and delivered by the contractor soon after the contract was executed, which was rejected by the assistant superintendent of the work, and he refused to receive any of the same description. By the finding of the court, it appears that the rubble-stone rejected was such as came within the description and standard of the small-sized stone required by the contract, and that the assistant superintendent informed the claimant of the kind which must be furnished to make such

a wall as he wanted; which was, in fact, what is called ranged-rubble or broken-ashlar stone, more expensive in kind than that described by the contract, and which would make a wall superior in appearance to that contemplated by the specifications. Two hundred and thirty cubic yards of rubble-stone had then been quarried by the claimant, and were ready for transportation and delivery. Wheeler, Civil Engineering, 209.

Throughout, the claimant maintained that he thought that the stone he had delivered was up to the contract: but he expressed the desire to furnish such material as would give perfect satisfaction to the government and their agents; and he quarried, transported and delivered, within the period mentioned in the finding, nine hundred and fifty-eight and three-fourths cubic yards of ranged-rubble or broken-ashlar stone, different from that described in the contract, and worth \$12.50 per cubic yard when delivered. These stones so furnished were cut, trimmed, and squared by the workmen, so as to fit the same for such a wall as the assistant superintendent desired to make, it appearing that one-fourth part of the measurement of the stone was lost by such fitting. Apart from that, the findings of the court also show that the market-value of the fifty cubic yards of the rubble-stone rejected, and of the two hundred and thirty cubic yards quarried and not shipped, was \$456.80, which is nearly \$350 less than the cost of quarrying the said quantity not shipped. Tested by these considerations, it is clear that the measure of damages adopted by the court of claims is correct.

Three items were allowed to claimant, as follows: 1. For nine hundred and fifty-eight and three-fourths cubic yards of stone delivered at the contract price of five dollars per yard, less the amounts paid to him in the settlement of his account. 2. Forty-five cubic yards of rubble-stone delivered, and rejected by the assistant superintendent, at the contract price, less the market value of the same. 3. For two hundred and thirty cubic yards of stone quarried, and refused by the assistant superintendent, at the cost of quarrying, less the market value.

Sufficient appears to show that the contract was never rescinded by either party, and that the claimant never signified any intention to abandon it. All that is proved in that regard is that he maintained that the first parcel of stone delivered was up to the contract; and that he protested, in presence of the inspector and superintendents, that he was required to furnish stone superior to that described in the contract, and that he announced to them his intention to make claim for extra allowance. Four payments were made to the claimant, amounting in all to \$3,825; and it appears that the vouchers were generally made out upon estimates in advance of the work actually done at the time, copies of which, with the certificate of the superintendent and the receipts of the claimant, are exhibited in the record.

§ 387. *Where a contractor knows that a government agent has no power to alter his contract he departs from it at his own peril.*

Evidence of the most persuasive and convincing character to show that the whole quantity of the stone for which compensation is claimed was delivered under the contract is exhibited in the record; and it is equally certain that the claimant knew that the agents in charge of the work had no authority whatever to enlarge or diminish, vary or alter, any of its terms, stipulations or conditions, as the contract itself provided that no departure from its condition shall be made without "the written consent of the secretary of the treasury." Confirmation of that view is also derived from the act of congress which con-

ferred the authority to make the contract; the language of the act being that the money appropriated shall be "expended under the direction of the secretary of the treasury, and that he shall cause proper plans and estimates to be made so that the whole expenditure for the erection and completion of the building shall not exceed the sum appropriated for that purpose." 17 Stat., 390.

Aid in the construction of the contract may be derived from the advertisement under which the bids were received, as the advertisement is expressly referred to in the written contract. Bids were invited by the advertisement for one thousand cubic yards, more or less, of rubble-stone . . . which is flat on the bed, sound, durable, and which breaks with a clean, square fracture; one-quarter to be bond-stones of a length equal to the thickness of the walls, and to contain not less than ten cubic feet. No stone containing less than one and one-half cubic feet or less than twelve inches in thickness will be received. Wheeler, Civil Engineering, 140.

Nothing can be plainer than the proposition that the contract was framed in conformity with the advertisement and the act of congress, which provided in effect that the erection and completion of the building should be under the direction of the secretary of the treasury. Both parties concur in the construction of the written contract; but the claimant undertakes to set up a subsequent implied contract between himself and the assistant superintendent.

Beyond doubt it is true that subsequent oral agreements between the parties to a written contract, not falling within the statute of frauds, if founded on a new and valuable consideration, may, when made before the breach of the written contract, have the effect to enlarge the time of performance specified in the written instrument, or may vary any other of its terms, or may waive and discharge it altogether. *Emerson v. Slater*, 22 How., 28 (CONTRACTS, §§ 1785-90); *Goss v. Nugent*, 5 Barn. & Ad., 58; *Leonard v. Vredenburg*, 8 Johns. (N. Y.), 28.

Concede that proposition in its fullest extent and yet it cannot benefit the claimant, as the findings of the court furnish no ground whatever to show that any subsequent oral agreement was ever made between the contracting parties to vary, enlarge, or diminish any of the terms of the written contract; nor is anything of the kind pretended by the appellant. What he alleges is, that he was required by the assistant superintendent to furnish better stone than that specified in the written agreement. Proof of that allegation is exhibited; but there is not a particle of proof that the assistant superintendent ever promised that the United States should pay for the stone delivered any greater sum than \$5 per cubic yard; and, if he had so promised, it could not benefit the claimant; as the contract under which he rendered the service, and under which the four payments to him were made, contained the express stipulation that no departure from the conditions of the contract should be made without the written consent of the secretary of the treasury.

Four times his accounts for rubble-stone delivered were adjusted during the progress of the work, in accordance with the terms of the written contract, as follows: 1. For three hundred cubic yards of rubble-stone at \$5 per cubic yard. 2. For two hundred cubic yards of rubble-stone, at \$5 per cubic yard, and the account refers to the written contract as the basis of the charge. 3. For one hundred and fifty cubic yards of rubble-stone at \$5 per cubic yard, less ten per cent. retained, and again refers to the written agreement as the source of explanation. 4. For two hundred cubic yards of rubble-stone at \$5

per cubic yard, less ten per cent. reserved, with a similar reference to the written agreement for the necessary explanation.

Appended to each is the customary certificate of the superintendent, and the receipt of the claimant for the amount of the charge, stating that it is received "in full payment of the above account." Proofs more persuasive and convincing that the work was done and that the payments were made under the written agreement can hardly be imagined; and they are certainly sufficient to show that the court below committed no error, either in the findings of fact or in their conclusions of law.

Ranged-rubble or broken-ashlar stones are usually of a larger size than ordinary rubble-stones; and the former when trimmed are suitable to make a wall of coursed masonry, as if constructed of squared stone of different sizes, resembling somewhat a wall constructed of dimension-stones. Loss to a considerable extent is sustained by the cutting and trimming, so that the stone measures less in the wall than when first quarried. Such a wall is more expensive than one made of mere rubble-stone, on account of the increased cost of the stone, and the additional labor in cutting and fitting the same before it is laid in the wall.

Rubble-stones flat on the bed, with certain other conditions, were specified in the advertisement; but the assistant superintendent desired to construct a wall which required a ranged-rubble stone. Mutual consent is required to modify a contract; and of course the directions of the assistant superintendent were not obligatory, for two reasons: 1. Because in contemplation of law he was not a party to the contract; 2. Because he had no authority to act in behalf of the United States.

§ 388. *A contractor who furnishes better and more costly material than his contract requires, without notifying the proper authorities of his claim for extra pay, cannot afterwards demand it.*

Viewed in that light, it is clear that the claimant might have declined to follow the directions given, or, if not allowed to complete his contract, might have maintained an action for damages. When the directions were given, he might have refused to comply and given notice to the United States; and, if he had done so, the proper authority would have had an opportunity to determine whether the directions given should be overruled, or whether the wall should be constructed as proposed by the assistant superintendent. Nothing of the kind was done, and the opportunity was lost to the United States to exercise any option in the matter. Instead of that, the claimant readily submitted to the directions given by the unauthorized agent, without giving any notice to the proper authority of the United States that he should claim any greater compensation. Subsequent complaints were made by him, in the presence of the superintendents, that he was required to furnish a superior stone to that required by the contract; and at one time he announced his intention to make claim for extra allowance, which is in fact what the claimant now demands.

Two facts are the chief reliance of the claimant, to wit: 1. That the stone delivered is better than that which the claimant contracted to furnish; 2. That the United States accepted the material, and is now in the full enjoyment of the same. Based on these facts, the proposition of the claimant is that he is entitled to recover the actual value of the materials, without reference to the contract price; which cannot for a moment be admitted, as the findings show that the written contract was in full force and operation, no attempt having

been made by either party to vary or rescind it; and that the claimant acted under it in furnishing and delivering the stone; and that the public authorities, also, in adjusting his accounts and in making the payments referred to, conformed in all respects to its terms, stipulations and conditions.

Unquestioned authority was given to the secretary of the treasury to make the contract; and he in contemplation of law made it when he approved the instrument signed by the claimant and the superintendent. Even the claimant does not pretend that any other contract was ever approved by the secretary, nor does he pretend that the assistant superintendent ever promised to pay any greater sum than the original contract price. All the claimant ever suggested was that he intended to make claim for extra allowance, for which there is no pretense of any express contract; nor can such a claim be supported, under the circumstances of this case, upon any implied promise, the record showing that the express contract was in full force and operation. *Ladd v. Franklin*, 37 Conn., 62.

Express stipulations cannot in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence the rule is, that, if there be an express written contract between the parties, the plaintiff in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit*. 1 Story, Contr. (5th ed.), sec. 18; *Selway v. Fogg*, 5 Mees. & W., 83; *Creighton v. City of Toledo*, 18 Ohio St., 447; *Weston v. Davis*, 24 Me., 374; *Whiting v. Sullivan*, 7 Mass., 107; *Merrill v. The Ithaca & Owego Railroad Co.*, 16 Wend., 586; *Glacius et al. v. Black*, 50 N. Y., 145.

When a special contract for work and services has been abandoned and put an end to, if the employer has derived some benefit from work done under it, he may be made liable upon an implied promise to make reasonable remuneration in respect to such work. *Burns v. Miller*, 4 Taunt., 745; *Inchbald v. Plantation Company*, 17 C. B., N. S., 733; *Bartholomew v. Markwick*, 15 C. B., N. S., 711; *Addison*, Contr. (6th ed.), 23.

Implied promises or promises in law exist only when there is no express promise between the parties — *expressum facit cessare tacitum*. Hence, says Chitty, a party cannot be bound by an implied promise, when he has made an express contract as to the same subject-matter; which is certainly sound law, unless the express contract has been rescinded or abandoned. Chitty, Contr. (10th ed.), 62; *Toussaint v. Martinnant*, 2 T. R., 100; *Cutter v. Powell*, 6 id., 320; *Ferguson v. Carrington*, 9 B. & C., 59; *Atherton v. Dennett*, Law Rep., 7 Q. B., 327.

Apply these principles to the case before the court, and it is clear that none of the errors assigned can be sustained; the rule being that, where the service is performed under an express contract, there can be no recovery where there is no proof of a breach of the agreement. Where there is a breach of the agreement, an action will lie for the breach; but, if there be no breach, no action will lie, as an implied assumpsit does not arise in such a case, unless it be shown that the parties have abandoned the express agreement, or have rescinded or modified it so as to give rise to such an implication. *The Mayor and City Council of Baltimore v. Eschbach*, 18 Md., 276.

§ 389. *The court of claims has no power to grant contractors extra allowances.*

Jurisdiction is not conferred upon the court of claims to allow mere extra allowances in a case where there is no promise to that effect, either express or implied. Power to hear and determine claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, and all claims which may be referred to it by either house of congress, is vested in the court of claims. Mere applications for extra allowance, unsupported by any contract, express or implied, must be made to congress, where alone they can properly be entertained. Rev. Stat., sec. 1059.

Judgment affirmed.

UNITED STATES v. SPEED.

(8 Wallace, 77-85. 1868.)

APPEAL from the Court of Claims.

STATEMENT OF FACTS.—Speed made a contract with the commissary department of the army, through Maj. Simonds, to slaughter hogs and pack pork for army use, and made preparations to handle fifty thousand head of hogs. By the terms of the agreement the government was to furnish him the hogs, no definite number being named, but he was only supplied with some sixteen thousand hogs, Maj. Simonds refusing to deliver any more. The contract was not made in the usual way, by sealed proposals, etc., nor was it formally approved by the commissary-general, but indirectly ratified by him. Speed's claim was for losses incurred by keeping up a force sufficient to handle the number of hogs he had, as he contended, a right to expect. Judgment for claimant, and the United States appealed.

Opinion by MR. JUSTICE MILLER.

The counsel for the appellant urges eight separate objections to this judgment, which we must notice in the order they are presented.

§ 390. *The war department has a right to make a contract for the preparation of pork for the army.*

1. Pork-packing and curing bacon is not a business within the scope of the powers of the secretary of war, or his subordinates.

If by this is meant that the war department has no authority to enter into the business of converting hogs into pork, lard, and bacon, for purposes of profit or sale as individuals do, the proposition may be conceded. But, if it is intended to deny to the department this mode of procuring supplies when it may be the only sufficient source of supply for the army, the proposition is not sound. The commissary department is in the habit, and always has been, of buying beef cattle and having them slaughtered and delivered to the forces. Is there no power to pay the butchers who kill for their services? That is just what the claimants contracted to do with the hogs which the government had purchased of other parties, and it is for this butchering and curing the meat that the government agreed to pay. The proposition places a construction altogether too narrow on the powers confided to the war department in procuring subsistence, which in time of war, as this was, must lead to great embarrassment in the movement and support of troops in the field.

§ 391. *The government is bound by a contract, although no provision is made in it for its termination at the pleasure of the commissary-general.*

2. The contract is not binding, because it contains no provision for terminating it at the discretion of the commissary-general.

This objection is based on rule 1179 of the army regulations of 1863. But that has reference to contracts for the regular and continuous supply of subsistence stores, and not to contracts for services or labor; and it is required because the post or force to be supplied may be suddenly removed or greatly diminished. It has no application to a contract for a certain amount of supplies, neither more nor less, or to do a specific job of work requiring skilled labor. While the commissary might have insisted on a provision in this contract that he should only be required to pay for packing as many hogs as he chose to furnish, for which he might in that event have been charged a higher price, he did not do so, and cannot have the benefit of it as though he had.

3. This answers also the third point, namely: that the agreement is to be treated as though that provision were in it.

§ 392. *A contract for supplies is binding although there be no advertisement for proposals.*

4. That it is not binding on the United States, because there was no advertisement for proposals to contract. This objection is founded on the act of March 2, 1861. 12 Stat. at Large, 220.

But that statute, while requiring such advertisement as the general rule, invests the officer charged with the duty of procuring supplies or services with a discretion to dispense with advertising, if the exigencies of the public service require immediate delivery or performance. It is too well settled to admit of dispute at this day, that where there is a discretion of this kind conferred on an officer, or board of officers, and a contract is made in which they have exercised that discretion, the validity of the contract cannot be made to depend on the degree of wisdom or skill which may have accompanied its exercise. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet., 448; *Martin v. Mott*, 12 Wheat., 19; *Royal British Bank v. Turquand*, 6 Ell. & B., 327; *MacLae v. Sutherland*, 25 Eng. L. & Eq., 114; *Ross v. Reed*, 1 Wheat., 482.

§ 393. *The commissary-general may approve a contract informally by a letter to the officer that made it.*

5. The contract was not approved by the commissary-general. The agreement contains a provision that it is subject to the approval of that officer. The court of claims finds that, while no copy of the agreement was presented to the commissary-general for formal approval, Major Simonds wrote him a letter informing him substantially of its terms, to which he replied, expressing his satisfaction at the progress made; and the court further finds as a conclusion of law that the letter of the commissary-general was a virtual approval of the contract. We are of opinion that, taking all this together, it is a finding by the court as a question of fact that the contract was approved by that officer; and inasmuch as neither the instrument itself nor any rule of law prescribes the mode in which this approval shall be evidenced, that a jury would have been justified in finding as the court did.

6. That by the terms of the contract the United States were not bound to furnish any given number of hogs. Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs requires an

expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant. But the last article of the agreement seems to be an express promise to furnish all the hogs mentioned in the contract.

7. That plaintiffs have not proved that they were ready and willing to perform. But the court of claims find this readiness, for they say that "claimants incurred large expenditures in preparation for fulfilling their contract, and during the whole season kept the full complement of hands necessary to have slaughtered the whole fifty thousand within the customary season."

§ 394. *The rule of damages.*

8. The rule for the measure of damages is not the correct rule as applied to the facts. What would be the true rule is not pointed out. And we do not believe that any safer rule, or one nearer to that supported by the general current authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract.

The leading case on this subject in this country is *Masterton v. Brooklyn*, 7 Hill, 62, and that fully supports the proposition of the court of claims.

TOTTEN v. UNITED STATES.

(2 Otto, 105-107. 1875.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE FIELD.

STATEMENT OF FACTS.—This case comes before us on appeal from the court of claims. The action was brought to recover compensation for services alleged to have been rendered by the claimant's intestate, William A. Lloyd, under a contract with President Lincoln, made in July, 1861, by which he was to proceed south and ascertain the number of troops stationed at different points in the insurrectionary states, procure plans of forts and fortifications, and gain such other information as might be beneficial to the government of the United States, and report the facts to the president, for which services he was to be paid \$200 a month.

The court of claims finds that Lloyd proceeded, under the contract, within the rebel lines, and remained there during the entire period of the war, collecting, and from time to time transmitting, information to the president; and that, upon the close of the war, he was only reimbursed his expenses. But the court, being equally divided in opinion as to the authority of the president to bind the United States by the contract in question, decided, for the purposes of an appeal, against the claim, and dismissed the petition.

§ 395. *No action lies on a contract with the government for secret services.*

We have no difficulty as to the authority of the president in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources and movements of the enemy, and contracts to compensate such agents are so far binding upon the government as to render it lawful for the president to direct payment of

the amount stipulated out of the contingent fund under his control. Our objection is not to the contract, but to the action upon it in the court of claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the court of claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery.

§ 396. *As a general rule an action will not lie where it will involve a disclosure of confidential communications.*

It may be stated as a general principle that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.

Judgment affirmed.

§ 397. *In general.*—The United States, when they contract with their citizens, are controlled by the same laws that govern citizens in that behalf, and all obligations which would be implied against citizens under the same circumstances will be implied against them. *United States v. Bostwick*, 4 Otto, 58.

§ 398. The United States, being a body politic and corporate, has within its constitutional limitations all the powers, faculties and properties of a government, and the right to use them freely to accomplish the objects of its creation, and among them the power to make contracts. *United States v. Maurice*, 2 Marsh., 96.

§ 399. The United States is a corporation capable of contracting. A bond payable to "The United States of America" is a valid bond at common law. *Dixon v. United States*, 1 Marsh., 177.

§ 400. There is a radical distinction between the acts of the government as a contracting party and as a sovereign. In becoming a contracting party it lays aside its sovereignty and becomes liable as an individual. But for its acts as a sovereign it can never be liable in dam-

ages to the person injured. And where its acts as a sovereign amount to a breach of its undertaking as a contracting party, the contractor so injured is without remedy. Thus, claimant had a contract with the government to deliver mules in Washington by a day certain. In time to perform the contract his servant approached the city with a part of the mules, but was turned back by the pickets acting under the orders of the military governor and provost-marshal, and not allowed to enter the city with his mules. In consequence, some of the mules were captured by the rebels. The government insisted upon claimant's delivery of the full quota of mules under the contract, with allowance for those that were so lost. He did so, and brought this action for breach of contract. *Held*, that he was not entitled to recover. *Wilson v. United States*,* 11 Ct. Cl., 518.

§ 401. The liability of the government on a contract express or implied is neither greater nor less than that of an individual. The government is to be regarded as a principal and its officers as agents. Where the government, by statute, authorized a contract for a branch mint for a certain sum, it could not be bound for "extras" by arrangement between the contractor and its officers. *Curtis v. United States*,* 2 Ct. Cl., 144.

§ 402. In the construction of contracts with the government the court of claims is limited to the application of those legal principles applicable in cases of contracts with individuals. *Smoot's Case*,* 15 Wall., 86.

§ 403. Advertising.—Where the secretary of war, without previously advertising for proposals, entered into a contract with a party for rifling one-half the guns or cannon of the United States then in its forts and arsenals, which would require several years for its completion, that contract was void and of no effect, being in contravention of section 3 of the act of June, 1860, re-enacted in section 10, act of March, 1861 (12 U. S. Stats. at Large, 220), which requires advertisements in all cases of contracts for services in any department when public exigencies do not require the immediate performance of the service. *James' Contract*,* 10 Op. Att'y Gen'l, 28.

§ 404. During a military emergency the commanding general orders his chief quartermaster to obtain two thousand tons of hay; "should there not be sufficient time to advertise and regularly let the contract," he was to purchase in open market. *Held*, that a contract made in pursuance of such order was valid under the act of July 4, 1864, notwithstanding the commanding officer does not in terms declare the emergency or direct his quartermaster to procure the hay "in the most expeditious manner without advertisement." *McKee v. United States*,* 12 Ct. Cl., 504.

§ 405. The accounting officers of the treasury, having, under a mistake of law, certified a balance as due to a claimant under a contract that is void, and the same having been paid, and the claimant bringing a suit against the government under the same contract, the government is entitled to set up a counterclaim and recover the money so paid. *Ibid*.

§ 406. The colonel or senior officer of the ordnance department, under the act of February, 1815, may make contracts for the supply of ordnance, without previously advertising proposals therefor, as required by the act of March, 1809. *Contracts for Supply of Ordnance*,* 3 Op. Att'y Gen'l, 293.

§ 407. Where a public advertisement is required previous to the making of a government contract, it seems that a contract entered into without that formality, while still executory, may be avoided by the government. *Unadvertised Contracts of the Departments*,* 6 Op. Att'y Gen'l, 406.

§ 408. An advertisement of the secretary of the treasury for a new form of locks to be used on cars in the revenue service is a sufficient compliance with the provisions of the act of March 2, 1861, to authorize a contract by a succeeding secretary for locks to be used on the cars and bonded warehouses. *International Co. v. United States*,* 13 Ct. Cl., 209.

§ 409. The public exigency which under the act of March 2, 1861, authorizes an open purchase without previous advertisement, must be a present and not a prospective state of things. Such a contract for the future supply of the army is void. Under the act of June 2, 1862, it is further essential to the validity of a contract made under such exigency without advertising that the exigency be found and the purchase ordered by the commanding general. *McKinney v. United States*,* 4 Ct. Cl., 537; *O'Neil v. United States*,* 4 Ct. Cl., 542.

§ 410. The act of March 2, 1861, authorizing contracts and purchase by a quartermaster, without advertising, when immediate delivery is required by "public exigency," should be liberally construed so as to sustain the validity of contracts so made when there is no fraud. *Child v. United States*,* 4 Ct. Cl., 176.

§ 411. A parol contract to furnish supplies to the army, between an assistant quartermaster and claimant, without advertisement, and without any declaration of public exigency by the commanding officer, and not reduced to writing, is void. Claimant, delivering supplies under a contract that is void, as such, is entitled to recover a *quantum meruit* only for so much of the supplies as the government receives and uses. *Adams v. United States*,* 7 Ct. Cl., 437.

§ 412. Contracts for military supplies in a military emergency during the civil war are controlled by the act of July 4, 1864. Under that statute valid contracts, when such emergency had been declared by the commanding officer, might be made without advertisement and by parol. *Cobb v. United States*,* 7 Ct. Cl., 470.

§ 413. The obligation is not upon a vendor, selling supplies to the quartermaster department in open market without previous advertisement, to ascertain whether the commanding general has declared the existence of a military exigency. He is entitled to presume that the officer with whom he deals is authorized to make the purchases. *Thompson v. United States*,* 9 Ct. Cl., 187.

§ 414. Where congress authorizes a contract for public work, to be executed according to a specified plan, under the direction of the secretary of the interior, and the secretary contracts for that work, without advertising, under circumstances constituting a public exigency, the fact that the contract price exceeds the appropriation made by congress for the work will not render the contract invalid. *Fowler v. United States*,* 8 Ct. Cl., 43.

§ 415. During a military emergency Gen. Thomas ordered his chief quartermaster to procure forage in the most expeditious manner possible. This he proceeded to do by a contract, without previous advertisement, entered into by one of his subordinates with the claimant, for five hundred thousand bushels of corn, to be delivered at the rate of from one hundred and fifty thousand to two hundred thousand bushels per month. Before the entire amount was delivered the war ended and the government declined to receive the balance. *Held*, that under the act of July 4, 1864, the contract was valid; that the order of the commanding officer, exercising the power of declaring an emergency, and conferring the consequent discretion on the quartermaster department, has the force of law; that the power thus communicated to the chief quartermaster to make contracts without advertisement is carried down through the head of the department to all his subalterns authorized by law to make contracts or purchases for supplying the army; that the measure of damages for the breach of such contract is the difference between the contract price and the market price of the undelivered corn at the appointed time of delivery. *Cobb v. United States*,* 9 Ct. Cl., 291.

§ 416. A verbal contract by a quartermaster for the purchase of sand, made without advertisement, at a period when no public exigency existed, is void, and property taken by the military authorities under it during a time of war within the lines of the army, comes within the terms of the act of July 4, 1864, excluding from the jurisdiction of the court of claims, claims growing out of appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion. *Lindsley v. United States*,* 4 Ct. Cl., 359.

§ 417. Under the act of July 4, 1864, the power to declare an "emergency" or public "exigency" requiring the immediate procurement of supplies for the necessary movement or operations of the army or detachment, without advertisement for bids, resides only in the commanding officer of such army or detachment. A contract made without advertisement, under the orders of the department quartermaster, will be held invalid. *Henderson v. United States*,* 4 Ct. Cl., 75.

§ 418. Where a purchase is made by a navy agent, under a requisition marked "open purchase" and "immediate use," after inquiry among persons dealing in similar articles, with a person who does not manufacture or deal in the article, but whose bid is the lowest attainable under the circumstances, the agent being ignorant of the manufacturer's price, such a contract, there being no evidence of fraud or collusion, will not be declared invalid simply because the price agreed upon was considerably in advance of the manufacturer's or market price. When a contract has been fairly entered into by the United States by their officers and agents lawfully competent thereto, an executive department cannot arbitrarily abrogate or change such contract to the prejudice of the party interested. *Wentworth v. United States*,* 5 Ct. Cl., 802.

§ 419. Whether such an emergency exists as will dispense with the necessity for advertising is a question which is left to the discretion of the commanding officer of the army, or of the detachment for which the services or supplies are required. His orders in that respect are conclusive. *Ibid*.

§ 420. During a public exigency a commanding general may order his quartermaster to make contracts for work, supplies, materials or transportation, without advertising; and such contracts will be valid. *Baker v. United States*,* 3 Ct. Cl., 343; *Caleb v. United States*,* 3 Ct. Cl., 351.

§ 421. Under the act of March 2, 1861, a purchase of army supplies during a "public exigency" will be valid without advertising. *Brady v. United States*,* 3 Ct. Cl., 203.

§ 422. The medical director of an army in the field, under the instructions of his commanding general, made a contract with the claimant for the delivery of ice for the use of the sick and wounded. The claimant delivered the ice. The surgeon-general had already contracted for the supply of this army with ice, but for some reason the supply was not furnished. This

circumstance, together with the fact that there were three thousand wounded in the hospitals, created a "public exigency," "requiring the immediate delivery of the article," within the meaning of the regulations. *Held*, that the contract of the medical director was valid, and that the claimant was entitled to recover. *Crowell v. United States*,* 2 Ct. Cl., 501.

§ 423. **Formality in making contracts.**—A contract was entered into, by correspondence, between the war department and A., without any previous advertising for proposals, for the completion of the construction of certain work, iron to be furnished at seven cents a pound. Later on, the war department attempted to modify the contract, and A., protesting against said modification, continued the work. The supervision of the work was subsequently transferred to the interior department, who instructed A. to proceed with the work, which he did, still protesting against any reduction of the original price. While the due formality of the law was not observed in making the contract, yet as A. had acted in perfect good faith, and had so far performed his contract that a rescission would be ruinous to him, while the government would enjoy the benefit of his work, it would be inequitable to take advantage of the technical defense of lack of due formality. Nor was the war department justified in attempting to modify the original contract; and A. in continuing the work under protest waived no rights under the contract, and was consequently entitled to the full contract price for work done. *Contract of Jones and others*,* 10 Op. Att'y Gen'l, 416.

§ 424. It is not indispensable to the validity of a contract with the government, that it should express the circumstances under which it was made, so precisely and distinctly as to show the motives which induced it. *United States v. Maurice*, 2 Marsh., 96.

§ 425. Under the acts of June 2, 1862, and July 17, 1862, requiring public contracts to be signed by the contracting parties, and forbidding their transfer or assignment, a suit cannot be maintained in the court of claims by the principal on a contract with the government by his agent in his own name, the name of the principal and fact of agency not being disclosed to the government. *Gill v. United States*,* 7 Ct. Cl., 522.

§ 426. A quartermaster, acting under the orders of his commanding general, chartered a brig, during a public exigency, at a rate exceeding the rate prescribed by the quartermaster-general, but which did not exceed the amount which the brig would bring at that time and place. *Held*, that the quartermaster-general had no authority to annul or disregard such charter-party. *Baker v. United States*,* 3 Ct. Cl., 343; *Caleb v. United States*,* 3 Ct. Cl., 851.

§ 427. A contract for the delivery of supplies to the army, which does not in its terms require the approval of any officer, and there being no regulation of the war department expressly requiring the approval of the commanding officer, will not be held invalid because of his failure to indorse his approval upon it, especially where it appears that he knew that claimant was delivering supplies under the contract, and indorsed his approval on vouchers issued to him for supplies so delivered. *Tenney v. United States*,* 10 Ct. Cl., 269.

§ 428. The quartermaster-general advertised for bids for a contract for the making of which there was no authority of law, though legislation was expected on the subject. He reserved the right to refuse any and all bids if unsatisfactory, and to delay the award not later than January 1, 1867. The claimants were the lowest bidders. They offered the security and guaranties required by the government. The secretary declined to execute the contract. *Held*, that the claimants had no cause of action, (1) because of the want of statutory authority to make the contract, and (2) because of the reserved right to reject any and all bids. *Strong v. United States*,* 6 Ct. Cl., 135.

§ 429. Proposals for transportation pursuant to the advertisements of the quartermaster-general were accepted and the contract made out and signed by the proper officers of the government and forwarded for the signature of the contractor, who had already been informed of the acceptance and had taken steps and incurred expense to enable him to perform the contract. Because of an interruption of the mails the contract did not reach the contractor until eleven days after it should have gone into effect, but the contractor had proceeded to its performance without waiting for its formal execution. He signed the contract but omitted to sign a tabular statement annexed to the contract and therein referred to as "signed by both parties." The secretary of war annulled the contract and advertised for new proposals. *Held*, 1. That the contract was complete. 2. That the contractor was entitled to recover the profits he would have realized. *Moore v. United States*,* 1 Ct. Cl., 90.

§ 430. An act of congress authorizing the secretary of the navy to make a contract, putting certain limitations upon the power so granted, but leaving the details to his discretion, is not of itself the contract. The secretary makes the contract. *Gilbert v. United States*,* 1 Ct. Cl., 28.

§ 431. Where a party sends proposals for certain supplies to the navy department, accompanying his bid with the security required by law for its fulfillment, if accepted, the contract is complete from the time of the acceptance by the officers of the government, although a formal written contract is to be subsequently executed. If, therefore, by an act subsequently

passed, such supplies are subjected to an internal revenue tax, such tax must be borne by the government, though the contract proper was not signed until afterwards. *Adams v. United States*,* 1 Ct. Cl., 192.

§ 432. By act of congress the secretary of the navy was directed to enter into certain contracts for the building of certain docks, at a price not more than ten per cent. greater than had been previously proposed by a contractor. *Held*, that this did not constitute a contract, and that if the contractor afterwards entered into a contract with the secretary at less favorable terms to himself, he could not claim compensation at the rate named in the act of congress. *Gilbert v. United States*,* 8 Wall., 358.

§ 433. Advertisements inviting proposals for the construction of public works, together with the written proposal, constitute, on the acceptance of the proposal, the contract for doing the work. *Harvey v. United States*,* 15 Otto, 671.

§ 434. To be in writing.—The act of 1862, requiring contracts for military supplies to be in writing, is not infringed by the proper officer having charge of such matter accepting delivery of such supplies after the day stipulated, nor is a verbal agreement to extend the time of performance invalid. *Salomon v. United States*,* 19 Wall., 17.

§ 435. Under the act of congress of June 2, 1862, a contract made by an officer of the army or navy in behalf of the government is void if not in writing. But where such a parol contract has been partly performed by the person contracting with the officer, he can recover only upon an implied contract a *quantum meruit*. *Clark v. United States*,* 5 Otto, 539.

§ 436. Under the act of March 2, 1861, requiring government contracts to be in writing, a distinction is to be made between a right of recovery upon executory contracts, where damages are sought for non-performance by the government, and those that arise from an implied obligation to pay for articles actually purchased and used by the government. Such an implied contract will support an action, notwithstanding the statute. *Burchiel v. United States*,* 4 Ct. Cl., 549.

§ 437. A parol contract for the delivery of corn to the quartermaster department, there being no exigency, is void, and the contractor can recover only a *quantum meruit* for the supplies delivered to the government and actually used in its service. *Salomon v. United States*,* 7 Ct. Cl., 482.

§ 438. A contract for the use of a vessel by the government was made verbally, though required by the act of June 2, 1862, to be in writing. *Held*, that the owner of the vessel could not recover in the court of claims for its breach. *Lender v. United States*,* 7 Ct. Cl., 530.

§ 439. Under the act of June, 1862, requiring contracts on behalf of the government by the departments of war, navy and interior, or their agents and officers, to be reduced to writing and returned to the "returns office" with the advertisement, proposals, affidavit, etc., it was as much a duty of the contractor as of the government officer to comply with the provision for the reduction of the contract to writing, and a verbal contract would be held invalid for the reason that it was verbal, though failure of the officer to make proper returns would not have the effect to defeat the contractor's right of recovery. *Henderson v. United States*,* 4 Ct. Cl., 75.

§ 440. Under the act of June 2, 1862, it was made the duty of the secretaries of war, navy and interior departments to cause all contracts made by them or by their officers to be reduced to writing, and an executory contract not so reduced to writing was void as far as it was executory. But the statute was a statute of frauds. It did not prohibit such contracts, but only regulated the manner of making them. Performance by the contractor and acceptance by the government are sufficient to take the case out of the prohibition of the statute, and leave it within the equitable rule of implied contracts. Where the chief of the cavalry bureau agreed with a contractor, tendering horses under a contract, that the latter was to keep the horses over winter, feed them well, and take good care of them, and that in the spring the government would take them all and pay for their keep, *held*, that the contractor, having complied with these requirements, is entitled to tender the horses in the spring and, if accepted, to recover the winter's keep. *Danolds v. United States*,* 5 Ct. Cl., 65.

§ 441. Construction.—A contract to furnish building stone for the "sum of sixty-five cents per cubic foot for all stones when the quarried dimensions do not exceed twenty cubic feet, and one cent additional for every cubic foot of those having such dimensions exceeding twenty feet," *held*, to entitle the contractor to sixty-six cents per cubic foot for all stones over twenty cubic feet in size. *Dix Island Granite Co. v. United States*,* 12 Ct. Cl., 624.

§ 442. Parties who have a government contract in their possession for two weeks before executing it cannot claim that they executed it in the belief that it was for the sale of nine thousand bushels of potatoes, when in fact it was for "such quantities (not exceeding three thousand bushels per week) as may be required," merely because the contract follows the terms of the government's advertisement rather than of the contractor's bid. *Clark v. United States*,* 1 Ct. Cl., 248.

§ 443. In answer to the advertisement of a commissary inviting proposals for the delivery of potatoes, in such quantities (not exceeding three thousand bushels per week), and at such times as may be required during the month of July, 1863, the claimants entered a bid, and subsequently executed a contract for the delivery, as they aver, of nine thousand bushels. *Held*, that, under the terms, the commissary was not bound to receive any definite number of bushels, and the claimants were obligated to deliver only so many as were required, within the maximum quantity. *Ibid*.

§ 444. A contractor's undertaking to purchase the offal of all the cattle slaughtered in a particular military department is subject to the change that may be effected in it by the change in the boundaries or of the subdivision of the department. *Gibbons v. United States*,* 5 Ct. Cl., 416.

§ 445. Claimant entered into contract to furnish at Fort Brown, "good, merchantable prairie hay," of as good quality as that furnished under a prior contract. If objections were made to the hay, a board of officers was, by the terms of the contract, to be convened, to pass upon the hay, and their decision was to be final. Objections were made to the hay, and a board of officers was convened, not, however, under the terms of the contract, but it was required to be "guided in its actions by letter of instructions from chief quartermaster of the department of Texas, the requirements of which were to be strictly complied with." The board found that it was not good, merchantable hay, and was unfit to feed to animals; that no good, merchantable prairie hay could be obtained in that vicinity; but that it was of the same quality as furnished under the prior contract. The claimant brought action in the court of claims for the breach of contract, without making application for the board of officers under the contract. *Held*, (1) that the burden was upon the contractor to show that such a board would probably have accepted the rejected hay; (2) that "merchantable" applied to forage means "edible." *Wood v. United States*,* 11 Ct. Cl., 680.

§ 446. A contract required the contractor to excavate and remove stone from the channel of a river down to a certain grade; that the material should be the property of the government, and that the decision of the engineer in charge should be conclusive both as to the quantity of the stone and the completion of the work. The contractor having excavated the stone below the grade required and spread it upon the bottom of the river, upon the refusal of the engineer to pay for this he brought action. *Held*, that he was not entitled to recover. *Case v. United States*,* 11 Ct. Cl., 763.

§ 447. An army transportation contract provides that a board of survey shall find as to the quantity and condition of supplies delivered, and that the receiving officer shall indorse upon the bills of lading "in accordance with the finding of a board of survey," "upon which indorsement, payment shall be made," and also the distance of transportation. *Held*, that these indorsements are not conditions precedent to a recovery upon such contract. *Braden v. United States*,* 12 Ct. Cl., 164.

§ 448. Claimants being invited by advertisement to bid upon the construction of piers and abutments of a government bridge, are shown plans fixing the number and dimensions of the piers. Their bid is accepted at so much per cubic yard. A written contract is entered into by which they agree to "construct the piers and abutments" "in accordance with such plans and specifications as may be fixed by proper authority," "the United States to furnish stone, cement, sand and all necessary templates required for the work and nothing more." *Held*, (1) that under this contract it is the duty of the contractors to erect the necessary coffer-dams, and of the government to furnish the material; (2) that the fact that the plans as furnished by the United States alter the dimensions of the piers so as to materially affect the value of the work is no ground of complaint by the contractors. *Harvey v. United States*,* 8 Ct. Cl., 501.

§ 449. The provisions of the contract for building the ironclad gunboat *Ozark* which exclude extras, held to apply to the vessel as described in the contract and specifications and to the details necessary for that, and not to apply to alterations from, or additions to, the plan as fixed by the contract. *Bestor v. United States*,* 3 Ct. Cl., 425.

§ 450. The builder of a government dry dock is entitled, under his contract, to hold the same, after delivery and acceptance by the United States, for a space of three years, with the privilege of docking merchant vessels for pay and the duty to dock government vessels free. *Held*, that the three years must date from the delivery and acceptance of the dock and is not to be computed from the time, before the completion of the work, when the contractor began to dock merchant vessels for pay and government vessels free, on portions of the unfinished docks. *Gilbert v. United States*,* 4 Ct. Cl., 290.

§ 451. Under a contract "to furnish all the labor required" in a government store house during a certain term, for a gross sum, the contractor cannot be required to furnish coal, water and a steam-engine for running the elevators, although the use of such means was a great saving of labor to the contractors. And though under that contract the government was entitled to charge back to them a fair compensation for the labor of men who had been employed

and paid for running the elevators, it could only charge them with a fair market rate for the labor so employed, and not the amount of the salary actually paid to them by the government. *Mudgett v. United States*,* 9 Ct. Cl., 467.

§ 452. Claimant had a contract to deliver at a military post "eight hundred and eighty cords of wood, more or less, as shall be determined to be necessary by the post-commander for the regular supply of the troops of the garrison of said post for the fiscal year." Claimant cut and was ready to deliver the eight hundred and eighty cords, but the post-commander notified him that only forty cords would be needed. That much was accepted and paid for. Claimant brought this action for breach of contract in refusing to receive the balance. *Held*, that the words "more or less" in the contract were equivalent to "about," "say," or "by estimation," and in absence of any action by the post-commander, the words "eight hundred and eighty cords" would fix the amount under the contract; but that the intervention of the post-commander under the terms of the contract fixed forty cords as the amount to be delivered, and that defendants were guilty of no breach. *Brawley v. United States*,* 11 Ct. Cl., 522.

§ 453. A contract provided that claimant should "have all the hides of beef-cattle slaughtered for Indians at Fort Sill," "which the superintendent of Indian affairs at that place shall decide are not required for the comfort of the Indians, the number of hides to be about four thousand, more or less." The superintendent of Indian affairs decided that the hides were all necessary to the comfort of the Indians, and the cattle were turned over to them on the hoof. *Held*, that there was no breach of contract. *Lobenstein v. United States*,* 9 Ct. Cl., 135.

§ 454. If a contract with the government is susceptible of two constructions, one consistent and the other inconsistent with the act of congress authorizing such contract, the former construction must be adopted. *Gibbons v. United States*,* Dev., 46.

§ 455. A contractor, under a building contract with the treasury department, purchased certain materials with money advanced by the government and transferred them to the latter. They were accidentally destroyed, and the court of claims, at a former trial, held that the loss fell on the government. The finding was approved by congress, the amount paid, and an act passed referring the case back to the court of claims to ascertain whether the full value of the property had been allowed. *Held*, that the construction put upon the contract by the treasury department, by the court at the former hearing, by congress, and by the claimants, is binding upon the claimants at the second hearing. *Gibbons v. United States*,* 2 Ct. Cl., 353.

§ 456. Where a contractor at first refuses to execute a contract for the purchase of the offal of cattle slaughtered, because it does not contain all the articles that he expected that it would, and had in mind in making the contract, a letter from the commissary department showing the interpretation that had previously been given to like contracts in the same terms, upon the receipt of which the contractor did execute it, is admissible to show the interpretation put upon the contract by the parties at the time of its execution. *Gibbons v. United States*,* 5 Ct. Cl., 416.

§ 457. A contract in writing to furnish beef to a particular division of the army, "and any other troops that might be attached thereto," at a certain rate, *held*, to imply about the number of troops of a division commander, and that upon subsequent orders being received pursuant to the orders of the commanding general during a military exigency to forward large numbers of cattle to supply the army, such subsequent orders will be held to form a separate contract, the rate of compensation for which will not be controlled by the former contract. *Battelle v. United States*,* 8 Ct. Cl., 295.

§ 458. Validity of contract.—The claimant, an architect, who is employed by the navy department to prepare plans for improvements to the naval school at Annapolis, *held*, not barred from his claim for services, by the act of March 2, 1861, forbidding a contract, "unless the same is authorized by law, or be under an appropriation adequate to its fulfillment," congress having provided by the act of May 21, 1864, that the naval academy should be returned to, and established at the naval academy grounds at Annapolis. *Mason v. United States*,* 5 Ct. Cl., 495.

§ 459. A lease made by the secretary of the treasury, of premises for a custom-house, at greatly exorbitant rates, on the recommendation of the collector of customs, who is secretly a joint owner of the premises, is fraudulent and void, and the assignee of such a lease cannot maintain an action on it. *Larkin v. United States*,* 5 Ct. Cl., 526.

§ 460. A purchase of horses during a military emergency under order of a department commander, at a fixed price, is a valid contract, and an arbitrary reduction of the price and a corresponding erasure and mutilation of the vouchers in the quartermaster-general's office is without authority. Nor is the holder of the voucher estopped by the receipt given for the amount allowed by the quartermaster-general, although in terms a receipt in full, from demanding the balance of the contract price. *Wilcox v. United States*,* 5 Ct. Cl., 386.

§ 461. Though every presumption is to be made in favor of the fairness of a public officer in making a government contract, yet when the circumstances excite suspicion, the court will

look narrowly into the case, and require stricter proof of fairness than would be required in the case of a contract between two individuals. A great discrepancy between the contract price and the ordinary price at the place and under the circumstances where the work was done, or materials furnished, is a fact that will raise a presumption of fraud and collusion. A contract for certain work and materials, amounting to nearly \$300,000, where the evidence showed that the work could have been done and the materials furnished, at the time and place and under the circumstances for not more than \$60,000, will be declared fraudulent and void. *Beard v. United States*,* 8 Ct. Cl., 122.

§ 462. When proposals for supplying beef to the troops at Fort Smith, advertised for, were opened, the lowest of four bids was found to be five and thirty-six hundredths cents per pound, and the next lowest was that of claimant, being ten cents. The lowest bidder was unable to furnish the required bond, and the acceptance of his bid was revoked and claimant's bid accepted. It appeared that at the time the contract was made, owing to the great danger of loss by capture, and to the condition of the country, the price was not an extravagant one at Fort Smith. *Held*, that claimant was entitled to recover the contract price. *Thompson v. United States*,* 8 Ct. Cl., 438.

§ 463. Under the act of July 4, 1864, for the better organization of the quartermaster's department, the power to contract for army transportation is exclusively in the hands of that department, and a contract in the nature of a charter-party between a naval engineer in charge of captured shipping in the harbor of Charleston, and the loyal owner of a steamboat found there, for her use in the service of the government, was invalid and would not support a recovery though she was so used. *Slawson v. United States*,* 4 Ct. Cl., 87.

§ 464. Where the express contract between the claimant and the government is void, the former, who has delivered his goods or performed services under it which have been accepted, is entitled to recover from the government on the implied contract in *quantum meruit*. *Heathfield v. United States*,* 8 Ct. Cl., 213.

§ 465. Assignment.—Under the act of July 17, 1862, which forbids the assignment of a government contract, no suit can be maintained, in the name of the contractor, to the use of the assignee of such a contract. But after an assigned contract has been executed, and the government has accepted the goods under it, an action for a *quantum meruit* may be maintained in the name of the assignor for the benefit of the assignee. *Wheeler v. United States*,* 5 Ct. Cl., 504.

§ 466. A substantial transfer of a government contract is sufficient to annul it under the act of July 17, 1862. An irrevocable power of attorney "to take and receive all vouchers and sign the same and draw the money thereon," in the name of the contractor, "with full power to perform everything whatsoever required and necessary to be done," *held*, to be a full and complete assignment of all interest, covering all the money payable under the contract, and to have the effect of rendering the same null and void. *Francis v. United States*,* 11 Ct. Cl., 688.

§ 467. The transfer of a government contract nine days prior to the passage of the act of July 17, 1862, providing that a "transfer shall cause the annulment of the contract," will not affect its validity. *Chollar v. United States*,* 2 Ct. Cl., 319; *Robertson v. United States*,* 2 Ct. Cl., 322.

§ 468. Under the act of July 17, 1862, expressly prohibiting the transfer or assignment of a government contract, the effect of such assignment or transfer is the complete "annulment of the contract, so far as the United States are concerned," and no action can be maintained upon it against the United States either by the assignor or the assignee. *Wanless v. United States*,* 6 Ct. Cl., 123.

§ 469. Inspection.—Where a contractor agrees to furnish government supplies at a distant point, an inspection of the goods at the place of shipment does not vest the title in the government. *Grant v. United States*,* 7 Wall., 331.

§ 470. Where a contract for furnishing government supplies does not provide for their inspection at certain places, it is optional with the contractor whether he submits to an inspection directed there or not. *Ibid*.

§ 471. After a contract to deliver certain cavalry horses to the United States had been entered into, the rules for the inspection of such horses were changed and made more strict. The contractor did not offer to deliver or tender any horses at the places specified in the contract within the time limited for the performance of the contract, but abandoned it and treated it as annulled by the new regulations. *Held*, that he could not recover damages on the contract against the United States. *Smoot's Case*,* 15 Wall., 36.

§ 472. Even if it be admitted that the government is not bound by the action of its inspecting officer, and may defend against a claim for oats delivered under a contract on the ground that they were not of a merchantable quality, notwithstanding they were inspected and accepted by its officer, still the burden of proving the deficiency in quality is on the government, and the report of a board of survey appointed during the dispute is not sufficient or competent

evidence for this purpose as against evidence introduced by the claimant tending to prove the good quality of the oats delivered. *Heathfield v. United States*,* 8 Ct. Cl., 213.

§ 473. Under a contract to deliver building stone to the government, on the cars at the quarry, subject to inspection, an inspection and approval of it at the quarry will conclude the government, and the contractor's right to compensation under the contract will not be affected by a subsequent rejection of it at the building. A receipt by the contractor for payment for the stone accepted at the building, though expressed to be in full, if it specifies so much stone by dimensions, and that was used in the building, will not bar the contractor's right of recovery for the rejected stone. *Kerchner v. United States*,* 7 Ct. Cl., 579.

§ 474. Ordinarily when an article is sold to the government, subject to inspection, the government is concluded by the action of the inspector; but where (as in the case of horses and mules for the public service) a well known kind and description of animal is required by the regulations, a manifest departure from that standard, which could not have been the result of oversight or inattention, is strong evidence of collusion between the inspector and seller. But where mules so sold and inspected are branded, and mingled with the mules purchased from other parties, so that it is impossible to say which of the defective mules were purchased from claimant, and he offers to take back his proportion of the defective mules and pay his proportion of their subsistence while in the hands of the government, the government cannot, if it fails to avail itself of this offer, but uses the mules in its service, afterwards withhold a part of the contract price on the ground of the defective character of the mules. *Allen v. United States*,* 3 Ct. Cl., 91.

§ 475. Where the terms of a contract to furnish horses to the government are substantially changed, by an order from the chief of the cavalry bureau, requiring a different method of inspection, and the government officials refuse to allow the contractor to comply with his contract, without submitting to these changes in its terms, he is relieved from the obligation to tender the horses; but upon its appearing that he was ready and willing to comply with his agreement, if permitted to do so, he is entitled to recover damages for the breach of contract. The measure of damages in such case is such a sum as would put the claimant, as nearly as possible, in the same situation as he would have been in if he had been allowed to deliver the horses. *Wormer v. United States*,* 4 Ct. Cl., 258; *Smoot v. United States*,* 5 Ct. Cl., 490.

§ 476. Under a contract to build one hundred army wagons, subject to inspection before shipment, the wagons were inspected and approved by an inspector appointed by the government. On arrival at their destination they were again inspected and rejected. *Held*, that, in the absence of fraud, the government is concluded by the inspection before shipment. *Brown v. United States*,* 1 Ct. Cl., 307.

§ 477. The government has the right, under a contract to furnish horses of a certain character, subject to inspection, to require such an inspection as will insure the faithful compliance with the terms of the contract, and is not limited or controlled by the antecedent practice as to the strictness of the inspection. A change in its rules in that respect is not a breach of its contract. Where the contractor is imprisoned by the government for failure to comply with his contract, the court of claims has no jurisdiction of an action against the government to recover damages for illegal arrest. *Spicer v. United States*,* 1 Ct. Cl., 316.

§ 478. After a contract for furnishing certain horses for the use of the army had been entered into, the regulations for the inspection of horses were so changed, with a view to prevent frauds against the government, that all horses offered were to be delivered twenty-four hours before inspection, and that all horses fraudulently offered should be branded by the inspector. The contractor having abandoned the contract rather than submit to the new regulations, it was held that as they were reasonable he could not recover anything from the United States for loss incurred by him in preparing to fulfill the contract. *United States v. Wormer*,* 13 Wall., 25.

§ 479. Revocation.—The government contracted with T. for furnishing meters to distillers which had been adopted by the government for that purpose. He was by the terms of the contract to manufacture them as required, but if not specially required, was not to have more than twenty in process of manufacture at one time. It was provided that the government might terminate the contract at any time on paying him for the meters in process of construction. On June 8, 1870, T. was informed that the government revoked all former orders relating to the construction and furnishing of meters, and that it would not be responsible for any meters, but it was not until June 8, 1871, that the further use of his meters was finally discontinued. *Held*, that the United State was not responsible for the value of the meters in process of construction at the time of the final order discontinuing the use of his meters. *Tice v. United States*,* 9 Otto, 286.

§ 480. A contract for certain work in a harbor provided it should be done by a certain time, and that if the contractor should delay or be unable to proceed with the work in accordance with the terms, the engineer in charge might terminate the contract and employ others to do

the work, deducting the expense from any sums due the contractor. The work was to be paid for as it progressed, but ten per cent. was to be retained till it was all completed. The contract was declared at an end by the engineer in charge after the expiration of the time limited for the completion of the work, and others were employed to finish the work. The second contractors completed the work for a much less sum than would have been required under the first contract. *Held*, that in the absence of satisfactory proof to the contrary it would be presumed that the engineer in charge properly terminated the contract, especially as this was not done till after the time limited for its performance had expired, and that after the contract was terminated, the contractor was entitled to no rights in regard to its performance by others, and was not entitled to recover the difference between the contract price and the price actually paid for the work. *Quinn v. United States*,* 9 Otto, 80.

§ 481. A lawyer was employed by the secretary of the treasury to recover a debt due to the government, for which service he was to be compensated by a percentage of the amount so recovered. The secretary reserved the privilege of terminating the arrangement at any time. The attorney negotiated a settlement, under which the money was subsequently collected; but before the payment was made, his contract with the government was canceled by a succeeding secretary of the treasury, and the money never actually passed through his hands. In an action by him in the court of claims for his percentage, *held*, (1) that he was entitled to recover; (2) that the indorsement by the secretary upon another account of his against the government for other services, at the time of its compromise and payment, that the payment is to be in satisfaction of all claims against the government, which indorsement does not appear to have ever been made known to him, will not bar his action. *Mellen v. United States*,* 18 Ct. Cl., 71.

§ 482. Where a government contract is for the purchase of such supplies as are needed at certain points, the contractor cannot recover for a breach of the contract caused by its rescission, until he shows that certain supplies were needed and that he met with loss by not being allowed to furnish them. *Grant v. United States*,* 7 Wall., 331.

§ 483. Damages cannot be recovered for the rescission of a government contract where there is no evidence of any actual damage by the abrogation. *Grant v. United States*,* 1 Ct. Cl., 61.

§ 484. When the United States through their authorized agents enter into a contract with an individual, they relinquish their sovereign character and subject themselves to the rules of right and justice as between man and man. An order from the secretary of war to the quartermaster-general, "to suspend the making of any new contracts" for a certain kind of knapsacks, will not justify an attempt by the quartermaster-general to annul a contract for such knapsacks already made, nor his refusal to receive them when offered under the contract. *Man v. United States*,* 3 Ct. Cl., 404.

§ 484a. Where the secretary of the navy makes a contract for provisions for the naval service, the chief of a bureau having charge of contracts and supplies cannot rescind such contract without the approval of the secretary. *United States v. Shaw*,* 1 Cliff., 317.

§ 484b. An agreement by a government contractor with a bank, giving the latter a lien on the drafts drawn on the government for the proceeds of articles furnished to it under the contract, for advances to be made by the bank to enable the contractor to fulfill his contract, does not give the bank a lien on a judgment against the government for damages for annulling the contract; the drafts having been drawn and paid either to the contractor or the bank. *Bank of Washington v. Nock*,* 9 Wall., 373.

§ 485. Settlement.—Where the amount due on a contract with the government is unascertained, the acceptance by the contractor of the amount found due by the auditor without objections is a bar to any action to recover a larger amount. *Baird v. United States*,* 6 Otto, 430.

§ 486. A judgment in favor of a claimant under a contract with the government for an indivisible part of his claim is a bar to a further suit on the contract. *Ibid*.

§ 487. A contractor for the delivery of wood at a military post, who has delivered the wood and received and receipted for his pay according to the contract, cannot afterwards set up as against the government that he was damaged by a refusal to allow him to cut the timber on public land, or because the post-commander improperly interfered with and delayed the delivery. *Francis v. United States*,* 6 Otto, 354.

§ 488. A contract for the transportation of government stores provided for the inspection of the stores at their destination by a board of survey composed of government officers, and who should "in case of loss, deficiency or damage, investigate the facts and report the causes, assess the amount of loss and injury, and state whether it was attributable to want of care of the contractor, or to causes beyond his control." The board of survey merely reported a deficiency, and that the contractor was liable therefor, but did not report its investigations or the causes of the deficiency, or whether or not the contractor was in fault. *Held*, that as the contractor did not then object, and as the transaction was in the wilds of the west, and as no objection was made till the contractor came to demand his pay, and then only a vague and

indefinite one, and as the witnesses were scattered and inaccessible, the contractor could not recover the amount deducted by reason of the deficiency reported by the board of survey. *United States v. Shrewsbury*, * 23 Wall., 508.

§ 489. A claimant who, during a public exigency, sold goods to an assistant quartermaster, for the use of the army, at a price which was the fair market value of the articles sold, the purchase being approved by the chief quartermaster of the department, and the goods used by the army, is entitled to recover the contract price. A deduction of \$7,293.34 from one of his vouchers by a military commission appointed to pass upon such claims, reducing his claim from \$107,293.34 to an even \$100,000, accompanied by a refusal to return his vouchers unless he should accept the latter sum and sign a receipt in full, was an act of duress, and such a receipt was void. *Livingston v. United States*, * 3 Ct. Cl., 131.

§ 490. The Holt, Davis and Campbell military commission, appointed by the secretary of war to pass upon vouchers of claimants and contractors, had no authority to interpret the law of assignments and adjudicate the respective rights and equities of parties to, and assignees of, such vouchers. *Brady v. United States*, * 3 Ct. Cl., 203.

§ 491. Where an officer of volunteers not yet mustered into the service of the United States gave vouchers for the subsistence of his troops, such vouchers are not a binding contract of the United States for want of authority in the officer; and any payment made by the government on account of such vouchers, which is acknowledged to be in full satisfaction of the claim, will be a bar to further action. *Kirkham v. United States*, * 4 Ct. Cl., 223.

§ 492. The sub-contractor of a contractor for transportation of army supplies, upon reaching the end of the contract route, was required by the officers to carry certain stores further still. This service he performed satisfactorily. *Held*, that he was entitled to regard this as a distinct service performed by himself under an implied contract, or an additional service rendered by his principal under the original agreement; but, that, by having stood by while his principal settled with the government on the latter theory, and having received compensation for such service from his principal at the rate prescribed by their sub-contract, he is estopped from setting up his demand for compensation from the government on the theory that this was a distinct service performed by him under an implied contract. *Lobb v. United States*, * 8 Ct. Cl., 250.

§ 493. *Compromise*.—C. chartered a steamer to the United States at a certain rate per day; some time afterwards the contract was disapproved at the rate agreed and reduced to a smaller sum for the whole time. C. having accepted the amount allowed by the government at the reduced rate, and given a receipt in full, could recover nothing more from the United States. *United States v. Clyde*, * 13 Wall., 35.

§ 494. Where a contractor, under a contract which provides that the estimates monthly by the engineer in charge of the work are to be the means of his final estimate, which final estimate is to be conclusive upon the contractor, has a dispute as to the price allowed in a monthly estimate, but accepts payment and gives a receipt in full under the final estimate, he will be concluded from seeking a greater price. *Case v. United States*, * 11 Ct. Cl., 712.

§ 495. Claimant had a contract with the government for the manufacture of one hundred thousand muskets. A commission was appointed by the secretary of war to investigate all claims and contracts in respect to ordnance, arms and ammunition. This commission confirmed the contract of the claimant, but reduced the number of muskets to thirty thousand. The claimant, after remonstrating and insisting upon his rights under the prior contract, finally consented to execute the contract as modified, and furnished sureties for its performance as required. *Held*, that by the acceptance of the terms offered by the military commission the claimant waived any cause of action he may have had against the government for the violation of his original contract. *Mason v. United States*, * 6 Ct. Cl., 57.

§ 496. Where claimant makes a demand upon the quartermaster department for rent under an implied lease, and the demand is reduced by the department, and the reduced amount is paid and accepted without protest, the claimant is precluded from reinvestigating the same matter in the court of claims. *Gilman v. United States*, * 8 Ct. Cl., 520.

§ 497. *Ratification*.—Where a contract for government work made by an agent, admittedly of competent authority, is in proper form and reserves no right of ratification to the secretary of war, a credit given to the contractor for work performed according to the stipulations of the agreement is sufficient evidence of ratification. *United States v. Tillotson*, 1 Paine, 305.

§ 498. Where a sub-Indian agent in California contracts for the purchase of the necessary subsistence for the Indians, drawing drafts for the purchase money on the department of the interior, which were subsequently protested; and the government afterwards recognizes its obligations to provide such subsistence for the Indians by legislative enactments, such enactments will operate as a ratification of the purchase of the sub-Indian agent to the extent of

making the government liable for the actual value of the subsistence so furnished. *Free-mont v. United States*,* 2 Ct. Cl., 461.

§ 499. Where an order for government supplies is informal and invalid, a subsequent acceptance of some of the goods, and the direction of alterations in others which are being manufactured, is a ratification, and the contract will be held obligatory. *International Co. v. United States*,* 13 Ct. Cl., 209.

§ 500. *Place of performance.*— In a contract to furnish granite from the quarries in Quincy, Mass., to the government, it was stipulated that the measurement of said granite should be had before it was shipped from Boston to New Orleans, by an agent of the government. The government could not lawfully insist upon a transfer of the measurement to New Orleans, and was bound and concluded by the admeasurement certified at Boston or Quincy, by its agent there. Granite for the Custom House at New Orleans,* 5 Op. Att'y Gen'l, 296.

§ 501. *Place of delivery.*— A contract for the sale of horses which is modified so as to provide for delivery at Washington instead of at Perryville, the government to pay the "additional cost of delivery," only entitles the claimant to be reimbursed the "actual outlay" occasioned by the delivery at the first named place. *Chollar v. United States*,* 2 Ct. Cl., 819; *Robertson v. United States*,* 2 Ct. Cl., 822.

§ 502. Under a contract for the delivery of two hundred horses at Perryville, whereby the government reserved to itself the privilege of having them delivered at Washington, agreeing at the same time "to pay the additional cost of delivery," the contractor is not entitled to recover for loss caused by the more rigid inspection at Washington and the consequent necessity of bringing more horses there than at Perryville, nor that caused by the fact that the market for rejected horses at Washington is not so good as that at Perryville. The undertaking of the government is to pay the "additional cost of delivery" not the "additional risk of delivery" nor the "additional loss of delivery." *Wormer v. United States*,* 1 Ct. Cl. 212.,

§ 503. *Time of delivery.*— A government contract for the delivery of material provided for a forfeiture of ten per cent. for a breach or failure. The materials were not delivered until after the date fixed by the terms of the contract, but were nevertheless accepted by the officers of the government. It did not appear that the delay caused any loss or damage to the government. *Held*, that though the United States had the right to annul the contract as to the remainder of the material to be delivered and did so, the forfeiture was waived. *Lester v. United States*,* 1 Ct. Cl., 52.

§ 504. The claimants made a proposal to sell the government one hundred and fifty thousand bushels of corn, to be delivered at Cairo; this offer was accepted by an assistant quartermaster, with the proviso that no purchases should be made by the contractors along the line of the Illinois Central Railroad, at the same time giving them an order on the government officials in control of the road for the transportation of the corn already purchased by them along the line of the road. The government held possession of the railroad, which was tasked to its utmost capacity, and it was impossible for the claimants to get their corn transported. *Held*, that the effect of this circumstance was to relieve the contractors from the obligation of their undertaking so far as time was concerned; and the war afterwards ending suddenly, and a final delivery of corn under the contract being refused, the government is liable for damages so caused. *Brandeis v. United States*,* 3 Ct. Cl., 99.

§ 505. *Loss of profits.*— A contract for the transportation of government stores provided that in order to enable the contractor to be prepared notice of the transportation required would be given in advance. Pursuant to the contract, notice was given that at a certain time certain transportation would be required. At the time mentioned, only a small portion of the transportation mentioned was required. *Held*, that the contractor could not recover the profits he would have made had the full amount of transportation been furnished, as the contract did not expressly bind the government to furnish the amount of transportation mentioned in the notices, but that the contractor could recover the expenses incurred by him in preparing to furnish the transportation mentioned in the notice. *Bulkley v. United States*,* 19 Wall., 87.

§ 506. A. agreed in time of war and in a country which was the theater of hostile operations, to furnish certain hay, and it was agreed that sufficient guards and escorts should be furnished by the United States for his protection: *Held*, that while under the contract the United States was bound to pay him for property destroyed by hostile forces, yet it was not liable for estimated profits on hay which he could not cut by reason of hostile operations. *United States v. McKee*,* 7 Otto, 233.

§ 507. A contract which requires a quartermaster to receive one thousand mules if delivered at a certain time, but which does not bind the contractor to deliver them, is valid and binding in so far as it is permitted by the quartermaster to be performed; but the contractor cannot recover for the prospective profits on mules which he had not yet procured with which to fill his contract at the time it was suspended by the government. *Thompson v. United States*,* 9 Ct. Cl., 187.

§ 508. The secretary of the treasury refuses to allow a contractor, who has undertaken to erect a building and lease it to the government for a term of years, to fulfill his contract. The measure of his damages is that gain or profit of which he is deprived by this refusal to allow him to complete his contract. *Adams v. United States*,* 1 Ct. Cl., 106.

§ 509. When a contract is terminated by the government against the will of the contractor, the latter is not confined to the contract price of the work, but may bring his action for a breach of agreement and recover as damages the profits he would have made if allowed to complete the work. Where there is no evidence as to profits the recovery will be limited to the work actually done, at the contract price. *McKee v. United States*,* 1 Ct. Cl., 336.

§ 510. Where the government has entered into a contract with a pork packer to dress and pack for a fixed price per head a given number of hogs to be furnished by it, but before the whole number are furnished withdraws from the undertaking and declines to furnish any more, the pork packer is entitled to recover for the loss of his contract, and the measure of his damages is the clear net profit he would have made if the whole number had been delivered according to contract. This profit is the difference between the amount which it would have cost the contractor to do the work and the amount which he was to receive for doing it, less the worth of the time, risk and responsibility from which he is relieved by the rescission of the contract. *Floyd v. United States*,* 2 Ct. Cl., 429; *Speed v. United States*,* 2 Ct. Cl., 429.

§ 511. Transportation contracts.—A contract provided for transporting military stores and supplies from and to certain posts, depots and stations named, and also "from and to any other posts, depots or stations that might be established within the district" mentioned, and "from one point to another within the route." *Held*, that a fort within the described territory was a "post" within the meaning of the contract and embraced within its terms, and that as the contract provided that the contractors should be paid for the distance the supplies were transported, they could not claim compensation for the distance traveled by their unloaded teams in reaching the fort from the point where they were when the transportation was required. *Black v. United States*,* 1 Otto, 267.

§ 512. Where a contract for the transportation of government supplies provides the distances shall be fixed by a specified person, his determination, in the absence of fraud or gross mistake, is conclusive on the contractor. *Kihlberg v. United States*,* 7 Otto, 398.

§ 513. A contract for the transportation of government supplies provided that the contractor should be paid according to the number of pounds of stores delivered. *Held*, that under the contract he was entitled, in case of shrinkage, to pay for only the number of pounds received at the destination, though the shrinkage was without his negligence. *Ibid*.

§ 514. Claimant had a contract with the quartermaster department of the army entitling him to do all the transportation between Fort Leavenworth and Fort Union. The commissary department having occasion for eighteen thousand bushels of corn at Fort Union, purchased it, deliverable at that point. The vendor, not having it on hand, borrowed the corn from the quartermaster department at Fort Leavenworth, and transported it himself to Fort Union. *Held*, that these circumstances afforded no evidence of an intent to defraud the claimant, by the officers of the quartermaster and commissary departments, out of his right to transport the grain to Fort Union, and did not constitute a breach, on the part of the quartermaster department, of his transportation contract. *Shrewsbury v. United States*,* 7 Ct. Cl., 374.

§ 515. An army transportation contract provided that the distance should be "ascertained and fixed by the chief quartermaster." *Held*, that the finding of the chief quartermaster so ascertaining and fixing the distance was conclusive upon the contractor, although erroneous and fixing the distance at less than the air line distance. *Kihlberg v. United States*,* 13 Ct. Cl., 148.

§ 516. A transportation contract, though relieving the contractor from responsibility for "unavoidable leakage and shrinkage," provides that payment shall be made on the basis of the receiving officer's certificate, "stating the quantity and condition of stores delivered." *Held*, the contractor is entitled to recover freight charges only, on such goods as were actually delivered at the destination, and not on the weight as received for transportation undiminished by "leakage and shrinkage." *Ibid*.

§ 517. The transportation of the United States is between depots and military posts, and these make the termini which define and constitute transportation routes, and transportation contracts are for such routes. Consequently, where claimant had a contract to furnish all the transportation the United States might require between Little Rock and Fort Smith, and to and from all points between, he cannot complain of a shipment by the government direct to Fort Smith from St. Louis, and of a refusal to reship by his boat at Little Rock as an infringement of his contract rights. *Scott v. United States*,* 4 Ct. Cl., 241.

§ 518. A quartermaster contracted in writing, with claimant, pursuant to advertisement, and with the approval of his commanding officer, for army transportation, to the amount of "four hundred and eighty-six tons, more or less." But a small part of the freight was fur-

nished for transportation, though the contractor was required to furnish teams, and to hold himself in readiness to undertake the transportation of the whole amount. *Held*, that this failure to furnish the freight for transportation constituted a breach of contract on the part of government, for which the contractor was entitled to damages notwithstanding the words "more or less" in the contract. The measure of recovery in such a case, where nothing is shown to mitigate the damages, will be the contract price. *Hardy v. United States*,* 9 Ct. Cl., 244.

§ 519. Claimant, who was under contract to furnish transportation for government stores during certain months, not to exceed in the aggregate ten million pounds, and was entitled to notice of the quantity and kind of stores to be transported, had been notified up to full amount of his contract. He was then called upon to transport further stores over and above the limit of his contract, amounting to three million, two hundred thousand pounds. He agreed to do it upon the terms of his contract, and made preparations to accomplish it for the government. The stores were never furnished. He brings this action to recover damages for the breach of contract. *Held*, that his loss of profits does not afford a proper element of recovery, but that he is entitled to recover for the expense incurred in the necessary preparation for the undertaking. *Bulkley v. United States*,* 7 Ct. Cl., 548.

§ 520. Claimants were contractors, furnishing the government certain transportation under a written agreement, which specified no particular period of time for its duration. Upon being subsequently requested to furnish transportation under that contract, they declined on the ground that transportation was rendered much more perilous because of the proximity of the Indians, but offered to furnish the transportation at a higher rate. This was accepted and a verbal contract for the higher rate was entered into, and under it the transportation was furnished. The quartermaster department cut down the claimants' demand to the rate under the written contract. *Held*, that as that contract fixes no period of continuance, the contractor was at liberty to determine it when he pleased, and having so determined it, he is at liberty to make another; that the verbal contract is binding, and that plaintiff is entitled to recover. *Wilder v. United States*,* 5 Ct. Cl., 462.

§ 521. When an army transportation contract binds the contractor to transport all the freight which the government may offer him in a certain territory, and a considerable preparation to enable him to carry out this obligation is necessary, there is a corresponding obligation on the government to allow him to transport all the freight required in that territory and not to withhold a part of it and parcel it out among others. For such a violation of contract he is entitled to recover damages. *Caldwell v. United States*,* 8 Ct. Cl., 334.

§ 522. Claimant had a contract with the government entitling him to furnish, at a fixed rate per mile for each hundred pounds, all the transportation which should be needed in a certain department for the space of one year. During three months of this time the transportation was withdrawn from him. *Held*, that he was entitled to recover, and that the measure of his damages was such sum as he would have made upon the contract less such a sum as was reasonable for the less time engaged and the less trouble and risk. *Wilder v. United States*,* 5 Ct. Cl., 468.

§ 523. **Captured and abandoned property.**—A person who contracted with the government to collect captured and abandoned cotton in a certain district was held not to be precluded from purchasing on his own account other cotton not captured or abandoned, it appearing there was no captured or abandoned property in the district. *Tweed's Case*,* 16 Wall., 504.

§ 524. The government is not liable upon implied contract to any person, loyal or disloyal, for property taken by its agents, civil or military, during the rebellion, and within the insurrectionary districts; and the only redress given to any person for property captured or seized is that provided by the abandoned or captured property act. *Green v. United States*,* 10 Ct. Cl., 466.

§ 525. A party had a contract with the government to bring property out of the insurrectionary states to be delivered at Norfolk and to be purchased by the government at three-fourths of its market value. A cargo of such cotton was captured by a naval vessel of the United States and turned over to the treasury department under the abandoned and captured property act. The plaintiff applied for his cotton and exhibited his license. It was not delivered to him until after the war was over and the price of cotton had materially fallen. *Held*, that he was entitled to recover for such detention. *Lane v. United States*,* 2 Ct. Cl., 184.

§ 526. **Indian supplies.**—A., under contract with the government, furnished a large number of rations to the Creek Indians for which he was paid. Subsequently he furnished an additional quantity and then abandoned his contract. The government withheld the pay for the latter as an indemnity for the breach of the contract. A. alleged that the breach was caused by failure of the government to give him due notice of a very large number of Indians that were brought to the reservation at an unseasonable time of the year. While A. was guilty of a technical breach, yet in equity and justice he was entitled to pay for those rations he had

latterly furnished. Non-performance of a Contract for Rations Excused,* 3 Op. Att'y Gen'l, 682.

§ 527. Claimants were entitled and bound under their contract to transport to certain Indian agencies all the goods purchased by the Indian department for public service, and transported over a certain railroad under a particular contract with that road. *Held*, that a purchase by the department of goods deliverable at the agencies, thereby depriving claimants of their right of transportation, did not amount to a breach of contract. *Piper v. United States*,* 12 Ct. Cl., 219.

§ 528. Where a contract provided a certain price for rations delivered in certain Indian country, it was held that the contract must be construed as referring to the boundary as then reputed and for rations delivered within the then reputed boundary. The contractor was entitled to the contract price though the place of delivery should afterwards prove to have been without the country specified. *United States v. Wilkins*,* 6 Wheat., 135.

§ 529. Army supplies.—Among other things a contractor for army supplies agreed to furnish a supply of provisions for six months in advance at Detroit, and for nine months in advance for Mackinac. An unusually large supply having been required by the commanding officer, more than sufficient for the specified times and ten per cent. for contingencies, the contractor made claim beyond the contract price for the excess. The matter having been decided favorably to the contractor by a federal court, and the accounting officers having been directed by act of congress to be governed by that judicial decision in their settlement, allowed the contractor the fair market value for the excess of rations furnished. 3 Op. Att'y Gen'l, 524.

§ 530. The government, in entering into an agreement with certain army contractors, stipulated to provide proper storehouses, and that the contractors should suffer no loss for want of such storehouses. They then erected a temporary wooden structure on the margin of a river, exposed to storms and to the overflows of the river, by which means it was ultimately destroyed, together with some stored provisions. The government, not having erected proper buildings, is liable for the loss. *Storehouse for Army Provisions*,* 2 Op. Att'y Gen'l, 408.

§ 531. In addition to delivering specified rations, which had been contracted for, to the army, the contractor, acting under orders of the war department, furnished an additional ration of liquor to troops on fatigue duty; for the price of the latter he was entitled to elect whether he would take the sum stipulated in his contract, or charge the fair market value of the same. *Allowance for Extra Rations Furnished Troops*,* 3 Op. Att'y Gen'l, 463.

§ 532. A contract for army supplies provided that, in case of a deficiency, the commanding general, or person appointed by him at each post or place, should have the right to supply the deficiency by purchase, at the expense of the contractor, construed to mean that such authority is vested in the person appointed to take command at each post or place. *Duties of Government under Contracts for Supplies*,* 1 Op. Att'y Gen'l, 260.

§ 533. The commandant of a post, anticipating a failure of supplies under such a contract, may make provision for it by contracts before it actually occurs, though the contractor is not liable for it until after it takes place. *Ibid*.

§ 534. The general is under obligation to furnish a contractor an escort for supplies through an enemy's country. If such escort is not furnished the contractor is exonerated from the consequences. *Ibid*.

§ 535. A contract for army supplies for the troops at a certain post "for the space of six months in advance" does not mean in advance of a perpetually advancing point of time, but in advance of the point of time at which the supply is required to be placed at the post. *Contracts for Army Supplies*,* 1 Op. Att'y Gen'l, 389.

§ 536. Under a contract for army supplies which provided that, in case of a deficiency, the commanding general or person appointed by him at each post or place should have the authority to supply the deficiency by purchase, at the expense of the contractor, the contractor is not liable for a purchase to supply a deficiency by any person other than the commanding general or person appointed by him at each post or place. *Contracts for Supplies*,* 1 Op. Att'y Gen'l, 270.

§ 537. A contract was entered into between the war department and a manufacturing company whereby it was agreed that the government would receive all the carbines that the company could make within six months after the date of the contract, not exceeding six thousand, the weapons to be of a specified kind and to be inspected and approved by a designated officer. A few days after the acceptance of the contract, a request was sent to the company's agent, to report whether certain changes in construction could be made without additional cost to the arm, to which no reply was made, but the changes were nevertheless made. None of the weapons were ready for inspection or delivery within the time specified, and the entire lot of six thousand was not completed until two years after. The government never accepted any of the carbines, nor was there any obligation to do so after the expiration of the six months;

nor in law was it bound to pay for them or to pay damages for the non-acceptance. *Case of the Amoskeag Company*, * 13 Op. Att'y Gen'l, 46.

§ 538. The army regulation, number 1002, declaring that "no officer or agent in the military service shall purchase from any other person in the military service, or make any contract with any such person, to furnish supplies or services, or make any purchase or contract, to which such person shall be admitted to any share or part, or to any benefit to arise therefrom," does not apply to contracts requiring the approval of the secretary of war, who is not considered in the military service in the sense of the regulation. *United States v. Burns*, 12 Wall., 246; 4 Ct. Cl., 113.

§ 539. A contractor to furnish hay to a military post, who is prevented by the officers of the government from obtaining the hay at the place where the contract contemplated that it should be obtained, is not responsible to the government for the increased cost of the hay when procured from other parties. *United States v. Peck*, * 12 Otto, 64.

§ 540. If a contractor is required under a contract for army supplies, to place at a given post a given number of rations as a supply for three or six months, as the case may be, and he shall so place the required number of good rations, the government must either consume them or pay for them. *Contracts for Army Supplies*, * 1 Op. Att'y Gen'l, 339.

§ 541. A contract to furnish beef to the army in the field is complete when the cattle reach and pass under the control of the army, although the contractors' drovers accompany them, to act as butchers for the soldiers. And where some of the cattle are subsequently lost or captured, and before vouchers are given for them, the loss will fall on the government. *Battelle v. United States*, * 8 Ct. Cl., 295.

§ 542. For carrying mails.—A contract having been entered into between the government and a mail carrier for the carriage of mail in a specified territory, in ignorance of the fact that the condition of the roads in that locality would render the execution of the contract an impossibility, the contractor was entitled to abrogate the contract, and also to receive compensation, at the rate specified by the contract, for services in transporting said mail by steamboat. *Relief where Performance of Contract is Impossible*, * 3 Op. Att'y Gen'l, 492.

§ 543. A contractor for carrying the mails in two-horse coaches, at a certain rate, found it absolutely necessary, in order to accomplish the service, to employ four-horse coaches. This he did for a period of a year and a half during his contract with the knowledge of the department. *Held*, that he was entitled to extra compensation reckoned on the basis of his original contract, on the ground of an implied promise. *Huston v. United States*, * 19 Law Rep., 89.

§ 544. If a bidder for the transportation of mail on a steamboat route fails to execute his contract or begin service at the stipulated time, the postmaster-general has authority under section 14 of the act of March 3, 1845, to enter at once into a contract with responsible parties for the remainder of the term, at a price not exceeding the average rate paid under the last preceding contract, without the previous advertisement that is required before entering into a contract for general service. *Mail Transportation*, * 13 Op. Att'y Gen'l, 565.

§ 545. The postmaster-general has no authority to make any contracts for the conveyance of mails, other than for "temporary service," except under or in pursuance of bids received after inviting them by advertisement. If the lowest bidder at an "annual letting" fails to enter into contract and perform service, the postmaster-general cannot legally contract with the next lowest bidder who will agree to perform the service at his bid for the whole term, without advertising. *Contracts for Carrying Mail*, * 13 Op. Att'y Gen'l, 473.

§ 546. The acquiescence of a contractor for carrying mail, in settlements made by the post-office department with another contractor who carried mail over a part of the same route, estops him from questioning the settlement, and from attempting to recover a portion of the sums thus paid. *Railroad Company v. United States*, * 13 Otto, 703.

§ 547. Section 6 of the act of July 1, 1862, constituted a contract between the Union Pacific Railroad Co. and the United States, and that contract was not affected by the general provisions of the Revised Statutes relating to the fixing by the postmaster-general of the compensation to be paid for carrying the mails. The company being by the terms of such contract obliged to carry the mails if required, there was no waiver on its part of the terms of such contract, by performing the services required by the postmaster-general, though that officer had annexed illegal conditions to such performance. *Union Pacific R. Co. v. United States*, * 14 Otto, 662.

§ 548. Congress cannot, during the continuance of a contract for carrying mails, lessen the compensation provided for by the contract. *Chicago, Milwaukee & St. Paul Railway Co. v. United States*, * 14 Otto, 687.

§ 549. Delay — Demurrage.—A. contracted with the government to transport military stores between certain designated places, and it was provided that in case any of A.'s trains were delayed above a specified time by any act on the part of the government or its agents, a certain rate of demurrage should be allowed to him. One of the trains was stopped while

en route by order in writing of a proper officer, and the question of the government's liability in the premises arose. If, as some of the evidence showed, A.'s wagon-master, who had charge of the train, requested the officer that the train might be stopped, the government's liability for the delay would cease. The mere fact, however, that the wagon-master acquiesced in the order, without protest, is no fact tending to relieve the government of its liability. The language of the written order, effecting the stoppage: "In consequence of the bad condition of the transportation and the lateness of the season, I judged it detrimental to the interests of the government for the trains to proceed further this season, and ordered the property stored," etc., would make out a *prima facie* case for the claimant at law. Claim of Henry S. Bulkley,* 13 Op. Att'y Gen'l, 92.

§ 550. A person contracted with the government to do certain work and furnish certain materials. No time was set within which the work was to be done, nor did the United States reserve the power of suspending the work. *Held*, that under such circumstances the law implied that the work should be done within a reasonable time, and that the United States would not necessarily interfere to prevent this; and where it unnecessarily interfered with the work it is liable to the contractor for the actual damages resulting therefrom, but no more. *United States v. Smith*,* 4 Otto, 214.

§ 551. The United States agreed to pay a contractor a certain sum for a certain number of muskets if he could furnish them within six months. He could have made and delivered the number within the time, but at the request of the government he made certain changes in the weapons which necessitated greater time than six months. *Held*, that on the refusal of the government to accept the number thus altered and completed he was entitled to recover the damages sustained by him in consequence of such refusal. *Manufacturing Co. v. United States*,* 17 Wall., 592.

§ 552. Claimant and teams of his were hired by the government to transport forage to a certain point, and it was agreed that they were to be considered as in the service until the teams had returned to the point of starting. Arriving at the destination, he needlessly detains his teams while he waits for his payment. *Held*, he is not entitled to recover the *per diem* compensation for his teams during the time he so detained them, but that he is entitled to recover a *per diem* for himself, his horse, saddle and bridle for the time he was so detained by the officer who was to pay him. *Hawker v. United States*,* 4 Ct. Cl., 551.

§ 553. A government contractor cannot recover for the loss of his goods and teams resulting as the consequence of a delay in shipping the goods to await inspection, if his contract did not provide for any inspection before shipment. *Grant v. United States*,* 1 Ct. Cl., 61.

§ 554. Claimant was under contract to deliver five thousand bushels of corn at Fort Kearney on or before March 15. The government was to furnish an escort for his train while *en route*. For delays while waiting for an escort after application, he was to receive \$10 a day per team. On February 25, he requests an escort to be in readiness on February 28. On the 28th he is prevented from moving by the weather, and is so detained until the last of March. Then he waits for an escort until April 6, but without having made any further application; on that day he starts without an escort, is attacked by Indians and loses a great number of oxen, and is compelled to halt and wait for an escort. At length he reaches Fort Kearney and the corn is accepted and paid for. In his action for demurrage and the loss of his animals, *held*, 1, that he is entitled to recover demurrage only for the time he was waiting for an escort and not for the delay caused by the weather; 2, that inasmuch as he was entitled to demurrage under his contract for his delay in waiting for an escort, his starting without an escort was at his own risk and he cannot recover for the lost animals. *Porter v. United States*,* 9 Ct. Cl., 356.

§ 555. A contractor agreed to build a vessel of certain dimensions, quality and materials within a specified time. The government agreed to pay him for it a certain sum, but reserved control of the construction and the right to order changes and additions. If such alterations caused additional expense the government was to pay for them; if they created a reduction of expense the contractor was to make an allowance for them. Alterations were ordered, for which the government paid the extra price, but by such alterations a delay was caused which, together with an increase in cost of labor and materials, caused a loss to the contractor. *Held*, that such damages do not constitute a cause of action against the government. *McCord v. United States*,* 9 Ct. Cl., 155.

§ 556. Under a contract to furnish the masonry for the necessary piers, abutments and approaches of a government bridge, where the United States has the right to furnish plans and working draughts, they have no right to delay the exercise of this privilege beyond a reasonable time and thereby cause a tardy progress in the work which was assigned as a ground subsequently for taking it out of their hands. *Harvey v. United States*,* 8 Ct. Cl., 501.

§ 557. Eight-hour law.—The act of June, 1868, "constituting eight hours a day's work for all laborers, workmen and mechanics employed by or on behalf of the government," provides only for a reduction of the hours of labor, without mention in regard to the compensation

therefor. This silence leaves the various departments of the government to the guidance of the rule of equality of compensation for equal worth of labor in government and in private employment, and to compensate in accordance with the requirements of that rule. The Eight-Hour Law,* 12 Op. Att'y Gen'l. 530.

§ 558. Under the statute of June 25, 1863, a contract by the government with a laborer fixing a different length of time than eight hours as a day's work, is legal and binding. *United States v. Martin*,* 4 Otto, 400.

§ 559. Where a contractor agrees to furnish all the tools and labor necessary to get out certain building stone for a public building, and the government agrees to pay him the full cost of said labor, materials and tools, with fifteen per cent. added, and to furnish superintendents to supervise his work and keep account of its cost, and the contractor requires his laborers to work ten hours a day, such an arrangement will not be held in an action against the government by a laborer to recover additional wages for the extra time over eight hours each day, to be merely an evasion of the act of congress known as the eight-hour law. *Driscoll v. United States*,* 13 Ct. Cl., 15.

§ 560. Charter of vessels.—A steamer taken into the service of the United States as a transport by a quartermaster, who states the destination and compensation to the master, which are not objected to, and permits the vessel during the trip to remain in the possession and under the management of the master, *held*, to be in the service of the United States under a contract of affreightment, and not within the terms of the act of March 3, 1849, providing for compensation for property destroyed in the "service of the United States." *Shaw v. United States*, 3 Otto, 235.

§ 561. The United States, after hiring a steamer in Mexican waters and bringing it within the United States, could not, in the absence of fraud or concealment, insist that it was entitled to the steamer as being forfeited property, and that the owner could not, therefore, recover for the use thereof. *Clark v. United States*,* 5 Otto, 539.

§ 562. A vessel chartered for government service by a duly authorized agent of the war department, the destination of the voyage being unknown to the owner, was duly inspected by government inspectors and pronounced seaworthy. She started on her voyage heavily loaded with stores and troops, but after being out a short time she burst her blow-pipe and seemed to become water-logged. The soldiers, becoming alarmed, compelled the captain to run her into the nearest port, where she was detained by the war department for one hundred and six days, in spite of the repeated requests of the owner that she be delivered to him. During this time she was required to keep a full complement of officers and sailors on board, with fires and steam up ready to put to sea in an hour. At the end of this time the owner's request was complied with and she was delivered to him. *Held*, 1. That no warranty of the sea-going qualities of a vessel can be implied where the owner is kept in ignorance of the destination of the voyage and the use to which she is intended to be put. 2. That fraud cannot be imputed to an owner making no representations as to seaworthiness and affording every facility for inspection. 3. That the claimant is entitled to recover the *per diem* compensation for the period the vessel was detained, less thirty-three and one-third per cent., because of the diminished expense and risk of lying in port; to this sum must be added the cost of repairs made necessary by damages done to her by the soldiers. *Richardson v. United States*,* 2 Ct. Cl., 483.

§ 563. The claimant's steamer is chartered by the quartermaster department, the "war risk" to be borne by the government, and the "marine risk" north of Cape Henry by the owners. While in charge of a pilot selected by the captain she strikes upon a wreck and sinks. *Held*, 1. That this was a "marine risk" within the terms of the charter. 2. That the pilot is the employee of the owner and not of the government, though commissioned and paid a salary for the pilotage of government transports. 3. That the negligence of a public officer in failing to keep the wreck buoyed gives no cause of action against the government to one injured in consequence of such negligence. *Flushing, etc., Ferry Co. v. United States*,* 6 Ct. Cl., 1.

§ 564. The claimant's schooner was chartered during a public exigency, by orders of the commanding general, at a rate which exceeded the rate of compensation allowed by the regulations of the quartermaster-general. The rate at which she was chartered was, at the time and place, a fair rate for the services of such a vessel. She remained in the service of the government long after the exigency was passed. *Held*, that claimant was not entitled to recover a greater rate of compensation than that allowed by the quartermaster-general's regulations, after the passing of the public exigency. *Emery v. United States*,* 4 Ct. Cl., 401.

§ 565. Set-off.—The government was a party to two contracts, one of which had been fulfilled by the contractor, and the other broken. On the latter, for such breach, there became due the government the amount of the forfeiture specified in the contract and stipulated to be paid in case of breach. By act of March, 1843 (5 U. S. Stats. at Large, 617), it is provided that forfeitures in similar cases shall be due as liquidated damages. And so the government

may lawfully deduct the amount of the forfeiture that has accrued to it under the second contract from the amount due the contractor on the first contract. *Right of Set-off in the Settlement of Accounts of Contractors*,* 11 Op. Att'y Gen'l, 120.

§ 566. In a claim by several joint contractors against the United States, for the amount due on a contract satisfactorily fulfilled, the government could not set up a counter-claim against one of the joint contractors for an amount due as a forfeiture for breach of contract by such party. *Ibid*.

§ 567. Under the act of March 3, 1797, a person sued by the United States is entitled to the benefit of any credit in his favor, whether arising out of the transaction which is the subject-matter of the suit, or out of a distinct transaction. *United States v. Wilkins*,* 6 Wheat., 135.

§ 568. Advertisement.—A contract for supplies, made during a military emergency without advertisement, is not invalid under the act of July 4, 1864, because the supplies are not deliverable under it until from thirty to sixty days thereafter. That may be the "most expeditious manner" for the "immediate procurement" of them, under the circumstances. *McKee v. United States*,* 12 Ct. Cl., 504.

§ 569. The board of navy commissioners established by act of February 7, 1815, had authority to make a contract for stationery for the use of their office. Such contract having been duly made, whether abrogated or not by the act which repealed the above, it could not be rescinded by force of a statute or otherwise without proper compensation to him who held the contract when the repealing act was passed. *Gideon v. United States*,* 19 Law Rep., 88.

§ 570. Rent of property.—Where A., prior to the passage of the legal tender act, rented certain property to the United States for a term of years, at a certain monthly rent, and subsequently, by the depreciation of the value of treasury notes, the rent became very inadequate, the secretary of the interior possessed no lawful authority to increase such rent. *Platt's Case*,* 11 Op. Att'y Gen'l, 51.

§ 571. Purchase of land.—The postmaster-general, under proper authority, made a contract for the purchase of certain lands in New York which provided for the payment of the money, as soon as the attorney-general should have examined and reported the title perfect, and the conveyance should have been executed. The contract was not completed during the existence of the administration under which it was begun, because no act was then in force giving the United States jurisdiction of the premises. And such an act being subsequently passed, it was not necessary, nor in fact had the postmaster-general the power to make a new contract in regard to the land. And all the preliminary requisites having been complied with, the vendor was entitled to his purchase money. *New York Postoffice Site*,* 10 Op. Att'y Gen'l, 34.

§ 572. Limited by appropriation.—By the special provision of an act appropriating money for a particular work then in progress, it was declared that nothing therein contained should be so construed as to authorize any agent of the United States to bind the government, by contract, beyond the amount appropriated by congress. The president having entered into a contract under this act which would involve the expenditure of a sum exceeding the amount appropriated, it did not invalidate his contract. The limitation created by the proviso was construed not as a limitation of the president's power to contract, but of his power to bind the government beyond the amount appropriated by congress. *Contracts for the Extension of the Capitol*,* 6 Op. Att'y Gen'l, 26.

§ 573. Revision by executive.—The secretary of the interior, pursuant to the requirements of an act of congress, advertises for proposals for furnishing stationery. Where after due consideration he makes an award, it is final, and cannot be revised by the executive. *Contracts for Stationery*,* 6 Op. Att'y Gen'l, 226.

§ 574. Removal of Indians.—The act of April, 1836, made an appropriation for effectuating the treaties of 1832 and 1834 with the Chickasaw Indians. A clause in the latter treaty provided that when the whole or any portion of the nation intended to remove, the government would furnish competent persons to conduct them to their future destination. A number of the Indians desiring to be transported, the government contracted with A. to conduct them. A. is entitled to be paid out of the appropriations made by the act of 1836, though a part of the Indians making the request subsequently refused to go. *Contract for Removal of Chickasaws*,* 8 Op. Att'y Gen'l, 561.

§ 575. Money erroneously paid to a contractor, for unnecessary work done beyond that required by his contract, can be deducted from other sums due to him. *Construction of a Contract for Army Supplies*,* 3 Op. Att'y Gen'l, 539.

§ 576. Contractor elected to congress.—A contract entered into between the government and a private individual, being valid when made, is not invalidated by that individual's subsequent election as a member of congress. *Contracts with Members of Congress*,* 5 Op. Att'y Gen'l, 697.

§ 577. While congress, in passing the act of April 21, 1808, "concerning public contracts,"

had not in contemplation the employment of members of congress as assistant counsel to the district attorneys of the United States, still such contracts come within the purview of that act, as all agreements between governmental officers and members of congress are indirectly forbidden, it being the purpose of the act to prevent the exercise of executive influence over members of congress by means of contracts. *Contracts with Members of Congress*,* 2 Op. Att'y Gen'l, 88.

§ 578. *New parol contract.*—A contractor tendering horses, under a contract with the government, is informed by the chief of the cavalry bureau, that the war department has stopped the purchase of horses, and advised him to build corrals and barns and keep them over winter, and that the government will want them in the spring and pay him a good price for them. The contractor understood this as a contract on the part of the government to pay for the keep of the horses. In the spring they are inspected and sold to another quartermaster at an advanced price, which is the market value of such horses at the time. The vouchers given are accepted by the contractor and paid and no reference is made to the alleged parol contract to pay for the winter's keep. The contractor brings action for the care and keep of the horses during the winter. *Held*, that he is not entitled to recover. The first contract required the horses to be delivered at \$130; but if the contractor in the spring under a new contract delivered his horses at \$140, he waived his right to deliver them under the old contract at \$130 and to collect under his parol contract for their winter's care and maintenance. *Danolds v. United States*,* 6 Ct. Cl., 71.

§ 579. *Notice of want of official authority.*—Claimants had a contract with the government which bound them to deliver the whole amount of ice required to be consumed at certain points during the remainder of the year. The assistant surgeon-general in charge of the department undertook to construe this contract so as to enable the contractors to deliver thirty thousand tons in quantities of five thousand and ten thousand tons. The surgeon-general directed this order to be revoked, but the revoking order never reached the contractors, who proceeded to get themselves in to readiness to deliver the whole amount, and lost in consequence ten thousand tons. They brought suit for breach of contract. *Held*, they were not entitled to recover. The assistant surgeon-general had no power under the law to so construe their contract as to fix the amount they were bound to deliver, and they were charged with notice of his want of authority. *Parish v. United States*,* 12 Ct. Cl., 609.

§ 580. *Price not agreed upon.*—If there is no specific price agreed upon for articles furnished by a contractor for the use of the United States, the price is left to be adjusted by the government and the contractor jointly, and not by either party exclusively. If they differ, a reasonable compensation will be allowed by the courts, and what is such a reasonable compensation may be shown. The contractor may show that a sum allowed him by the accounting officers of the government is not a reasonable compensation. *United States v. Wilkins*,* 6 Wheat., 185.

§ 581. *Enhanced cost of labor.*—In the absence of a special contract to that effect, the United States is not liable to a contractor for the enhanced cost of labor and materials, in consequence of delay caused by changes ordered by the United States in the work during its progress. *Chouteau v. United States*, 5 Otto, 61.

§ 582. *Excess of authority.*—Assistant special agents of the treasury had no power to bind the government by contract for transporting, ginning and rebaling abandoned or captured cotton. The government is not bound by the acts of such agent done without authority, unless it manifestly appears that he was acting within the scope of his authority, or that he had been held out as having authority to do the act. *Whiteside v. United States*, 3 Otto, 247.

§ 583. *Where by a resolution of congress the secretary of war was authorized to award to government contractors damages for their loss provided certain personal property was surrendered by them and the contract canceled, he exceeded his authority if he included in the award the value of real estate.* *De Groot v. United States*, 5 Wall., 419.

§ 584. *Lease of building.*—An assistant quartermaster at Key West, during the rebellion, had no power to bind the government by the execution of a lease of premises for the use of the quartermaster's department, and such an agreement, though approved by the commanding general, was of no binding force unless approved by the quartermaster-general. The use and occupation of the premises by the government comes within the terms of the act of July 4, 1864, excluding from the jurisdiction of the court of claims claims against the United States growing out of the destruction, or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion. *Filor v. United States*, 9 Wall., 45.

§ 585. *A lease made to the secretary of war by name, and his successors, and entered into by that officer under authority of law, does not bind him personally, but is the contract of the government.* *Hodgson v. Dexter*,* 1 Cr., 845.

§ 586. *Naval supplies.*—The power of the secretary of the navy to contract for naval supplies does not include the power to promise indemnity to a citizen for losses incurred in mak-

ing experiments in relation to such supplies, though such experiments might result in a national benefit. *Myerle v. United States*, * 20 Law Rep., 633.

§ 587. **Property permitted to go to waste.**—When a quartermaster in charge receives of a person corn for the government, gives a receipt and voucher for the amount and price, and the government uses such part of it as it wants and suffers the remainder to decay by exposure and neglect, there is an implied contract to pay the value of such corn, which value may, in the absence of other testimony, be presumed to be the price fixed in the voucher of the quartermaster. *Salomon v. United States*, * 19 Wall., 17.

§ 588. **Party a contractor and not an agent.**—O. agreed to furnish men for certain work and was to receive the amount of wages paid out by him, with fifteen per cent. added. He was also to forfeit a certain sum for every day work was delayed by him. *Held*, that he was a contractor and not an agent for the government, and that there was no privity between the men employed by him and the government. *United States v. Driscoll*, * 6 Otto, 421.

§ 589. **Cutting wood on public lands.**—A contract for the delivery of wood at a military post provided that no trader, sutler, contractor or civilian would be allowed to cut timber from the public lands about the post until all required for the purposes of the United States had been secured. *Held*, that this provision did not give the contractor the right to cut wood on the public lands, but expressly forbade it. *Francis v. United States*, * 6 Otto, 354.

§ 590. **Acts binding on successor in office.**—Parties entered into a contract with the secretary of the navy for carrying to the Pacific Ocean all the naval stores that the government should have occasion to send there within a specified time. The secretary withheld certain stores or sent them in a public vessel, and a claim for damages arising from the same was presented to the secretary's official successor. That claim could not be entertained, for there is no law authorizing the head of any department to review the acts of his predecessors, and award damages for their assumed misconduct, or errors, and further authorize such damages to be paid out of the public treasury. *Claim of Benson for Damages*, * 5 Op. Att'y Gen'l, 28.

§ 591. **Sub-contractor.**—A government contract for the furnishing of certain brick provided that it should not be assigned or sublet. K. was employed by the contractors to furnish a certain quantity of brick, and was by them constituted their attorney in fact to furnish the brick and receive pay therefor. A resolution of congress directed the secretary of the treasury to examine the claim under the contract and settle the same. He thereupon awarded the contractors a certain sum as the only parties embraced in the contract, and K. received a part of that sum under protest. *Held*, that K. had no claim under the contract which he could enforce at law, because he was an employee and not a party to the contract, either originally or by substitution. *Kellogg v. United States*, * 7 Wall., 361.

§ 592. **Substituted contract.**—A government officer invited proposals for furnishing certain medical supplies, and a contract was drawn up and signed and transmitted to the surgeon-general, on whose approval it was to become binding. It was disapproved by him; but a new contract was entered into by the parties and approved, in which one place to which such supplies were to be furnished under the first contract was omitted. The substituted contract was fully executed. *Held*, that it superseded the proposed contract, and no action could be maintained on such proposed contract. *Parish v. United States*, * 8 Wall., 489.

§ 593. **Extending time of delivery.**—A party under contract with the government to furnish cloth for uniforms at a certain time and place, was unable to comply with his contract because of the destruction of his mill by fire. Upon application to the head of the bureau of clothing, he was informed that there was no power, out of congress, to release him from his contract, and that he must furnish the goods. The officer also remarked, that upon application to the assistant quartermaster, sufficient time would be allowed to deliver the goods. The contractor had the cloth manufactured and offered to deliver it. It was declined by the quartermaster-general to whom it was referred by the assistant quartermaster-general. On suit by the contractor for damages caused by such refusal, *held*, that the remark of the head of the bureau of clothing did not have the effect of extending the time of delivery under the contract. *Jones v. United States*, 6 Otto, 24; 11 Ct. Cl., 733.

§ 594. The order of an alteration in an article, in process of manufacture, which under the contract is to be delivered on a day certain, is equivalent to an extension of the time within which to deliver. *International Co. v. United States*, * 13 Ct. Cl., 209.

§ 595. **Construed against the government.**—A contract for furnishing certain Minnie rifles for \$27 each, "or such less sum as the ordnance department may have paid for guns like in quality or description, or contracted to pay the contractor," was, at the instance of the government modified by an indorsement thereon to the effect that the government would accept from the contractor certain described guns and bayonets "upon the value conditions as are herein specified" and the indorsement was signed by the officer making the contract. Guns of the substituted pattern were delivered and two thousand eight hundred were paid for at \$27 each. Payment for three thousand two hundred at that price was refused. *Held*, that the

substituted contract was ambiguous and should be construed against the government, being signed by its representative only, and being for its accommodation, and further that the government was bound by the contemporaneous construction given by paying \$37 each for the first lot of guns and was bound to pay that sum for the remainder. *Garrison v. United States*,* 7 Wall., 688.

§ 596. **Contract affected by enactment of a law.**—A contract between the government and a private party cannot be specially affected by the enactment of a general law. Where a party contracts to furnish certain supplies to the government at a fixed price, and the government by a statute subsequently passed increases the duty upon such articles so that they cannot be furnished except at a loss, such loss constitutes no claim against the government. Nor does the loss on such a contract occasioned by the subsequent enactment of the legal tender act. *Deming v. United States*,* 1 Ct. Cl., 190.

§ 597. **Property lost in military service.**—Teams of a government contractor under a contract to furnish supplies, captured by the rebels, do not fall within the provisions of the act of March 3, 1849, entitled "An act to provide for the payment for horses and other property lost or destroyed in the military service of the United States." *Grant v. United States*,* 1 Ct. Cl., 61.

§ 598. **Exorbitant charges.**—While it is true that great exorbitance of price in a contract with the government is a badge of fraud, still in determining the question in a given case whether the price charged was exorbitant or not, regard must be had to all the circumstances, the state of the country, the credit of the government, the place of contract, the kind of money in which payment would be made, the time of payment, the authority of the officer making the contracts and the likelihood of his acts being approved. *Child v. United States*,* 4 Ct. Cl., 176.

§ 599. **Implied Contract.**—An executive department undoubtedly has the right to make or ratify an implied contract not forbidden by law, and represents, and in an executive sense is, the government. When the war department treated property as held by it under contract, and paid the owner for or on account of its use, the court cannot say that it was "property appropriated by the army," but must treat it as the government treated it, as property held under an implied lease. *Waters v. United States*,* 4 Ct. Cl., 889.

§ 600. **Postponement of other contracts.**—Claimants, who were locomotive manufacturers, were ordered by the government to build fifteen locomotives for the military railroads, "to the exclusion of all other interests or contracts whatever;" it being understood that they were to be indemnified for any damage resulting from a compliance with that order. They were compelled to postpone contracts on hand in order to comply with the requirements of the government contract. *Held*, they are entitled to recover compensation for the damages suffered from such postponement. *Baird v. United States*,* 5 Ct. Cl., 348.

§ 601. **Cost of work exceeding limit fixed by congress.**—Congress authorized the erection of a public building and limited its cost to a certain sum. A contract was made with claimants for a sum within that limit. Extras were ordered and the limit thus exceeded; the amount of the limit was paid to the contractors and they were notified to stop the work. They bring their action for damages for not being allowed to complete the same. *Held*, they are not entitled to recover. They are chargeable with notice of the limit fixed by congress upon the cost of the work, and they cannot set up a breach of contract which in effect will do away with the restriction. *Trenton Locomotive and Machine Co. v. United States*,* 12 Ct. Cl., 147.

§ 602. **Tender of property — Refusal to accept.**—Under a contract to sell the government a large quantity of grain, if a portion of it when tendered for delivery is refused for the want of storage room, it is not necessary for the claimants to bring all their grain to the point of delivery and make a formal tender of it. It is sufficient if they have tendered a part of it within the time fixed by the contract and have made arrangements and been ready to supply the rest within the prescribed time. When the time fixed for the acceptance of the corn expired, the claimants had the right to throw the corn upon the government and seek the contract price or to dispose of it as trustees for the government, crediting it with the proceeds and looking to it for the balance which might remain. As such trustees the claimants were bound to use the prudence and diligence required of trustees under such circumstances. They had no right to ship to an unusual or dangerous market, or to hold what, under the circumstances, was a perishable commodity, for a better price. Having done so, they must bear the loss so incurred. *Held*, that they were not entitled to recover for the corn lost or spoiled on their hands, but that they should recover the fair profit on all the corn which the government neglected or refused to receive. *Hughes v. United States*,* 4 Ct. Cl., 64; *Grover v. United States*,* 5 Ct. Cl., 427.

§ 603. **Change of contract — Acquiescence.**—Claimant undertakes by contract to deliver "rubble-stone" for masonry for a certain price. The superintendent of the work compels him to deliver "ranged-rubble," which is a much better and more expensive grade of stone. *He*

makes no complaint to the supervising architect, and does not notify him of any intention to claim more than the contract price until after the work has progressed so far that it is not practicable to change the character of the wall. *Held*, that he is not entitled to recover more than the contract price. *Hawkins v. United States*,* 12 Ct. Cl., 181.

§ 604. *Death of contractor.*—A contractor for furnishing subsistence to the army having died while his contract is partially unfulfilled, neither his surety nor his general partner have any right to undertake the completion of the contract. But the performance of the contract having been completed by the surety or general partner and paid for by the treasury department, the administrator of the contractor cannot recover again from the government for supplies furnished by the surety subsequent to the contractor's death. *McPherson v. United States*,* 10 Ct. Cl., 488.

§ 605. *Extra work.*—Although the contract for a government building provides that no "extra charge for modification will be allowed unless such modifications are agreed upon in writing," yet if during the progress of the work the contractor is directed by the agent of the government to furnish extra material and perform extra labor, and he does so, and the building is thus rendered more valuable and useful, and it is thus accepted and used by the government, it will be liable on an implied contract for the extra labor and materials. This liability will not be affected by the fact that the cost of the building, as altered, exceeds the appropriation made for it by congress, nor by the provision of the act of June 2, 1862, requiring all contracts by the departments of war, navy and interior and their officials on behalf of the government to be in writing. *Grant v. United States*,* 5 Ct. Cl., 71.

§ 606. Although a contractor cannot recover for extra work, or for better materials used, unless with the authority of the other party, yet if a government officer in charge of the work authorizes changes in it from the contract specifications which necessarily imply an increase in price, or even if he silently, but with full knowledge, assents to such changes in the materials and work, the government is bound for such extras. *Cooper v. United States*,* 8 Ct. Cl., 199.

§ 607. *Reasonable compensation.*—Where a contractor is to be paid "a reasonable compensation," to be determined by a board of inspectors, and after the work is complete, the board of inspectors is appointed but is unable to determine upon the compensation, and no further steps are taken by the government to settle the amount of compensation to which the plaintiff is entitled, he may, after waiting a reasonable time, bring his suit in the court of claims for a *quantum meruit*. *Cooper v. United States*,* 8 Ct. Cl., 199.

§ 608. *Suspension of work.*—Where the government orders the work under a contract to be suspended, so as to prevent the completion of the work within the time and under the terms of the contract, the contractors may either treat the order to suspend as a breach of the contract and sue for damages, or they may finish the work when the government orders it to be resumed, collect the full amount of compensation under the contract and then sue for the damages occasioned by the suspension. The elements of this damage properly include the inconvenience occasioned by the change of seasons, the loss caused by non-employment of hands, advance of wages and lumber washed away and stolen. *Figh v. United States*,* 8 Ct. Cl., 319.

§ 609. *Miscellaneous.*—A., who had contracted to furnish all the ice required by the government at certain points, was ordered to deliver thirty thousand tons at certain named points. A few days afterwards the order was suspended, but it was never annulled. The contractor, before the suspension was known to him, contracted for and bought a sufficient quantity to fill the order, some of which melted while being held by him. There was no delivery or offer to deliver. *Held*, that he was entitled to recover what he had paid for the ice that was lost, and for what expense he was at in making the purchase and in keeping it until it was lost, and also on other ice so purchased. *Parish v. United States*,* 10 Otto, 500.

§ 610. An order of the assistant surgeon-general to a contractor in relation to the delivery of medical stores contracted to be delivered by him is binding on the United States. *Ibid*.

§ 611. A. contracted to deliver a certain quantity of timothy or prairie hay at certain points in Indian Territory. *Held*, that the contract was for the hay, and not for the cutting, etc., of grass. *United States v. McKee*,* 7 Otto, 233.

§ 612. A contract was entered into with an agent of the government by which there were to be delivered to the contractor the hides of all cattle slaughtered for the use of the Indians at certain agencies, "which the superintendent of Indian affairs . . . shall decide are not required for the comfort of the Indians," the hides to be about a certain number more or less. The commissioner of Indian affairs ordered all cattle to be turned over to the Indians on foot, and it was held that the United States were not liable for not furnishing the hides and that the order of the commissioner turning over the cattle on foot was an adjudication that the hides were necessary for the use of the Indians, and that the estimate of the number of hides did not bind the United States to furnish that number. *Lobenstein v. United States*,* 1 Otto, 324.

§ 613. A contractor for the transportation from A. to B. of all the corn required by the government at B. has no claim for damages on the government because it subsequently con-

tracts at A. for the purchase of corn to be delivered at B. *Shrewsbury v. United States*,* 18 Wall., 664.

§ 614. Where a contract, entered into by the board of navy commissioners, valid at the time it was made, remained unfulfilled at the passage of the act of August 31, 1842, it was held that the United States could not put an end to such contract, either by an act of congress or through the agency of the navy department, without being responsible to the other contracting party for the damages he sustained thereby. *Gideon v. United States*,* Dev., 126.

§ 615. Where parties contracted with the government to do a specified amount of printing, a portion of which has been rendered unnecessary by the interference of third parties, the contractors can claim no compensation for the work not done by them. *Erroneous Payment for Printing Land Patents*,* 3 Op. Att'y Gen'l, 539.

§ 616. The claimant sold horses and mules to the quartermaster of a military depot, who was acting under the orders of the general commanding, and received his vouchers for the price of the same. The contract was regular in form, and the horses and mules up to the standard required by the regulations. The department quartermaster refused to pay the vouchers in full, alleging that they were too high. *Held*, that the claimant was entitled to recover such sum as the department quartermaster had deducted from the contract price. *Akers v. United States*,* 2 Ct. Cl., 875.

§ 617. It seems the navy commissioners, constituted by the act of February 7, 1815, acting under the superintendence of the secretary of the navy, had authority, by the act of March 3, 1839, to make a contract for "blank-books, contracts and bonds," at specified prices, for the use of the board. *Gideon v. United States*,* Dev., 125.

§ 618. Claimant was surety on a contract to furnish forage, but was in reality a partner in the contract, which provided that upon default the receiving officer might "supply the deficiency by purchase and have the contractor charged with the difference." Claimant's principal made default and claimant sold the forage to the officers for a much higher price. Upon payment of the vouchers being refused he brought action in the court of claims. *Held*, that the government had a right to avail itself of his character as a partner and restrict his recovery to the original contract price. *Houston v. United States*,* 11 Ct. Cl., 763.

§ 619. A steamboat, the *Louis D'Or*, employed by the government to get another steamer containing military stores off the rocks, where she had grounded, and failing in that, to relieve her of part of her cargo, but which, upon approaching the steamer in distress, herself runs aground and remains there until helped off by a third steamboat, the *National*, and then immediately returns to her harbor without accomplishing anything for the vessel she was employed to relieve, can recover nothing on a voucher given her for such attempted service. *Johnson v. United States*,* 10 Ct. Cl., 414.

§ 620. A contract between the government and the *National* to so go to the relief of the *Louis D'Or*, after she had thus met disaster, is of no validity to bind the government. The government had no stores on the *Louis D'Or* and she was not in the service of the government, but of the owners. *Ibid*.

§ 621. A contractor, who is under agreement with the government to furnish one thousand carbines, is required to cease the manufacture and notified that they will not be received because they are of calibre 42 rather than 44, a defect which under the facts was due to the negligence of the inspector, rather than that of the contractor, is entitled to recover a fair compensation for the expense he has incurred toward fulfilling the contract, taking into consideration the value of the machinery and of the unfinished arms retained by him. *Lee v. United States*,* 4 Ct. Cl., 156.

§ 622. The claimant had brought a former action against the government for the breach of a contract for the manufacture of mail locks, and for damages arising by the refusal of the government to reassign to him a patent, in accordance with its agreement to do so; the decision then was adverse to his claim on technical grounds. Afterwards, in pursuance of a joint resolution of congress, the case was referred back to the court for its decision, with the recommendation that it be decided upon the principles of equity and justice. *Held*, that such action on the part of congress was not equivalent to awarding a new trial, but was merely a waiver of a technical defense. *Nock v. United States*,* 2 Ct. Cl., 451.

§ 623. A quartermaster voluntarily sent wagons to assist and hasten a delayed transportation train, without any request from the contractor or his servants. *Held*, in an action by the contractor, that the government had no right to deduct anything for the use of its teams from the freight earnings due the contractor. *Kihlberg v. United States*,* 13 Ct. Cl., 148.

§ 624. Under the joint resolution of August 31, 1842, and the act of congress of March 3, 1843, the appointment by the secretary of the navy of a commissioner to experiment in steam boilers, at a compensation of \$300 per month, was a contract authorized by law. Its continuance is until the report is completed and returned to the secretary of the navy. The provision

that "compensation shall be at the rate of \$300 per month," excludes any measure by days' service. *Reed v. United States*,* 1 Ct. Cl., 141.

§ 625. A blacksmith, having been employed by an assistant quartermaster to shoe government horses and furnish the shoes, failed to obtain payment, owing to the subsequent death of the assistant quartermaster; it was held, that as he had proved his employment and the reasonableness of his charges, he was entitled to the amount he claimed. *Donahue v. United States*,* 2 Ct. Cl., 340.

§ 626. Where a contractor is unable to complete work which he has undertaken for the government within the time contracted for, but is permitted to go on and finish it, the government has no right, by the interference of its officers, to compel him to do it in such a manner as to necessarily involve him in great loss. *Clark v. United States*,* 4 Ct. Cl., 148; 6 Wall., 543; reversing *Clark v. United States*,* 1 Ct. Cl., 246.

§ 627. A contractor undertook "to furnish all the material and make two hundred and twenty-one thousand cubic yards of embankment" for the government, at such places as he should be directed by the government engineer, for a fixed price per yard. The engineer selected a place where the inevitable waste by shrinkage and settling and action of the water would be exceedingly great. *Held*, that the contractor was entitled to a system of measurement which would allow for such waste. *Clark v. United States*,* 4 Ct. Cl., 148; 6 Wall., 543, reversing *Clark v. United States*,* 1 Ct. Cl., 246.

§ 628. A transportation contractor, having agreed orally to furnish transportation on a different route at the contract price, sent his agent to attend to it. The agent concealed the fact of agency from the officer in charge, and made a contract for himself for a higher rate. The transportation was furnished and vouchers issued for the higher rate. Upon suit on the vouchers by the agent in his own name, *held*, that he was entitled to recover only the contract price of his principal. *Carr v. United States*,* 13 Ct. Cl., 136.

§ 629. Under a contract providing that contractors shall erect shops, sheds, etc., for the government's laborers, on the written order and under the direction of the supervising architect of the treasury, an allegation of the erection of boarding-houses, barns, etc., with the full knowledge and consent of the officers of the United States, and upon their requirements and which were necessary was held insufficient. *Dix Island Granite Co. v. United States*,* 12 Ct. Cl., 624.

§ 630. Claimant had a contract for the delivery of one million pounds of corn. A third person, without his knowledge, requested the privilege of delivering a large quantity of corn on this contract, expecting to be able to get claimant to ratify the transaction. This was accepted and the corn delivered. The commanding officer refused to affirm the transaction or recognize the vouchers that had been issued for the corn, but directed that the transaction be treated as a purchase in open market, and that vouchers for the market price of corn be issued for it, at the same time directing the claimant to complete the delivery of the whole amount, and allowing him additional time in which to do it. *Held*, that as to claimant, the delivery by the third person was *inter alios acta*, and he could maintain no action in relation to it. *Dold v. United States*,* 13 Ct. Cl., 97.

§ 631. General Butler was ordered by the secretary of war to raise, organize and arm, not to exceed six regiments, the cost of which should not exceed "in the aggregate that of like troops now or hereafter raised for the service of the United States." *Held*, that this order must be merely directory, and he might at any rate contract for separate articles at such prices as he saw fit, provided the aggregate did not exceed the limit prescribed by the order. *Garrison v. United States*,* 7 Wall., 688.

IX. CLAIMS AGAINST THE GOVERNMENT.

SUMMARY — *Property taken for military purposes*, § 632. — *Money received through fraud of agent*, § 633. — *Assignment of claims*, §§ 634, 635.

§ 632. Where, in pursuance of an imperative military necessity, private property is taken for the use of the United States, the government officers are not trespassers, and the government is bound to make full compensation to the owner for the use of the property taken. *United States v. Russell*, §§ 636-39.

§ 633. Where the United States has come into the possession of the money or property of an innocent party by means of the fraud of its agents, such money or property cannot be held by the United States as against the owner. *United States v. State Bank*, §§ 640-41.

§ 634. The statute forbidding the assignment of a claim against the government does not apply where it is assigned by a debtor together with all of his other property for the benefit of his creditors. *Goodman v. Niblack*, §§ 642-46.

§ 685. In the absence of statutory regulations, an order drawn against a claim upon the government would, on acceptance, amount to an equitable assignment, *pro tanto*, of the claim. But under the act of February 26, 1853, an assignment of a claim, before the same is allowed and a warrant issued therefor, is void. *Spofford v. Kirk*, §§ 647-49.

[NOTES.—See §§ 650-800.]

UNITED STATES *v.* RUSSELL.

(13 Wallace, 623-632. 1871.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE CLIFFORD.

STATEMENT OF FACTS.—Private property, the constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. 2 Kent, 11th ed., 339; 2 Story on the Constitution, 3d ed., 596. Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy; or for food or medicine for a sick and famishing army, utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing, to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war, no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner. *Mitchell v. Harmony*, 13 How., 134.

Three steamboats, owned by the appellee, during the rebellion, were employed as transports in the public service for the respective periods men-

tioned in the record, without any agreement fixing the compensation to which the owner should be entitled. Certain payments for the services were made in each case by the government to the owner, but he claimed a larger sum, and the demand being refused he instituted the present suit. Prior to the orders hereinafter mentioned the steamboats were employed by the owner in carrying private freights, and the findings of the court below show that he quit that employment in each case and went into the public service in obedience to the military order of an assistant quartermaster of the army. Reference to one of the orders will be sufficient, as the others are not substantially different. Take the second, for example, which reads as follows, as reported in the transcript: "Imperative military necessity requires the services of your steamer for a brief period; your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing." Pursuant to that order, or one of similar import in substance and effect, the respective steamboats were impressed into the public service and employed as transports for carrying government freight for the several periods of time set forth in the findings of the court. Throughout the whole time the steamboats were so employed in the military service they were in command of the owner as master, or of some one employed by him and under his pay and control, and the findings of the court show that he manned and victualled the steamboats and paid all the running expenses during the whole period they were so employed. Unexplained and uncontradicted the findings of the court show a state of facts which plainly lead to the conclusion that the emergency was such that it justified the officers in each case in ordering the steamboat into the service of the United States, as the orders purport to have been issued from an imperative military necessity, and if so, they show beyond all doubt that the officers who issued them were not trespassers, and that the government of the United States is bound to make full compensation to the owner for the services rendered.

§ 636. *Under what circumstances private property can be taken for public uses.*

Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.

§ 637. *The government is always bound to reimburse one whose property has been taken or used for public purposes.*

Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation; and it never will

sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law. *Curtis v. Fiedler*, 2 Black, 478.

Tested by those rules, it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to congress or to the executive department, and not to the court of claims.

§ 638. *Jurisdiction of the court of claims — its limitations.*

Jurisdiction is vested in the court of claims, by the act of congress establishing the court, to hear and determine all claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, which may be suggested to it by a petition regularly filed in the court. 10 Stat. at Large, 612. Express authority, therefore, is given to the court by that act to hear and determine claims founded upon a contract with the government of the United States, whether express or implied. Claims of the kind before the court would certainly be within the jurisdiction of that court were it not that congress has passed a later act restricting to some extent the jurisdiction conferred by that provision. By the act of July 4, 1864, it is provided that the jurisdiction of the court of claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement thereof to the close. 13 Stat. at Large, 381.

Special reference is made in behalf of the appellants to that provision, and the argument is that it is decisive to show that the decree in this case is erroneous. Support to that proposition is chiefly drawn from the signification attributed to the word appropriation, and from certain remarks of this court in one of its recent decisions. *Filor v. United States*, 9 Wall., 48. Those remarks were made in respect to a claim where a military order was issued for the seizure of certain real estate for the purpose of compelling a lease of the premises, and the findings of the court show that the agreement for the lease was concluded under the pressure of that order. Apart from that it also appeared that the premises belonged to an insurgent in the rebel army, and the court of claims also found that the contract was void on that account. Applied as those remarks must be to the case then under consideration, no doubt is entertained that they were correct, but they cannot be applied to the case before the court, as the conclusion to which they would tend would contradict the finding of the court below in matters of fact, which cannot be reviewed in this court.

§ 639. *Steamers employed for a season in government service, and then returned to their owner, are not so "appropriated" as to exclude the jurisdiction of the court of claims.*

Briefly stated, the findings of the court in that behalf are as follows: That the military officers did not intend to appropriate the steamboats to the United States, nor even their services; that they did intend to compel the masters and crews, with the steamers, to perform the services needed, and that the United States should pay a reasonable compensation for such services, and that such was the understanding of the owner; that the steamers, as soon as the services

for which they were required had been performed, were returned to the exclusive possession and control of the owner. They were equipped, victualled, and manned by the owner, and he, or persons by him appointed, continued in their command throughout the entire period of the service. He yielded at once to the military order and entered into the service of the government, and the court here fully concur with the court of claims that there was not such an appropriation of the steamboats or of the services of the masters and crews as prohibited the court below from taking jurisdiction of the case. On the contrary, the court is of the opinion that the findings of the court of claims show that the employment and use of the steamboats were such as raise an implied promise on the part of the United States to reimburse the owner for the services rendered and the expenses incurred, as allowed by the court of claims. Valuable services, it is conceded, were rendered by the appellee, and it is not pretended that the amount allowed is excessive. Neither of the steamers was destroyed nor is anything claimed as damages, and inasmuch as the findings show that an appropriation of the steamers was not intended and that both parties understood that a reasonable compensation for the services was to be paid by the United States, the court is of the opinion that the objection to the jurisdiction of the court of claims cannot be sustained, as the claim is not for "the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion." Viewed in that light, the case is free of all difficulty, as the jurisdiction of the court, by the express words of the act of congress, extends to claims founded upon an implied contract as well as upon that which is express.

Certain other acts of congress have been passed in respect to property impressed or employed in the suppression of the rebellion, but it is not necessary to refer to them, as they have no application to any question presented in this record.

Decree affirmed.

UNITED STATES v. STATE BANK.

(6 Otto, 30-36. 1877.)

APPEAL from the Court of Claims.

Opinion by MR. JUSTICE SWAYNE.

STATEMENT OF FACTS.—Upon analyzing this case as it is presented in the record, the facts are found to be few and simple. Hartwell was cashier of the sub-treasury in Boston. He embezzled a large amount of money belonging to the United States by lending it to Mellen, Ward & Co. As the time for the examination of the funds in the sub-treasury approached, Mellen, Ward & Co. endeavored to tide Hartwell over the crisis and to conceal his guilt and their own by the devices out of which this controversy has arisen. They had sold to the Merchants' National Bank of Boston a large amount of gold certificates, with the understanding that they might buy back the like amount by paying what the bank had paid and interest at the rate of six per cent. per annum. Carter, one of the firm, arranged with Smith, the cashier of the State National Bank of Boston, to buy from the Merchants' National Bank of Boston gold certificates to the amount of \$420,000, and to pay for them with the checks of Mellen, Ward & Co., certified to be good by Smith as such cashier, and then to deposit the certificates in the sub-treasury, where they were to remain until the ensuing day. A receipt was to be taken from the

proper sub-treasury officer. The certificates were bought, paid for and deposited accordingly. Hartwell received them from Smith in the presence of Carter and made out the receipt to Mellen, Ward & Co., or order. Smith inquired why the receipt was to them. Carter thereupon indorsed it by the firm name to Smith as cashier, and Smith took it without further remark.

Subsequently, pursuant to a like arrangement between the same parties, Smith, as such cashier, made a further purchase of gold and gold certificates from the Merchants' Bank and converted the gold into gold certificates. The aggregate of the certificates thus procured was \$60,000. Thereafter Smith, as such cashier, at the instance of Carter, made a further purchase of gold certificates from another bank to the amount of \$100,000. All these certificates, amounting to \$160,000, were also deposited by Smith in the sub-treasury in the presence of Carter, and a receipt taken and indorsed as before to Smith as cashier. The receipts specified that the certificates deposited were "to be exchanged for gold certificates or its equivalent, on demand." Only \$60,000 of the last deposit is claimed by the appellee. The residue is not involved in this controversy. The total claimed is \$480,000. All these things occurred on the 28th of February, 1867. On the following day Smith presented the receipts at the sub-treasury and payment was refused. The certificates were all canceled and sent to the proper officer at Washington. The gold which they represented has since remained in the treasury of the United States. Carter gave Smith plausible reasons, not necessary to be repeated, for desiring to make the deposits. The court of claims found these facts: "He (Carter) submitted his plan to Hartwell, which was as follows: He proposed to buy gold certificates in New York, bring them to Boston, and borrow money upon them of the Merchants' Bank, and he then proposed to get Smith, the cashier of the State Bank, to pay for these certificates and leave them with Hartwell during the examination. Hartwell made no objection to this plan, but he thought Smith would not do it. The plan was carried into effect by Carter, as hereinbefore set forth; but Hartwell had no agency in carrying it out, except to receive the moneys and gold certificates paid to him on the 28th of February, as aforesaid, and he had no actual knowledge of the proceedings taken by Carter on that day to obtain said gold certificates. When Carter and Smith deposited the \$420,000 of gold certificates in the sub-treasury, as aforesaid, Smith did not know Hartwell, nor did Hartwell know Smith, or know that Smith was connected with any bank or money institution."

The case, under another aspect, was before us on a former occasion. *Merchants' Bank v. State Bank*, 10 Wall., 604 (BANKS, §§ 101-18). We there held, after the most careful consideration, that the legal title to the certificates was, by the purchases made by its cashier, vested in the State Bank. We find no reason to change this view. The finding of the court shows clearly that Hartwell knew when he received the certificates that they did not belong to Mellen, Ward & Co., and that they did belong to the State Bank, represented by Smith as its agent. Hartwell was privy to the entire fraud from the beginning to the end, and was a participant in its consummation.

It is not denied that Smith acted in entire good faith. What he did was honestly done, and it was according to the settled and usual course of business. Hartwell was the agent of the United States. He was appointed by them, and acted for them. He did, so far as Smith knew, only what it was his duty to do, and what he did constantly for others, and it is not denied that it was

according to the law of the land. 12 Stat., 711. Smith no more suspected fraud, and had no more reason to suspect it, than any other of the countless parties who dealt with the sub-treasury in like manner.

§ 640. *Where a trust fund has been perverted, the beneficiary can follow it at law as far as it can be traced.*

There could hardly be a stronger equity than that in favor of the plaintiff. It remains to consider the law of the case. The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced. *May v. Le Claire*, 11 Wall., 217; *Taylor v. Plumer*, 3 Mau. & Sel., 562.

Where a draft was remitted by a collecting agent to a sub-agent for collection, and the proceeds were applied by the sub-agent in payment of the indebtedness of the agent to himself, in ignorance of the rights of the principal, this court held that, there being no new advance made, and no new credit given by the sub-agent, the principal was entitled to recover against him. *Wilson & Co. v. Smith*, 3 How., 763 (AGENCY, §§ 405-6). See, also, *Bank of the Metropolis v. The New England Bank*, 6 id., 212 (BANKS, § 204).

A party who, without right and with guilty knowledge, obtains money of the United States from a disbursing officer, becomes indebted to the United States, and they may recover the amount. An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. *Bayne v. United States*, 93 U. S., 642.

§ 641. *The United States are bound by the same rules of law that bind individuals.*

The United States must use due diligence to charge the indorsers of a bill of exchange, and they are liable to damages if they allow one which they have accepted to go to protest. *United States v. Barker*, 12 Wheat., 560; *Bank of the United States v. The United States*, 2 How., 711 (BILLS AND NOTES, §§ 1624-29); *The United States v. Bank of the Metropolis*, 15 Pet., 377 (BILLS AND NOTES, §§ 127-34). In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved.

Atlantic Bank v. The Merchants' Bank, 10 Gray (Mass.), 532, and *Skinner v. The Merchants' Bank*, 4 Allen (Mass.), 290, are, in their facts, strikingly like the case before us, and they involved exactly the same point. It was held in each of those cases, after an elaborate examination of the subject, that the defrauded bank was entitled to recover. But surely it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party. The agent was agent for no such purpose. His doings were vitiated by the underlying dishonesty, and could confer no rights upon his principal.

The appellee recovered below the amount claimed. A different result here would be a reproach to our jurisprudence.

Judgment affirmed.

GOODMAN v. NIBLACK.

(12 Otto, 556-563. 1880.)

APPEAL from U. S. Circuit Court, District of Indiana.

Opinion by MR. JUSTICE MILLER.

STATEMENT OF FACTS.—There came into the hands of Niblack, as administrator *de bonis non* of the estate of Albert G. Sloo, the sum of \$150,000, and the complainant is the owner of a judgment against said Sloo for \$31,344.44, recovered in the supreme court of the state of New York, on the 20th day of January, 1855. The purpose of the present bill is to follow this money in Niblack's hands as a trust fund devoted by Sloo in his lifetime to the payment of that judgment. This trust arises, if it exist at all, out of a deed of assignment made by Sloo of all his property, rights, and credits to Benjamin H. Cheever and James Wiles, of the date of February 3, 1860, for the benefit of all his creditors, but with some preferences, among which is the judgment. The sum above mentioned was received by Niblack as the share of Sloo's estate in a claim of over a million dollars recovered in the court of claims against the United States and paid by the government to Marshall O. Roberts and Edward N. Dickerson, in whose names the judgment was recovered. The history of this claim, which is necessary to an understanding of the case in hand, is this:

The fourth section of the act of congress of March 3, 1847, chapter 62 (9 Stat., 187), directed the secretary of the navy to contract with Sloo for the transportation of the mails of the United States from New York to New Orleans, Charleston, Savannah, Havana, and Chagres, and back twice a month, at a compensation not to exceed the sum of \$290,000. The mail was to be carried in steam vessels of a character described in the act, not less than five in number, to be constructed under the supervision of officers of the navy, in such manner as to be easily converted into war steamers of the first class. Under this authority the secretary and Sloo executed a written contract on the 20th of April of that year, for the construction of the ships and transportation of the mails at the sum of \$290,000 per annum. On the 17th of August thereafter, Sloo entered into an agreement with Marshall O. Roberts, George Law, Prosper M. Wetmore, and Edwin Croswell, by which they were taken into this contract with him, and agreed to build the vessels, and run them, and perform the obligations of Sloo to the government. He was to receive one-half of the net profits of the venture and the four persons named the other half. In order to the perfect working of this agreement, a tripartite instrument in writing was made, in which Sloo is called the party of the first part, and Roberts, Law, Wetmore, and Croswell the party of the second part, and George Law, Marshall O. Roberts, and Berres R. McIlvaine, party of the third part, whereby, after reciting the agreement between the party of the first part and the party of the second part, the contract of Sloo is assigned to the party of the third part as trustees for the due execution of the agreement. This was signed by all the persons named.

The ships were built, and the mails carried for many years. By death and substitution, Marshall O. Roberts and Edward N. Dickerson became the surviving trustees under the agreement, and, as such, recovered, in a controversy with the United States in the court of claims, judgment for the sum of \$1,031,000 as money due under the original contract with Sloo, which judgment was affirmed in this court and the money paid to them. In the meantime, Sloo,

who had become insolvent, executed in 1860 the general assignment to Cheever and Wiles, already mentioned. He died before the final payment of the money by the government to Roberts and Dickerson. Niblack was appointed his administrator.

These facts are all set out in the bill, and copies of the several contracts and assignments are filed as exhibits. Another averment of the bill is that the sum really due to Cheever and Wiles, as assignees of Sloo, out of the sum paid by the government, was \$182,000; that Cheever and Wiles received \$37,000 of this money, and consented to the payment of the remaining \$145,000 to Niblack under some arrangement not understood by the complainant. It is also alleged that all the other indebtedness of Sloo which might have been a claim on this fund under his assignment to Cheever and Wiles has been paid and there remains no other claim on it than complainant's. It is also averred that Wiles and Cheever are not citizens of Indiana, and cannot be served with process, and are not made parties to the bill, and for the reasons above stated are not necessary parties.

The demurrer is, first, general, and, secondly, special as regards the failure to make Cheever and Wiles parties. The general demurrer is maintained on the ground that the assignments made by Sloo are void by reason of the provisions of section 3477 of the Revised Statutes. These provisions were enacted by congress in 1853 (10 Stat., 170), and were, therefore, not in force when Sloo made his contract with the government, or his agreement with Roberts, Law, and others. That agreement remains unaffected by them. They were in force, however, when he made the general assignment of all his effects to Cheever and Wiles, and as the complainant claims through it, and can probably succeed only in that way (because, as we are informed, the state court of Indiana has decided that the statute of limitations bars his claim as an ordinary debt), we must inquire whether that assignment is void under the act of congress. The statute has several times within the last few years received the consideration of this court. *United States v. Gillis*, 95 U. S., 407; *Spofford v. Kirk*, 97 id., 484 (§§ 647-49, *infra*); *Erwin v. United States*, id., 392.

§ 642. *Proper construction of section 3477 of the Revised Statutes.*

It is understood that the circuit court sustained the demurrer under pressure of the strong language of the opinion in *Spofford v. Kirk*. We do not think, however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs, as laid down in that opinion, and in the others referred to, are mainly two:

First, The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.

Second, That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the congress, as desperate cases, when the reward is contingent on success, so often suggest.

Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment. *Erwin v. United States*, *supra*, decided at the

same term as *Spofford v. Kirk*, is suggestive on this point. It was there held that the claim of a bankrupt against the United States passed by the assignment in the bankruptcy proceeding to his assignee, and that the latter, and not the original claimant, was the proper person to sue in the court of claims. "The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the statute aimed," said the court. The language of the statute, "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein," is broad enough (if such were the purpose of congress) to include transfers by operation of law, or by will. Yet we held it did not include a transfer by operation of law, or in bankruptcy, and we said it did not include one by will. The obvious reason of this is that there can be no purpose in such cases to harass the government by multiplying the number of persons with whom it has to deal, nor any danger of enlisting improper influences in advocacy of the claim, and that the exigencies of the party who held it justified and required the transfer that was made. In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of *all his effects*, which must, if it be honest, include a claim against the government, differ from the assignment which is made in bankruptcy? There can here be no intent to bring improper means to bear in establishing the claim, and it is not perceived how the government can be embarrassed by such an assignment. The claim is not specifically mentioned, and is obviously included only for the just and proper purpose of appropriating the whole of his effects to the payment of all his debts. We cannot believe that such a meritorious act as this comes within the evil which congress sought to suppress by the act of 1853.

§ 643. *The assignment of a government contract recognized as valid by an act of congress is not within the terms of Revised Statutes, section 3477.*

It is also to be remarked that the government had recognized Sloo's original assignment of his contract to Roberts, Law and McIlvaine as trustees, by permitting them to perform the contract and receive the pay under it for years; and when a dispute arose as to the sum due under that contract, congress, by the act of July 14, 1870, very fully recognized the validity of that transfer.

That act is in these words: "Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the claim of the trustees of Albert G. Sloo, for compensation for services in conveying the United States mails by steamers, direct between New York and Chagres, in addition to the regular service required under the contract made between the said Albert G. Sloo and the United States, be, and the same is hereby referred to the court of claims, and the said court is hereby directed to examine the same and determine and adjudge whether any, and if any, what amount is due said trustees for said extra service, provided that the amount to be awarded by said court shall be upon the basis of the value of conveying other first-class freight of like quantity with the mails actually carried between the same points at the same time."

This is still further recognized by the appropriation to pay this judgment "to Marshall O. Roberts and E. N. Dickerson, surviving trustees of A. G. Sloo," found in chapter 3 of the second session of the forty-fifth congress. 20 Stat., 7. The first agreement of Sloo, therefore, is unassailable. His assignment to Cheever and Wiles, in 1860, conveyed only his interest in the

profits of the contract which the parties in the first assignment were performing or had performed for the government.

§ 644. *An assignment of one's whole property, including an interest in a government claim, for the benefit of creditors is not within the mischief of nor prohibited by Revised Statutes, section 3477.*

The general assignment of Sloo, in 1860, gave Cheever and Wiles no right to assert a claim against the government. They could only deal with the trustees under the first assignment, and on them they had only the claim for net profits which came into their hands. Cheever and Wiles and the present complainant were neither of them capable of suing the United States in the court of claims, or of presenting the matter before the accounting officers of the government, and could give no valid or just acquittance to the government for any part of the claim. We do not think the transfer to Cheever and Wiles, as trustees for Sloo's creditors, is forbidden by the act of 1853, or by any other principle of law or of public policy.

§ 645. *Necessary parties.*

But we are of opinion that Cheever and Wiles are not only proper but necessary parties to this suit. The entire sum to which the estate of Sloo could possibly be entitled was assigned to them. The trust on which it was assigned remains unexecuted. They are charged with having received \$37,000 of that fund. What have they done with it?

If, as alleged in the bill, there are no other debts of Sloo secured by the assignment, this sum in their hands should be accounted for before a decree is rendered against his administrator. They are charged with consenting to the payment to the administrator of the fund now sought in this suit. There may have been good reasons for it, and if not, they may be personally liable for it. The fund can only be subjected to the complainant's debt through these trustees. It is only in right of the assignment to them that he proceeds. They are living, and cannot be divested of this trust by any decree to which they are not parties. The administrator has a right, if a decree is rendered against him, to have it made effectual against them.

Notwithstanding the allegation of the bill that all the liabilities of the trust fund except the complainant's debt have been discharged, this may not be so, and it may be in the power of these trustees, and it may be their duty, if made parties to this suit, to show that there are others entitled to share in it. No decree against that fund can rightfully be made while they are not before the court.

§ 646. *The proper course when a bill does not include among the defendants necessary parties.*

This, however, need not defeat the jurisdiction of the court if the bill is amended by making them defendants. This is a proceeding in equity to enforce a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, section 738 of the revised statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and this is all that is necessary to give the court jurisdiction to grant the relief prayed for by the complainant.

If the decree of the circuit court had dismissed the case without prejudice for want of proper parties, we should have been bound to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any other suit. It must, therefore, be reversed and remanded to that court.

If the complainant shall ask leave to amend his bill by making Cheever and Wiles defendants, he should be permitted to do so and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits. *Shields v. Barrow*, 17 How., 130; *Barney v. Baltimore City*, 6 Wall., 280 (Courts, §§ 1221-25); *House v. Mullen*, 22 id., 42; *Kendig v. Dean*, 97 U. S., 423.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion; and it is so ordered.

SPOFFORD v. KIRK.

(7 Otto, 484-490. 1878.)

APPEAL from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.—Kirk had a claim on the United States government, and gave orders on his agent against that fund, of which Spofford became the owner. Kirk refused to permit the orders to be paid, and Spofford filed a bill to enforce his demand as an equitable assignment, *pro tanto*, of the fund. His bill was dismissed and he appealed.

§ 647. *In the absence of statutory regulations, an order upon the proceeds of a claim upon the government would be an equitable assignment, pro tanto, of the fund.*

Opinion by MR. JUSTICE STRONG.

Whether the orders, drawn as they were upon a designated fund, made payable to order, and accepted by the drawees, are held by the indorsee free from any equities existing between the payees and the drawer, though the indorsee purchased them without any notice of such equities, is a question which the case does not require us to consider. It has been ably and elaborately argued by the counsel for the appellant, and if the orders could have any legal effect, we might be compelled to answer it. But there is a primary question which must be met and determined before we reach the one principally argued. It is, whether the orders are operative for any purpose. The complainants' case rests upon the assumption that, coupled with the acceptance of the drawees, they created an equitable lien upon the debt due from the United States to the drawer. If they did not, it is plain that the court below had no jurisdiction in equity to grant the relief asked for by the bill. The complainants' only remedy was at law. If they did, it must be because the orders and acceptances amounted to an equitable assignment, *pro tanto*, of the claim of the drawer against the government. The ingenious argument for the appellant is that the orders clothed the respective payees with absolute ownership of the several sums mentioned therein, out of whatever moneys might be coming into the hands of the drawees from the United States for the drawer; and it is said that the fund thus specified was unaffected by the orders, and had only a potential existence in the drawees' hands until it was received by them, but that from the moment of possession they assumed a trust to administer the fund in accordance with the directions given by the orders, having previously accepted them.

Another formal statement of the argument is, that the orders drawn by Kirk upon Hosmer & Co., and accepted by them, created in equity an absolute and irrevocable appropriation of their contents, when collected by the drawees from the drawer's claim against the government, and that when collected, the sums named in the orders were held by the drawees in trust for the

payees or their assignees. There is no substantial variance in the argument stated in these several forms. However stated, the equitable effect of the orders and acceptances, independent of any statutory prohibition, if they had any effect when they were drawn, was to transfer a portion of the drawer's claim against the United States to the payees. After the orders were given and accepted, the drawer could not, in a court of equity, insist that he was entitled to the entire amount which might subsequently be allowed for his claim. If, instead of two orders, he had given one for the entire sum which might be awarded to him by the government, there can be no doubt that it would have divested his whole interest, and vested it in equity in the person in whose favor the order was drawn. In other words, it would have been an equitable assignment of the claim. How, then, can it be that an order drawn upon the fund, or payable out of it, if accepted, is not a partial assignment? There is nothing in Story's Equity Jurisprudence, sections 1040 to 1047 inclusive, nor in any of the cases cited by the appellant, inconsistent with our holding that such an order is, in equity, a partial assignment.

§ 648. *Assignment of claims against the government under act of 1853, void, when.*

We are brought, then, to the inquiry whether such an assignment of a claim against the United States, made before the claim has been allowed, and before a warrant has been issued for its payment, has any validity, either in law or in equity. The act of congress approved February 26, 1853 (10 Stat. 170), entitled "An act to prevent frauds upon the treasury of the United States," re-enacted in section 3477 of the Revised Statutes, declares that all transfers and assignments thereafter made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself.

§ 649. — *scope of the statute.*

In *United States v. Gillis*, 95 U. S., 407, we had occasion to examine this act. We then concluded that it embraced every claim against the United States, however arising, of whatever nature, and wherever and whenever presented. We had not, however, before us the precise question which is here presented. That was the case of a suit by the assignee of a claim in the court of claims. We held he could have no standing there. We held also that such an assignee could not prosecute the claim in any court, or before the treasury department, against the government. We were not called upon to decide whether such assignments were invalid as between the assignor and the assignee. But if after the claim in this case was allowed, and a warrant for its payment was issued in the claimant's name, as it must have been, he had gone to the treas-

ury for his money, it is clear that no assignment he might have made, or order he might have given, before the allowance, would have stood in the way of his receiving the whole sum allowed. The United States must have treated as a nullity any rights to the claim asserted by others. It is hard to see how a transfer of a debt can be of no force as between the transferee and the debtor, and yet effective as between the creditor and his assignee to transmit an ownership of the debt, or create a lien upon it. Yet if that might be,—and we do not propose now to affirm or deny it,—the question remains, whether the act of congress was not intended to render all claims against the government inalienable alike in law and in equity, for every purpose, and between all parties. The intention of congress must be discovered in the act itself. It was entitled “An act to prevent frauds upon the treasury of the United States.” It may be assumed, therefore, that such was its purpose. What the frauds were against which it was intended to set up a guard, and how they might be perpetrated, nothing in the statute informs us. We can only infer from its provisions what the frauds and mischiefs had been, or were apprehended, which led to its enactment. One, probably, was the possible presentation of a single claim by more than a single claimant, the original and his assignee, thus raising the danger of paying the claim twice, or rendering necessary the investigation of the validity of an alleged assignment. Another and greater danger was the possible combination of interests and influences in the prosecution of claims which might have no real foundation, of which the facts of the present case afford an illustration. Within our knowledge there have been claims against the government, interests in which have been assigned to numerous persons, and thus an influence in support of the claims has been brought into being which would not have existed had assignments been impossible. We do not say that the passage of the act was induced by these considerations. It is enough that frauds or wrongs upon the treasury were possible in either of these ways, and it may be that congress intended to close the door against both. However that may be, the language of the act is too sweeping and positive to justify us in giving it a limited construction. We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the government.

It follows that, in our opinion, the accepted orders under which the appellant claims gave him no interest in the claim of the drawer against the United States, and no lien upon the fund arising out of the claim. His bill was, therefore, rightly dismissed.

Decree affirmed.

MR. JUSTICE FIELD did not sit in this case.

§ 650. Interest.—Where congress referred a claim against the United States to the court of claims with instructions to ascertain, determine and adjudge the amount equitably due, if any, it was held that the investigation was to be made according to the rules governing that court in the exercise of its ordinary jurisdiction, and that the prohibition upon the allowance of interest by it was not removed by the act committing the investigation of the claim to it. *Tillson v. United States*,* 10 Otto, 43.

§ 651. The defendant, a public contractor, upon settlement by the treasury department of his account with the government in 1808, was found to be indebted in the sum of \$2,200. Afterwards, in 1812, he claimed other credits which were not allowed in 1808, but were

allowed then. These reduced the balance against him of \$1,616. *Held*, that the government was entitled to interest from the date of the settlement in 1808 on the real balance of \$1,616. *United States v. Ormsby*, 3 Wash., 195.

§ 652. About 1812 the United States became indebted to Maryland in a large sum of money, the principal of which was liquidated prior to 1823, no interest being allowed. In 1852 an act was passed allowing interest, and providing that in the computation of it all payments were to be applied first to the interest, the surplus, if any, going in diminution of the principal, but no interest was to be allowed on interest. By this method a portion of the principal remained due, and the question arose as to the length of time interest should be allowed on it. The object of the act of 1852 was to allow interest and prescribe a rule for counting it. Therefore whatever portion of the principal was found to be due was entitled to draw interest as long as it remained unpaid. Claim of the State of Maryland,* 9 Op. Att'y Gen'l, 57.

§ 653. The claimant sold to the provisional government established in West Florida, arms, ammunition, etc., for which it was agreed to pay the sum of \$11,850. They were delivered at the garrison of Baton Rouge, used by the military of the government, and a portion afterward used by the United States forces at New Orleans in 1815. An act was passed in 1814, for the liquidation of all claims for advances made by the inhabitants of the province for the use and benefit of the United States. The claim in question was presented under that act to the accounting officers and disallowed. Subsequent appeals were made to congress and in 1848 a bill was passed for his relief. Under that act he was entitled to the full price as agreed by the contract of purchase; under the special circumstance he was also entitled to interest from the date of the sale in 1810, to the passage of the act of relief in 1848, at the rate of six per cent. Claim of Henry de la Francia,* 5 Op. Att'y Gen'l, 105.

§ 654. The established rule of the government of the United States is not to pay interest on claims, but congress may dispense with this rule by a general or special law. Payment of Interest by the United States,* 7 Op. Att'y Gen'l, 523.

§ 655. Prior to 1831, there was no law prohibiting the allowance of interest to claimants against the government, where it appears that interest is justly due. Accounts and Accounting Officers,* 2 Op. Att'y Gen'l, 463.

§ 656. Limitations.—The act of congress of June 8, 1872, referred the claim of the heirs of Francis Vigo which accrued in 1778, to the court of claims with directions that in passing upon it the court should "be governed by the rules and regulations heretofore adopted by the United States in like cases . . . and without regard to the statute of limitations." *Held*, that the bar of the lapse of time was removed, and that as the claim was found to be a just one, and as by the act of August 5, 1790, which would have embraced the claim if it had not been barred, interest was allowed on similar claims, interest was properly allowed. *United States v. McKee*,* 1 Otto, 442.

§ 657. The limitation of six years prescribed by the act of March 3, 1863, to claims against the government in the court of claims does not apply to a case where the claim was presented to the proper department within the six years and after a delay for more than the six years, not caused by the laches of the claimant, the matter is sent to the court of claims for adjudication by the head of the department. *United States v. Lippitt*, 10 Otto, 663.

§ 658. A claim was presented against the government for services, in taking charge of and disbursing a certain ship's cargo, some years after the rendition of the services (the evidence does not show how many) which was rejected by the secretary of the navy as being a stale claim; the court, however, held that as claimant had resided abroad and the department had on file all the data for the adjustment of the account, the claimant could not be charged with being remiss. *Smith v. United States*,* 1 Ct. Cl., 111.

§ 659. Re-opening accounts.—It is the settled rule in regard to the re-opening of adjusted accounts that, where an account has been once duly adjusted, settled and closed, by the proper officers upon a full knowledge of all the facts, and where no errors in calculation have been made, it cannot be re-opened without express authority of law, but must be regarded as final and conclusive. Claim of Ezra Carter,* 12 Op. Att'y Gen'l, 386.

§ 660. The act of March 3, 1845, declares that adjusted accounts shall not be re-opened without authority of law, providing, however, that it should apply to special acts, passed or to be passed. The act of March, 1841, directing the adjustment of the accounts of a certain firm with the United States was such a special act. Hence, it rested entirely in the discretion of the executive as to whether or not the matter should be re-opened. Accounts and Accounting Officers,* 4 Op. Att'y Gen'l, 378.

§ 661. Where a claim upon the whole evidence has been rejected by a departmental head, it is an irregular proceeding for his successor to review that decision. The proper remedy in such a case is by appeal to the president. Accounts and Accounting Officers,* 2 Op. Att'y Gen'l, 463.

§ 662. Attorneys.—The claimant of money from the treasury of the United States has power to change his attorneys for its collection, at any time, in the absence of a special agreement, and an attorney who has been superseded has, in such case, no lien on the fund claimed. *Bristol's Case*,* 11 Op. Att'y Gen'l, 8.

§ 663. In general, the secretary of war has no legal authority "to exclude authorized attorneys and agents from collecting bounties, and that in the presentation and payment of claims the claimant may act by attorney." But he may in his discretion decline to recognize an agent or suspend the transaction of business with him for "frauds and fraudulent practices" by such agent in the prosecution of claims before the department. Suspension of Claim Agents,* 13 Op. Att'y Gen'l, 150.

§ 664. A steamboat having been impressed into the military service of the government was destroyed by the explosion of one of her boilers. In a claim for indemnity under section 2, act of March, 1849 (9 U. S. Stats. at Large, 415), the burden of proof rests on the owner, and before he can receive compensation he must prove the ownership, the destruction, the military service, the unavoidable character of the accident, and the entire absence of negligence on his part. *Case of the "Joseph Pierce,"** 13 Op. Att'y Gen'l, 381.

§ 665. Claimants' boat was taken out of their possession and impressed into the service of the United States. While in that service she was injured. The boat being fully insured, the owners resorted to the insurers for compensation and obtained it. *Held*, they are not entitled to recover further damages for such injury from the government. *Dozier v. United States*,* 9 Ct. Cl., 342.

§ 666. Claimants' vessel, being impressed into the service of the United States, is injured while in that service. The government pays the *per diem* compensation, certified to by the impressing officer, up to the time she goes on the docks for repairs. *Held*, that claimants are entitled to such *per diem* up to the time she is returned to them in a condition for use. *Ibid*.

§ 667. Charter of vessel.—The owners of a vessel chartered her to the United States for a *per diem* compensation of \$150, with the provision that when the amount paid under the charter-party should equal the estimated value of \$40,000, the title of the vessel should vest in the government, and that at any time during the continuance of the arrangement the government should be entitled to acquire the entire property in the vessel, by paying the difference between the amount already paid on account of the charter-party and the estimated value of \$40,000. The owners were to bear the marine risk and the government the war risk. The vessel was lost by a war risk. *Held*, that the measure of the recovery, that the claimants were entitled to, was the difference between the amount already paid on account of the charter-party and the sum of \$40,000. *Propeller Co. v. United States*, 14 Wall., 670.

§ 668. Claimant chartered his vessel to the quartermaster department of the army, the marine risk to be borne by the owner, he undertaking that she was and should be kept during the whole voyage, tight, staunch, strong, well and sufficiently manned, victualled, tackled, appareled, and ballasted at his cost and charge. She put to sea with a government cargo, and during a stress of weather she sprung a leak and was driven into the port of St. Thomas. Here the master, without making any effort to communicate with the quartermaster department, hypothesized the vessel, cargo and freight, to raise funds to make the necessary repairs. Upon her arrival in New York the bond was not paid and she was libeled with her cargo and freight. The cargo was discharged on the ground that the court had no jurisdiction to entertain a libel against a cargo of the United States. Claimant brings suit in the court of claims to recover the *per diem* for the period until she was discharged from the custody of the marshal under the libel. *Held*, he is not entitled to recover. Her detention under the libel comes within his obligation that she shall be kept in every respect fit for service. *Goodwin v. United States*,* 6 Ct. Cl., 146.

§ 669. The owner of a vessel in the service of the government claims under a charter specifying her *per diem* compensation at \$300. After some months the steamer passes to another department, where she is allowed and paid only \$140 *per diem*, no reference being made to the former charter. The owner remonstrates, and after the vessel has left the service the quartermaster allows and pays him the additional sum of \$5 *per diem* for the period the vessel was compensated at \$140. No appeal was ever made to the quartermaster-general. *Held*, that this transaction was in the nature of a compromise, and no action would lie in the court of claims for the difference between the amount paid and the charter price. *Sweeney v. United States*,* 5 Ct. Cl., 285.

§ 670. A claimant whose vessel is in the service of the United States under an agreement for a *per diem* compensation, and who, after being informed of a reduction in the compensation by order of the quartermaster-general, allows her to remain in the service of the government, will be deemed to have assented to the reduction, and cannot recover the *per diem* contracted for. But a subsequent order for a further reduction of the compensation, of which no notice

is given to claimant, will not be deemed to be acquiesced in. *Crary v. United States*,* 5 Ct. Cl., 231; *Thome v. United States*,* 5 Ct. Cl., 242.

§ 671. Claimants' steamboat was chartered at St. Louis, with the alternative of impressment, to take a cargo of military stores to Fort Berthold at a certain *per diem* compensation, the possession and control of the boat remaining in the officers and crew of the owners. After discharging her cargo she started on her return trip, and during a gale of wind was blown aground, and all efforts to release her were unavailing. During the following spring an expedition was sent out by the owners with the concurrence of the government to bring her into port. Just before it reached her she was carried off by an ice-freshet and totally destroyed. *Held*, 1. That the vessel was not "in the service" of the United States in such a sense as to make the government liable as insurers under the act of March 3, 1849. 2. That the government was not the owner for the voyage, and that the expense of the expedition for her relief could not be charged against the government. *Reed v. United States*, 11 Wall., 591, reversing, 4 Ct. Cl., 132.

§ 672. For money expended.—An Indian agent expended a sum of money on the Cherokee reservation, and charged the same to the "Cherokee reservation," and never presented the charge to the government. After his death his representatives seek to charge the government with the amount so expended. *Held*, that the charge could not be allowed. *United States v. Duval, Gilp.*, 356.

§ 673. In an act passed by congress for the relief of an officer in the army, it was enacted that in settling the accounts of said officer, "the accounting officers of the treasury are authorized and required to credit him with any sum or sums of money paid or advanced by him" for certain designated purposes, on the production of proper vouchers by the secretary of the treasury. *Held*, that, under the act, the accounting officers were not the proper judges of the expediency or necessity of the advances covered by the vouchers; congress had pre-judged that, and the judgment of the officers was limited only to the evidence of the expenditure. *Riley v. United States*,* 1 Ct. Cl., 299.

§ 674. A marshal who has paid deputies for taking a census, and has made repeated, though ineffectual, efforts to obtain reimbursement from the proper department, may retain the amount out of public moneys in his hands, notwithstanding the deputies were paid the second time by his successor, though notice of the previous payment had been given to the government by the marshal. *United States v. Ten Eyck*, 4 McL., 119.

§ 675. An Indian agent was authorized to purchase an agency house, and had distinct orders not to exceed the sum of \$3,000 for this object. *Held*, that he could not charge the government with the excess of his expenditure beyond his orders. *United States v. Duval, Gilp.*, 356.

§ 676. The government allowed an Indian agent to expend a certain sum in erecting a cotton-gin and gin-house for use of the Indians. The agent expended beyond that amount large sums of money, which he seeks to charge to the government. By treaty with the Indians, May 6, 1828, they made a cession of certain territory to the United States upon the agreement that a certain part, on which were erected the cotton-gin and gin-house, was to be sold and the proceeds applied to the use of the Indians. The sale was made and the proceeds applied in accordance with the provisions of the treaty. *Held*, that the agent was not entitled to charge any more than he was authorized to expend; besides that, the government had paid for the cotton-gin and gin-house once, when the proceeds of the sale were paid to the Indians, and could not be compelled to pay for them again to the agent, who had erected them at his own hazard, so far as he had exceeded his authority in their cost. *Ibid.*

§ 677. Jurisdiction.—Under the resolution of December 28, 1869, the jurisdiction of the court of claims over claims against the United States by the owners of steamboats impressed into the service of the United States, was not restored, but such owners were thereby allowed to present such claims to the executive and legislative departments of the government. *United States v. Kimbal*,* 13 Wall., 636.

§ 678. The jurisdiction of the court of claims does not extend to cases arising *ex delicto*. *Langford v. United States*, 11 Otto, 341.

§ 679. Immunity from suit is an incident of sovereignty, but the government of the United States, in a spirit of great liberality, waived this immunity in favor of those persons who had claims against it which were founded on any law of congress or upon any contract with it, express or implied, and gave the court of claims power to hear and determine cases of this nature. But the court of claims has no equitable jurisdiction, and was not created to inquire into rights of equity set up by claimants against the United States. Consequently it will not take jurisdiction of the claim of the holder of a military bounty land warrant for compensation, on the ground that the government has wrongfully appropriated to other uses the lands ceded for his benefit. *Bonner v. United States*, 9 Wall., 156.

§ 680. Claimants bring their action at law against the government in the court of claims and recover damages, but are unable to obtain the equitable relief which they ask because the court has no equitable powers to reform a contract. They appeal to congress and a private act is passed referring their case to the court of claims, conferring equity jurisdiction to proceed according to the "rules and principles of equity jurisprudence" and to "reform said contract." They bring their second action accordingly, but set up, in addition, demands at law which might have been and were passed upon in the former action. *Held*, that a demurrer must be sustained; that the court can proceed only as a court of equity jurisdiction to give relief which it could not have given before, as a court of law. *Harvey v. United States*,* 12 Ct. Cl., 141.

§ 681. Arbitration.—By joint resolution, congress in 1860, authorized and directed the secretary of war to investigate and re-settle a claim for damages for property destroyed by soldiers, and make such allowances to the claimant as justice should require. *Held*, that the resolution did not constitute a submission to arbitration, and that the United States was not bound by the amount awarded, and could repeal the resolution without notice to him. *Gordon v. United States*,* 7 Wall., 188.

§ 682. Where a claim against the government before congress is referred by it to an accounting officer of the treasury with instructions to "adjust the damages," and "adjudge and award on principles of law, equity and justice the amount found due," such an award is an arbitration of the claim, and an acceptance of it is conclusive upon the claimant. *Carmick v. United States*,* 2 Ct. Cl., 126.

§ 683. Congress passed a joint resolution authorizing and requiring the secretary of war to re-state and re-settle his account of a former award to certain claimants; and the same having been done and while the award was yet unpaid, the resolution was rescinded, and all acts done under it invalidated. *Held*, that the passage of such resolution was not, in effect, a submission to the arbitrament of the secretary. *Gordon v. United States*,* 1 Ct. Cl., 1.

§ 684. *Held*, that where a departmental head is directed by congress to re-state and re-settle an account, such official acts not in a judicial capacity, but ministerially only. *Ibid*.

§ 685. Wrongful acts of government agents.—A purser in the navy issued, to the crew of a vessel, a quantity of a certain kind of clothing from his private stores, on which an advance of twenty-five per cent. was charged, and a small quantity from the public stores on which an advance of ten per cent. was charged. The commodore issued an order against taxing the crew over ten per cent. advance and was sustained by the secretary of the navy. The purser claims from the United States the difference between twenty-five and ten per cent. on what was and might have been sold, and loss by depreciation on articles not sold. *Held*, that, without considering whether the commodore and secretary had the right to issue the order, the purser could not hold the United States responsible for a wrong done by their agents. *United States v. Buchanan*, 8 How., 83.

§ 686. Where a consul exceeded his official powers in authorizing the sale of a vessel, pronounced unseaworthy, and in making a distribution of the proceeds, under the acts of 1803 and 1840, the United States were not responsible for the same to the master of the vessel, except as to such amounts as the consul may have retained under the act of 1803 as a part of the fund for maintaining destitute American seamen, or for the payment of the passages of seamen citizens of the United States desirous of returning here; or may have paid into the treasury or legally expended to the use of the United States. *Liabilities of the United States*,* 6 Op. Att'y Gen'l, 617.

§ 687. The claimant contracted to buy a number of condemned muskets from the chief of ordnance at private sale; subsequently, and acting upon the opinion of the attorney-general, the chief of ordnance revoked the contract. *Held*, that the contract was void and of no effect as against the government, being in contravention both of a statute, requiring a sale at auction, and of the settled principles of the law whereby the acts of a public agent, in excess of his authority, do not bind the government. *Cooper v. United States*,* 1 Ct. Cl., 85.

§ 688. The government is not responsible for any damage occasioned by the unauthorized acts of a commissary-general; and his discharge of a vessel, without any authority to do so, and without the master's consent, entitles the latter to claim only freight *pro rata*. *The Claim of John Martin for Freight*,* 4 Op. Att'y Gen'l, 142.

§ 689. Loan-office certificates.—The United States is not bound to pay "loan-office certificates" authorized by the continental congress where they were irregularly issued; and the fact that the United States paid interest for several years on such certificates, but disclaimed liability and held the certificates invalid as soon as the facts became known, creates no estoppel against denying their validity. *Ward v. United States*,* 10 Wall., 593; 1 Ct. Cl., 360.

§ 690. Property destroyed by troops.—A claim for compensation for property destroyed by the troops of the United States during the war of the rebellion cannot be enforced against

the United States in the court of claims since the act of July 4, 1864, denying jurisdiction to that court in such cases. *Pugh v. United States*,* 13 Wall., 633.

§ 691. Property of the claimant was destroyed at the outbreak of the war, by a subordinate officer acting under the command of his superior, in order to prevent its falling into the hands of and benefiting the enemy; *held*, that such act was an exercise of the right of *eminent domain*, the necessity of which justified the officer and establishes the liability of the government to make just compensation to the claimant. *Grant v. United States*,* 1 Ct. Cl., 41.

§ 692. Property destroyed by public enemy.—The government is not liable for private property destroyed by the public enemy without the negligence of the owner. *Grant v. United States*,* 7 Wall., 331.

§ 693. The government is liable for the destruction by the enemy of a building in consequence of its authorized occupation for military purposes. *Loranger v. United States*,* 20 Law Rep., 630.

§ 694. Compromise.—Claims against the United States which are disputed by the officers authorized to adjust such accounts may be compromised, and if the claimant voluntarily enters into such a compromise and accepts a smaller sum than the claim, and executes a discharge in full for the whole claim, he is bound by the adjustment and cannot sue for what he has voluntarily relinquished. *Sweeney v. United States*,* 17 Wall., 75.

§ 695. Where the quartermaster-general has ordered a reduction to be made from one of two vouchers held by the claimant as the proceeds of the same transaction, acceptance of payment of the unreduced voucher by the claimant, accompanied by a refusal to receive anything on that from which the reduction has been ordered short of the full amount, cannot in any sense be regarded as a waiver or submission to a compromise. *Heathfield v. United States*,* 8 Ct. Cl., 213.

§ 696. Congress has power to revoke the authority conferred on a head of a department to adjust a certain claim against the government, by repealing the resolution conferring authority upon him, and may refer the case to the court of claims. *De Groot v. United States*, 5 Wall., 419.

§ 697. Where a contractor accepts without objection the sum awarded to him on an adjustment of his accounts by the head of the department with whom he has contracted, he cannot maintain an action against the United States on any of the items embraced in the claim adjusted. *Murphy v. United States*,* 14 Otto, 464.

§ 698. Set-off.—An unliquidated demand against the government cannot be used as an offset against a demand by it. *United States v. Williams*,* 5 McL., 133. See SET-OFF.

§ 699. A marshal to whom the United States is indebted for fees earned by him may, when attached for neglecting to pay over moneys due the United States on executions, set up such indebtedness of the United States to him as an offset. *United States v. Mann*,* 2 Marsh., 9.

§ 700. The A. railway company being indebted to the United States upon a judgment, the United States applied for an execution. The B. company, which succeeded to the assets and liabilities of the A. company, applied to have a claim against the United States accruing subsequent to the judgment, and the validity of which was in controversy, offset against the amounts due under the judgment. *Held*, that the offset could not be allowed. *Railway Co. v. United States*,* 11 Otto, 639.

§ 701. The United States have the right to retain a sum out of a claim against it and set the same up as an offset against a contingent liability of the claimant as surety on an official bond. *McKnight v. United States*,* 8 Otto, 179.

§ 702. A suitor against the government in the court of claims submits to the provision in the law constituting that court that he is liable to have judgment rendered against him on an offset existing against him in behalf of the United States. The government, in permitting itself to be sued, has the right to annex such conditions as may seem fit. *McElrath v. United States*,* 12 Otto, 426.

§ 703. Where money is paid to a claimant who, at the time, protests against the amount allowed, and announces his intention not to abide by the settlement, the action of government officials, in making such payment, is not conclusive on the government, and in a suit by the claimant for the balance claimed by him, the United States may set up the amount as an offset if it was paid improperly. *Ibid*.

§ 704. A delinquent public officer sued by the United States cannot plead as a set-off a claim which, in its nature, is addressed to the generosity of the government to compensate for losses growing out of a faithful performance of his official duty and as to which the government is under no contract obligation. *United States v. Wells*, 2 Wash., 161.

§ 705. Nor can a marshal, having informed against delinquents under the excise law, who were afterwards pardoned, set up, as a counterclaim to a demand by the government, a claim for one-half of the penalties which might have been collected, on the ground that the govern-

ment could not deprive him of his share of the penalties by pardoning the offenders. Such a claim at best is unliquidated. *Ibid.*

§ 706. A party against whom the United States have recovered judgment, and who has not pleaded as a set-off a claim against the government for the rents collected from his real estate, which he abandoned during the war and which the government took possession of and leased as abandoned property, cannot set up such a claim two years after the judgment against him, in a petition for a writ of *audita querela*, and excuse his failure to plead it as a set-off by saying that he did not know that the proceeds of the lease of his property had gone into the treasury. Besides, the writ of *audita querela* does not run against the sovereign. *Avery v. United States*, 12 Wall., 304.

§ 707. Under the act of March 3, 1797, a defendant in an action by the United States cannot plead as set-off a claim against the government which has not been previously presented to and disallowed by the proper accounting officer of the treasury department, unless he was not able to produce voucher for such claim, or was prevented from presenting it by absence from the United States or unavoidable accident. *United States v. Smith*, 5 Am. L. Reg., 268; 1 Bond, 68.

§ 708. Where a defendant has in his own right an equitable claim against the United States for services rendered, or otherwise, and has presented it to the proper accounting officers of the treasury, who have refused to allow it, he may set it up as a credit on a suit against him for any balance of money claimed to be due to the government; but no judgment can be rendered against the government, although it may be judicially ascertained that the government is indebted to the defendant. *United States v. Tillow*,* 3 Ct. Cl., 454.

§ 709. Under the act March 3, 1797, a district attorney who is sued for public moneys cannot maintain a claim of set-off for costs not taxed but taxable, unless it has been presented to and disallowed by the proper accounting officers of the treasury. *United States v. Ingersoll*, *Crabbe*, 185.

§ 710. Evidence of equitable claims in the nature of set-off against the government by the defendant, which have been rejected by the proper accounting officer of the treasury, is admissible. *United States v. Fitzgerald*, 4 Cr. C. C., 208.

§ 711. The statute of March 3, 1797, allowing set-offs, though very liberally construed, does not extend to torts or unliquidated damages. *United States v. Buchanan*, 8 How., 83.

§ 712. In a suit by the United States on the official bond of an officer, for a balance due, no set-off will be allowed unless it appears that the item of credit claimed has been presented to the proper accounting officer of the treasury and by him disallowed, or the failure to so present it for allowance duly accounted for. *United States v. Corwin*, 1 Bond, 149.

§ 713. Where a government officer is sued for a balance due the government, he cannot plead as a set-off, a claim which he had already pleaded as a set-off to another demand of the government, to which he now proposes to plead the statute of limitations. The court will control the application of a set-off to one of two demands, and according to equity between the parties. *United States v. Prentice*, 6 McL., 65.

§ 714. The right of set-off against claims by the government is regulated exclusively by the acts of congress, and no local law or usage can have any influence on it. A claim against the government of which the defendant is the equitable owner by assignment, or a claim which is unliquidated, cannot be pleaded as a set-off. *United States v. Robeson*, 9 Pet., 819.

§ 715. While the claim of an officer against the government which requires legislative sanction is not a proper subject of set-off, there may be cases in which the court will make an equitable allowance of a claim which the auditor would not be authorized to make, but which should have been allowed by the head of the department. *United States v. Macdaniel*, 7 Pet., 1.

§ 716. When an action is brought by the United States to recover money against one who has a legal claim against them he may set off such claim. *United States v. Ringgold*, 8 Pet., 150.

§ 717. Assignment.—The common law rule, that choses in action are not assignable, has not been changed by the federal statutes, and a claim against the government cannot be transferred so as to enable the assignee to sue the government in the court of claims. *United States v. Gillis*, 5 Otto, 407.

§ 718. The act of February 26, 1853, to prevent frauds on the treasury, forbids only voluntary assignment of demands against the government, and does not embrace cases where there has been a transfer of title by operation of law. *Erwin v. United States*, 7 Otto, 392.

§ 719. The assignment or transfer of a decree against the United States in an equity proceeding by them for an accounting, rendered after the passage of the act of February 26, 1853, is void unless made in accordance with the provisions of that act; that is, unless executed in the presence of two witnesses, after an allowance of the claim and the issue of a warrant therefor. *Adams v. United States*,* 3 Ct. Cl., 812.

§ 720. By the act of congress of February 26, 1853, all transfers of any part of any claim against the United States shall be null and void unless executed in the presence of at least two attesting witnesses after the allowance of the claim. *Trist v. Child*, 21 Wall., 441.

§ 721. A "claim" against the United States within the prohibition of assignment is something in the nature of a demand for damages arising out of some alleged act or omission of the government, not yet provided for or acknowledged by law. When the demand is admitted, authorized or provided for by law it is not a mere claim but a debt. *Dowell v. Cardwell*, 4 Saw., 217.

§ 722. **Presentation of claims to accounting officers.**—Where a claim against the United States does not appear to have been presented to the proper accounting officers and by them disallowed, it cannot be allowed upon the trial in court. Act of March 3, 1797. *United States v. Duval*, Gilp., 356.

§ 723. In an action upon the bond of a depository of public moneys, sums claimed to have been paid by such depository for clerk hire and office rent cannot be offset unless it is shown that such claims have been presented to the proper accounting officer of the treasury, and evidence from the books of the treasury is indispensable to prove that fact. *United States v. Gilmore*,* 7 Wall., 491.

§ 724. Under the act of March 2, 1797, no claims of the defendant to credits in a suit by the United States against a government officer can be admitted which have not been disallowed by the accounting officer of the treasury, but they may be admitted though not presented and disallowed until after suit brought. *United States v. Hawkins*, 10 Pet., 125.

§ 725. In suits between the United States and individuals, no claim for a credit shall be admitted upon trial but such as shall appear to have been presented to the accounting officers of the treasury for their examination and by them disallowed in whole or in part. *United States v. Martin*, 2 Paine, 68.

§ 726. In a suit on a deputy postmaster's bond, claim of the principal defendant, not for commissions or receipts from boxes, but for damages for the unlawful discontinuance of the office, cannot be sustained as a credit unless it affirmatively appears that it had been presented to the auditor of the postoffice department and by him disallowed, or that he had been prevented from presenting it by unavoidable accident. *Ware v. United States*, 4 Wall., 617.

§ 727. The act of congress requiring that a claim cannot be set up as a counterclaim in an action by the United States against a disbursing officer until it has been presented to and disallowed by the proper accounting officer of the treasury, is not only reasonable but founded upon the soundest principles of public policy. *United States v. Lent*, 1 Paine, 417.

§ 728. By the act of March 3, 1817, it is provided that all accounts whatever, in which the United States are concerned, shall be settled and adjusted at the treasury department; a claim for bricks furnished and for masonry, coming properly within the purview of this act, and not having complied with it, presents no ground for presidential interference. *Accounts and Accounting Officers*,* 2 Op. Att'y Gen'l, 518.

§ 729. Although the court of claims may entertain jurisdiction before a claim has been presented to the proper department for payment out of the proper appropriation, yet the court must exact such presentation before giving relief out of the general appropriation. *Sweeney v. United States*,* 5 Ct. Cl., 285.

§ 730. **Transportation.**—The words "posts, depots, or stations," used in a contract for the transportation of military supplies, includes military posts and stations only. *Caldwell's Case*,* 19 Wall., 264.

§ 731. A contract for transportation gave the contractor the exclusive right to transport government supplies from points "on the west bank of the Missouri river." *Held*, that the words "on the west bank of the Missouri river" did not include places west of the river simply and not on it. *Ibid*.

§ 732. A contractor for the transportation of military stores is not in the military service of the United States, and he cannot claim the benefit of the provisions of the law of 1849, indemnifying persons in such service for property destroyed or lost therein. *Stuart v. United States*,* 18 Wall., 84.

§ 733. Animals and wagons used in government transportation contracts, but not taken from the possession or protection of the owner, are not in the "service of the United States" in the sense to entitle the owner to compensation for their loss. *Porter v. United States*,* 9 Ct. Cl., 356.

§ 734. **Delay of vessel — Demurrage.**—A contract with the United States provided that a vessel should proceed to Port Royal and discharge her cargo of coal. No other place of destination was provided for in the contract, but the quartermaster to whom the cargo was consigned, ordered it to proceed to Key West without delay. The master protested on account of the state of the tide, but the vessel was ordered to proceed at once, and while departing under tow of a government tug the vessel struck on the bar and was injured so that it could not pro-

ceed. The government officials, after some delay, unloaded the coal. *Held*, that the owners of the vessel were entitled to demurrage for the delay at the rate stipulated for in the contract. *United States v. Kimbal*,* 13 Wall., 686.

§ 735. **Effect of findings of court.**—A claim of a steamship company for carrying the mails was heard by the court of claims and such a finding of facts was made by it in relation to a certain trip that the supreme court directed the allowance of the claim of the steamship company for that trip. *Held*, that that decision was final and the matter of the claim for that trip was not open to controversy in the court of claims. *United States v. Steamship Co.*,* 14 Otto, 480.

§ 736. The supreme court, on appeal from the court of claims, directed that court to allow a steamship company a certain compensation for carrying the mails on a certain trip. The contract provided that for delays, etc., on the part of the company the postmaster-general might inflict such fines on the company as he might deem proper. After the case was remanded he addressed a letter to the court to the effect that if the company was to be allowed the compensation for the trip in question, then he elected to fine the company a sum named for delays therein. *Held*, that the election came too late. *Ibid*.

§ 737. **Lease—Successive suits.**—The assignee of a lease to the government brought suit to recover the rent due under the lease, but his action was defeated on account of a technical defect in the lease. Congress, thereupon, by act of November 15, 1856, enacted that the lessee should be permitted to sue as if the defect did not exist, and a suit was brought on which a recovery was had. *Held*, that such recovery did not preclude a second suit and recovery of rents accruing after the institution of such suit. *Cross v. United States*,* 14 Wall., 479.

§ 738. **Salary of officer—Sundays.**—P., employed as occasional weigher of the customs at a salary of \$2,000 per annum when employed, made out all his bills for services as follows: "for services" for a certain time "Sundays excepted, at the rate of \$2,000 per annum," and each bill had a receipt annexed. *Held*, that he could not claim compensation for the Sundays omitted on the ground that the \$2,000 mentioned was an absolute salary. *Pray v. United States*,* 16 Otto, 594.

§ 739. **Over-payment to assignee.**—Where a claimant under a contract gives another person an order on the secretary to pay to such person the sum due on the contract, and a larger sum is paid than is due, the maker of the order is not liable to the United States for the amount overpaid. *United States v. Jones*,* 8 Pet., 387.

§ 740. **Pay of servants of army officers.**—Up to 1863 the accounting officers of the government, under a somewhat doubtful construction of the law, allowed to commissioned army officers for pay of servant a sum equal to the pay and allowances of a private. In that year it was enacted that the act of 1861 increasing the pay of private soldiers should not be construed to increase the emoluments of such officers. In 1864 the pay of privates was increased, but the provision of the law of 1863 was not re-enacted. *Held*, that as the construction of the law up to 1863 was doubtful, and the act of 1863 was an expression of disapproval of such construction, the act of 1864 would not be construed so as to increase the allowance for servant's pay beyond what it was previous to 1861. *United States v. Gilmore*,* 8 Wall., 330.

§ 741. **Tax deducted from judgment.**—Where judgment has been rendered against the United States in the court of claims for the proceeds of captured and abandoned property, and no appeal has been taken or motion for a new trial has been made by the United States, the secretary of the treasury has no authority to deduct from the amount of the judgment a sum claimed by the government as internal revenue tax due upon the cotton. *United States v. O'Grady*,* 23 Wall., 641.

§ 742. **Supplies.**—Hay left in charge of the commander of a fort on the frontier, but under no agreement to purchase, was partly used for government purposes, part was wasted, and part suffered to decay from natural causes. *Held*, that the government was liable to the owner for that part which it used and which was destroyed by the negligence of its servants, at its value at the time it was received, and not at its value at the time it was used. *United States v. Gill*,* 20 Wall., 517.

§ 743. **Fraud.**—Where a person, by means of false and fraudulent vouchers, obtains a certificate of the public stock, the United States may elect to consider the certificate valid, and may recover its value from the person committing the fraud. *Fenimore v. United States*,* 8 Dal., 357.

§ 744. **Practice in departments.**—The treasury department may prescribe its own rules for the adjustment of claims against the government, and those rules, if reasonable, will be respected by the court. But when those rules go to a total denial of justice, to an absolute refusal to allow a just and legal claim, a court which has jurisdiction of the subject will not disregard the rights of the claimant. *United States v. Mann*,* 2 Marsh., 9.

§ 745. **An appropriation by congress in liquidation of a claim against the United States is conclusive upon the judiciary as to the amount of the claim.** *United States v. Williams*,* 4 McL., 567; S. C., 5 McL., 183.

§ 746. **Money lost by failure of bank.**—The proceeds of cotton seized under the confiscation act was deposited by the clerk of court in which the proceedings were pending in a bank which was a designated depository of public money. The bank failed, and judgment was rendered in favor of the claimant in the confiscation proceedings. *Held*, that payment into the bank was not payment to the United States, and that the claimant could not recover the sum lost from the United States. *Branch v. United States*,* 10 Otto, 673.

§ 747. **Removal of officer.**—The appointment, confirmation and commissioning of a first lieutenant in the marine corps, in 1866, in the place of one dismissed by the secretary of the navy, was as effectually a removal of the latter as if dismissed by direct order of the president over his own signature. *McElrath v. United States*,* 12 Otto, 426.

§ 748. The act of July 13, 1866, providing that the president should not summarily dismiss any officer of the military or naval service in time of peace, did not take effect till peace was announced by proclamation of the president dated August 20, 1866. *Ibid*.

§ 749. M. was dismissed as a first lieutenant in the marine corps in 1866, and his place was filled. In 1873 the secretary of the navy directed his restoration, and at the same time accepted his resignation; but at the time the place was filled by his successor who could only be removed on sentence of court-martial, and the complement of first lieutenants in the marine corps was filled. *Held*, that the order of restoration was inoperative, and that the lieutenant had no valid claim against the United States for pay and allowances as such officer between the time of dismissal and the time of his reinstatement and restoration. *Ibid*.

§ 750. The twenty-second treasury regulation forbidding the transportation of coin or bullion to any state in insurrection, except for military purposes or under license from the president, was valid, and was authorized by the act of May 20, 1862. The effect of the final proclamation of amnesty and pardon of the president of December 25, 1868, is limited to persons who "participated in the late insurrection or rebellion," and would not have the effect to restore to one who was not such a participant property which he had forfeited for a violation of that regulation. *Gay's Gold*, 13 Wall., 358.

§ 751. **Non-intercourse acts.**—Under the act of July 13, 1861, prohibiting commercial intercourse with the states in insurrection, except under license from the president, and in pursuance of the rules and regulations prescribed by the secretary of the treasury, no one except the chief magistrate could give such licenses. Those given by the military authorities were mere nullities. *The Ouachita Cotton*, 6 Wall., 521.

§ 752. **Captured and abandoned property.**—The act of July 27, 1868, accords the right to recover the proceeds of captured or abandoned property from the United States by process in the court of claims, to the "citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts." *Held*, that under this act citizens of Great Britain are entitled to prosecute such claims in that court, because citizens of this country are allowed to prosecute claims against that government by the process known as the "petition of right." *United States v. O'Keefe*, 11 Wall., 178.

§ 753. The effect of the proclamation of amnesty and pardon of the president of the United States of December 25, 1868, extends to aliens domiciled in this country who gave aid and comfort to the rebellion and will relieve them, when prosecuting a claim in the court of claims for the proceeds of captured or abandoned property, of the necessity of establishing their loyalty. *Carlisle v. United States*, 16 Wall., 147.

§ 754. The proclamation of pardon and amnesty by the president of December 25, 1868, did not have the effect to repeal the provisions of the confiscation act of July 17, 1862, nor in any way affect the title of condemned property that had become vested in the United States in 1865, under that act. *The Confiscation Cases*, 20 Wall., 92.

§ 755. The president of the United States having, pursuant to the act of July 17, 1862, issued a proclamation on December 8, 1863, promising a restoration of all rights of property, except as to slaves, to all concerned in the rebellion, who would take and keep inviolate the prescribed oath of amnesty, *held*, that the subsequent repeal of the act of July 17, 1862, would not affect the force and validity of the pardon, under the proclamation of one who had taken and kept inviolate the prescribed oath. *United States v. Klein*, 13 Wall., 128.

§ 756. The act of August 6, 1881, declaring that all acts, proclamations and orders of the president after March 4, 1861, respecting the army and navy of the United States, and calling out the militia or volunteers, are thereby legalized and validated, had that effect, and the provision of the president's proclamation and general orders of the war department, providing that every private entering the service under the plan set forth should be paid when honorably discharged the sum of \$100, is not controlled by the provision of the act of July 22, 1861, providing that the provisions applicable to three years volunteers (among them, that those who were honorably discharged should receive the bounty of \$100), should apply to two years volunteers and to all volunteers who have been or may be accepted into the service of the United States for a period of not less than six months. *United States v. Hosmer*, 9 Wall., 432.

§ 757. The act of March 3, 1863, suspending the writ of *habeas corpus*, and the act of March 2, 1867, declaring valid and conclusive certain proclamations of the president and acts in pursuance thereof, in the suppression of the rebellion, do not cover all acts done by the officers in the service of the United States, simply because they are acting under the authority of the president, as commander-in-chief, but only acts done under his orders and proclamations, and such orders or proclamations must be specially pleaded. *Bean v. Beckwith*, 18 Wall., 510.

§ 758. Where property or money of an innocent person has gone into the coffers of the nation by means of a fraud, to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged or injured party. *United States v. State National Bank*, 17 Alb. L. J., 188 (§§ 640-41, *supra*).

§ 759. *Illegal taxes.*—The remedy for demands against the United States for illegal taxes collected, which have been rejected by the auditing officers, is by suit in the court of claims. *United States v. Pacific Railroad*, 4 Dill., 66.

§ 760. *Confiscated property — Proceeds in treasury.*—Money, the proceeds of confiscated property, once in the treasury, cannot be withdrawn except by appropriation by law. Consequently the general amnesty and pardon by the president of all persons concerned in the rebellion will not have the effect to enable a person whose property has been confiscated to recover the same. But where property condemned, or its proceeds, have not vested in the treasury, but remain under control of the executive, or of officers subject to his orders, it will be restored to its original owner on his full pardon. *Knote v. United States*, 5 Otto, 149.

§ 761. *Equitable, as well as legal claims against the government are contemplated by law as proper items of credit on the trial.* *United States v. Ripley*, 7 Pet., 18.

§ 762. The credits allowed a government officer in the statement of his account by the treasury department are evidence in his favor as between him and the government, nor can he be precluded from benefit thereby, because he will not admit the debits therein entered, the evidence of which does not rest in the department. *United States v. Jones*, 8 Pet., 375.

§ 763. *Evidence.*—Where moneys of the United States come into the hands of an individual, and the books of the treasury do not exhibit the facts, and they cannot be known officially to the officers of the department, a statement of account certified under the act of March 3, 1797, is not evidence of the indebtedness, but the claim must be established by the evidence on which the statement is based. *United States v. Buford*, 3 Pet., 12.

§ 764. The United States have a right to apply sums due to officers as pay and emoluments to the extinguishment of any balance due to them whether owing in the capacity of a private individual or as a public officer. *Gratiot v. United States*, 15 Pet., 336.

§ 765. The exercise of a power, not warranted by law, by the head of a department, raising a mistaken expectation of compensation of an officer at the time of his acceptance of the office, cannot create such an equity against the United States as will be recognized and enforced in a court of justice. The only remedy is by application to congress. *Goldsborough v. United States*, Taney, 80.

§ 766. *Use of invention.*—Where an inventor and patentee of certain improvements in ship building proposes to apply such inventions to a vessel being built for the government, making no demand by virtue of his patent right, but permitting the matter of compensation to remain in abeyance, and expressed to be dependent upon the success of the experiment, and the government accepts such proposals and uses the inventions, then, if the experiment is successful, the government is liable for a fair and reasonable compensation for the use of such inventions. *Ericsson v. United States*, * 9 Law Rep. (N. S.), 557.

§ 767. An agreement to "lobby" the claim of a private person through congress, that is, to bring to bear private influences upon members of congress to induce them to vote for a private bill, irrespective of its merits, is void, as against public policy. *Trist v. Child*, 21 Wall., 441.

§ 768. *Government not liable for acts of officers.*—A foreign vessel was stranded through the unskillfulness or negligence of a member of the associated body of pilots. Suit was brought and judgment recovered against that association, but the marshal failed to collect the amount of the execution. For this breach the parties endeavor to make the government pecuniarily responsible. The government, however, is not a surety for the good conduct of the officers of the law appointed by it. Hence such an endeavor must fail. Responsibility for the Unskillfulness or Carelessness of Public Officers, * 7 Op. Att'y Gen'l, 229.

§ 769. *Mail carrier.*—By the terms of a contract for the carriage of mails, entered into between A. and the postmaster-general, the right was reserved to the latter to discontinue the route at his discretion. A. was entitled to notice of any determination to discontinue and an allowance of one month's extra pay. The postmaster-general discontinued the route only partially. He was entitled to do this, but at the same time it gave an option to the contractor to entirely avoid the contract and receive the one month's pay. And the fact that he chose to continue the service on the new terms renders the government liable only for the services actually performed. *Contracts for Transporting the Mails*, * 4 Op. Att'y Gen'l, 140.

§ 770. **Approval of president.**—Where an act of congress, passed for the purpose of settling the accounts of Wm. Otis, provided that the decision of the accounting officers in the matter must receive the approval of the president, it would have been inconsistent with the act for the president to have expressed an opinion in the matter before such settlement made, and also at variance with the established system of auditing and settling accounts at the treasury. President and Accounting Officers in Case of Otis,* 3 Op. Att'y Gen'l, 500.

§ 771. **Lease—Reduction of rent.**—The government rented the claimant's premises at a monthly rental of \$300 per month. Subsequently they notified her that the rent would thereafter be \$200 per month. She accepted this rent but requested the secretary of war to restore the rent to \$300, which was declined. She made no demand for possession and continued to receive the lesser rent and sign receipts therefor acknowledging complete satisfaction. This she continued to do for a period of thirty-six months. *Held*, that claimant must be taken to have acquiesced in the reduction of the rent by the government. *Dougherty v. United States*,* 5 Ct. Cl., 108.

§ 772. **Findings of officers not conclusive.**—The finding of the accounting officers of the treasury department upon a demand against the United States is not final so as to oust the jurisdiction of the court of claims under the act of June 25, 1868, authorizing the head of any executive department whenever any claim is made upon said department involving disputed facts or controverted questions of law to cause such claim to be transmitted to the court of claims, and the court has jurisdiction of a claim so transmitted by the secretary of war, notwithstanding it has already been passed upon by such accounting officers of the treasury. *Delaware Steamboat Co. v. United States*,* 5 Ct. Cl., 55.

§ 773. **Where wood is cut from the public domain with the design of selling it to the military authorities, the person so cutting it acquires no title to the wood and is entitled to recover nothing for it when seized for use by the military authorities.** But where the wood so cut is knowingly bought by the officers in command for the use of the troops, he is entitled to recover on the vouchers given for it. The payment in such case is for the cutting and hauling, and not for the property in the wood. *Spencer v. United States*,* 10 Ct. Cl., 255.

§ 774. **Use of property for military purposes.**—Where property is taken from a citizen and delivered to an officer of the government and applied to military uses, the government is liable for the value of it. *Brooke v. United States*,* 2 Ct. Cl., 180.

§ 775. **Use of building for hospital.**—The legal liability of the government for the safety of a building which it has seized and used as a small-pox hospital is simply that of a tenant. If it is accidentally destroyed by fire, whether in the possession of the government or after it is restored to its owner, there is no liability of the government for its value. *Lagow v. United States*,* 10 Ct. Cl., 266.

§ 776. **Miscellaneous.**—Powell was lieutenant in the 71st New York volunteers, an infantry regiment under command of General Hooker. He was a surgeon by profession and was detailed by General Hooker as surgeon in charge of a hospital. General Hooker testifies that "it was both necessary and proper that he should be mounted with two horses," and that he "was mounted with three horses and equipments, prepared for field service." Powell, together with his three horses and equipments and some swords and pistols, was captured by the enemy while in the discharge of his duty. *Held*, that under the act of congress of 1849 (9 Stat. at L., 414) Powell should be allowed the value of the three horses and equipments, not to exceed the amount authorized by the act of 1849, but that he was not entitled to anything for the loss of his swords and pistols. *Powell v. United States*,* 1 Ct. Cl., 400.

§ 777. A duly authorized agent of the United States entered into a contract with claimant for the purchase by the government from claimant of products of insurrectionary states. The contract contained the following clause: "Nothing in this contract shall be construed as incurring any liability on behalf of the United States." A navy officer seized a lot of cotton as captured and abandoned property, purchased by claimant to sell, under the above contract to the United States. Said seizure was made contrary to an executive order issued on the 24th of September, but before the navy officer received the order of the secretary of the navy to that effect, which was issued December 1st. As soon as the order was received the cotton was released and was subsequently disposed of according to claimant's contract. By reason of the detention of the cotton under the seizure it did not sell for as much as it would, had it been sold sooner, the market having gone down. *Held*, that the seizure did not amount to a breach of the contract by the United States, and claimant could recover only the contract price, and without any damages for the fall in the market: that the expenses of storage during the seizure should be borne by the United States. *Burnside v. United States*,* 3 Ct. Cl., 367.

§ 778. A subsequent ratification by congress of the acts of a territorial convention will inure to the benefit of an officer appointed in the course of such proceedings, and render valid a claim of his for services performed after his appointment. *Riley v. United States*,* 1 Ct. Cl., 299.

§ 779. A party being in the proper employ of the government is entitled to be reimbursed in the amount of a judgment and costs recovered against him, for a trespass committed by him under instructions from his superior officer. *King v. United States*,* 1 Ct. Cl., 88.

§ 780. Where a party was employed in a certain capacity, with the implied understanding that his services were to continue only for a certain duration, it was held that he could not recover for any period beyond that implied by his appointment. *Ibid.*

§ 781. A survey being delayed first by the astronomer of the government and subsequently by the contractor who has undertaken to make it, so that it cannot be completed during the autumn, but must be postponed until the following spring, the government, though liable for the expenses and services of the contractor during the period of delay caused by the government officer, is not liable for the period of delay caused by the contractor, nor for the inaction during the winter to which his delay contributed. *Jones v. United States*,* 1 Ct. Cl., 266, 883.

§ 782. Claimant was appointed agent of the navy department to purchase and ship anthracite coal "as specially ordered by the department." His duty was "to select anthracite coal under the direction of the department" "and to ship it to such points as may be indicated." His compensation was to be "a commission of five per cent. on the aggregate amount of the cost of the coal, its transportation and freight," which was to cover all his "expenses of selecting, purchasing and shipping the coal." The department directed him to ship to several home ports, including Charleston and Gosport. He was also directed to send coal to vessels which the government had provided in home ports to transport it to foreign stations. *Held*, that he was entitled to his commission on the cost of the coal and the freight to the home ports or to the vessels in the home ports, but he was entitled to no commission on the marine freight of the coal to the foreign stations, although he attended to the delivery on board the foreign bound vessels, and countersigned the bills of lading. *Tyson v. United States*,* 4 Ct. Cl., 884.

§ 783. Every person engaged in the trade of bringing cotton out of the insurrectionary districts during the rebellion under a treasury license, in view of its being attended by so many hazards and vicissitudes, is expected, for the large gains success brings, to assume all such as arise from the ignorance, perverseness, or cupidity of the agents and officers of the government he has to encounter in the progress of his adventure. He cannot recover from the government damages occasioned by the delay caused by capture and detention consequent upon the failure of the secretary of the navy to transmit to the officers of the fleet orders to respect such licenses. *Burnside v. United States*,* 3 Ct. Cl., 807.

§ 784. The claimant of captured cotton appeared on the quartermaster's registration book as "a thorough Union man, a poor shoemaker whose wife carried with her own hands, and walked two and a half miles nearly every day, provisions for the Union prisoners at the race-course; taking bread from her own table and using it without pay." This was corroborated by other evidence to the same effect. *Held*, sufficient to show that the claimant did not give aid or comfort to the rebellion. *Koester v. United States*,* 3 Ct. Cl., 95.

§ 785. An assistant quartermaster in the United States army sent a clerk to procure rooms for offices of the pay department. The clerk took possession of claimant's house, telling him that he would be paid a reasonable compensation for the use of his property. The quartermaster never ratified this arrangement, and during the two years and more that the premises were so occupied, he paid no rent for them nor even acknowledged that any was due. *Held*, that claimant was not entitled to recover. There was no contract on the part of the government to pay rent. The clerk had no power to bind the government, and his action was never ratified by the quartermaster. The taking of the property was such an "appropriation" by the army as ousts the jurisdiction of the court of claims, under the act of July 4, 1864. *Ayres v. United States*,* 3 Ct. Cl., 1.

§ 786. A claimant who had sold cotton to the treasury agent of the United States under the act of July 2, 1864, and the treasury regulations of September 24, 1864, for the purchase of products in the insurrectionary states, has no cause of action against the government for the subsequent capture of the cotton by the military authorities, while the cotton was stored, and before delivery to the treasury agent. An order of the president on the certificate of a purchasing treasury agent promising immunity from seizure and detention of products of the insurrectionary districts while "moving in compliance with the regulations of the secretary of the treasury" does not extend to products not in transit but stored by the contractor. The only remedy of the contractor in such a case is under the abandoned or captured property act. *Noble v. United States*,* 11 Ct. Cl., 608.

§ 787. The commissioner of internal revenue, acting under the authority of a statute, ordered that the "Tice" meter should be attached to distilleries, at the expense of the distiller, as a condition to the right of distilling. The commissioner directed that the price of the meter should be deposited with the collector, and the meter was then ordered of the manufacturer by the commissioner. Under this arrangement a distiller is notified that if he does not pay for and attach two meters previously ordered his distillery will be closed. He does so, but the

meters are found defective and are never used. Afterwards the department abandons the use of meters. Claimant brings action against the government to recover the price paid for such meters. *Held*, that the government is not liable. The arrangement for purchase through the government was simply to protect the distiller from the imposition of an exorbitant price by the manufacturer when the government ordered the use of the meters. The government did not guaranty the meters. *Sausser v. United States*,* 11 Ct. Cl., 588.

§ 788. The cashier in a sub-treasury of the United States embezzled the government funds and loaned them in very large sums to one Carter. Upon the approach of an examination of his accounts he insisted upon a return of the funds so loaned. Carter, having first submitted the plan to him and no objection being made, proceeded to buy gold certificates; and to pay for them, he induced Mr. Smith, cashier of the State National Bank, to certify the checks of the firm of brokers, of which Carter was a member, on condition that Mr. Smith was to hold the gold certificates, which Carter told him would be exchanged for gold at the sub-treasury. Mr. Smith did certify the checks of Carter's firm and the certificates were bought with them to the amount of \$580,000. Carter and Smith went together to the sub-treasury where the certificates were left with the defaulting cashier and a receipt given for them to Carter by whom it was indorsed to Smith. The certificates were canceled and sent on to Washington to cover the cashier's defalcation. Upon presentation of the receipt by Smith next day, the sub-treasury officials declined to give him either the money or the certificates. The State National Bank then brought its action, in the nature of *assumpsit* for money had and received, in the court of claims against the government. *Held*, 1. That although an action will not lie against the government for wrongful acts of its servants, this case did not come within that rule. Here the cause of action was based upon the lawful act of the cashier in receiving the certificates and receipting for the same, and the government cannot avail itself of his subsequent wrongful use of them to cover his defalcation. 2. The government having in its possession gold coin belonging to the claimant, the judgment will be rendered for gold coin. *State National Bank v. United States*,* 10 Ct. Cl., 519. See §§ 640-41, *supra*.

§ 789. The claimant, being the owner of a sutler's store, built on a government reservation, was forbidden by the commanding officer to sell it to his successor. It was recommended by the quartermaster-general that the building be purchased at its appraised value. It was appraised, but a third party made a claim founded on a mortgage. The government refused to purchase except on the receipt of a deed from both the claimants. Before this condition was complied with the government withdrew its proposition to purchase. The claimant brought his action in the court of claims. *Held*, that he is not entitled to recover. The right of one contracting party pending negotiations to withdraw any proposition made to the other before it is accepted cannot be questioned; a mere voluntary compliance with the conditions of the proposition afterward does not render the other liable on it. *Mayer v. United States*,* 5 Ct. Cl., 317.

§ 790. The claim of the people of Georgia against the Creek nation for property destroyed by them did not extend further back than June 29, 1796, when the treaty of Colerain was entered into between the federal government and the Indians. But for property destroyed between that date and March 30, 1802, they had a claim, as far as the same was not satisfied under the provisions of the act of May 19, 1796, regulating trade and intercourse with the Indian tribes, and preserving peace on the frontiers, and the act of March 3, 1799, providing for the same objects, subject to set-offs of claims of the same description which the Creek nation might be able to establish on their part. In regard to negroes that should have been restored under the various treaties, their claims might extend to the issue of all the females whose mothers ought to have been delivered up. *Georgia and the Treaty of Indian Spring*,* 2 Op. Att'y Gen'l, 110.

§ 791. A claim for a sum of money forfeited by reason of a failure to comply with the terms of a contract is not a good one; such sum can be refunded only by authority of congress. *Duties of Accounting Officers*,* 2 Op. Att'y Gen'l, 480.

§ 792. It is not competent for the accounting officers of the government, in the absence of legislative authority, to allow a claim of a commissioner for the exploration and survey of the northeastern boundary. *Compensation of Commissioners of Exploration*,* 4 Op. Att'y Gen'l, 269.

§ 793. Where a negro, the property of an alien, has been abducted, the owner must seek his redress in the courts; the government itself cannot interfere in his behalf, further than to direct the district attorney to institute a prosecution, if the facts in the case will warrant it. *The Executive and Judiciary*,* 4 Op. Att'y Gen'l, 269.

§ 794. The fact that the United States have in their hands a fund belonging to their debtor, being the proceeds of an award under a treaty, is no impediment to the prosecution of their suit. They may, if they elect to do so, apply so much of the money thus awarded as will satisfy their claim. But this power, until exercised, constitutes no bar to their suit. *United States v. Myers*, 2 Marsh., 516.

795. Where a navy agent pays out money irregularly without taking the purser's receipt, or allows the latter to take the receipt for money so paid, and exhibit it to the government and obtain a credit thereon, his only redress is against the purser. *United States v. Hawkins*, 10 Pet., 125.

§ 796. A lease for the term of three years, entered into in behalf of the United States by the postmaster-general, provided that no payment on account of the rental should be made until an appropriation became available. At the time the lease was entered into, congress had enacted that it should not be lawful for any department of the government to expend in any one fiscal year a sum in excess of the appropriation for that year, or involve the government in any contract for the future payment of money in excess of such appropriation, and that no contract should be made unless authorized by law, and under an appropriation adequate to its fulfillment. The lease was not authorized by law, but congress appropriated the stipulated rent for two successive years. About four months before the second year expired, congress appropriated a much smaller sum for the rent of the house for the third year, but provided that it should be surrendered to the owner on demand at the end of the second year. No demand was made, and at the end of the third year action was brought for the stipulated rental for that year. *Held*, that the lease was drawn with reference to the acts of congress first mentioned, and subject to the action of congress as to appropriations, and that as the premises had not been demanded the owner must be held to have acquiesced in the sum appropriated for the third year's rent. *Bradley v. United States*,* 8 Otto, 104.

§ 797. The payment by the government of a part of the claim against it to the assignee under a void assignment is no waiver of the invalidity of the assignment as to the residue. *McKnight v. United States*,* 8 Otto, 179.

§ 798. One Chorpenning appealed from the action of the court of claims dismissing an action brought by him against the government. Pending the appeal, congress, by resolution of July 15, 1870, referred the matter to the postmaster-general, who found there was due the claimant a certain sum. Before anything was done the resolution of July 15 was repealed, and the postoffice appropriation bill provided that no part of the money voted should go to the payment of the claim. *Held*, that the United States was not bound to pay the amount found due by the postmaster-general, and that the act last referred to showed the intention of congress that the claimant should receive nothing without its further action. *Chorpenning v. United States*,* 4 Otto, 397.

§ 799. A debtor of the United States placed in the hands of a public officer certain evidences of debt which were to be collected by the supervisor and applied to the payment of the debt due the United States. A suit was instituted and certain moneys were paid on the judgment thereon to the agent employed by the supervisor to sue. *Held*, that the debtor was not entitled to credit the amount thus recovered, it not having come into the hands of a public officer authorized to receive it. *United States v. Patterson*,* 7 Cr., 575.

§ 800. By treaty with the Cherokee Indians large sums of money were appropriated to be paid one Graves. These sums were put into the hands of an Indian agent, who paid them to Graves. Graves drew on the government for the same money and the order was paid by the government. Graves was thus paid twice. *Held*, that the agent was not in fault and should be allowed the money paid out by him in accordance with the terms of the treaty. *United States v. Duval, Gilp*, 356.

X. PRIORITY OF THE UNITED STATES AS A CREDITOR.

[SEE DEBTOR AND CREDITOR.]

SUMMARY—*Assignment of all of debtor's property; judgment liens*, §§ 801, 815, 820.—*Bona fide conveyance or mortgage of property*, § 802.—*Assignment of only a part*, § 803.—*Assignment for benefit of one or more creditors*, § 804.—*Effect of state laws and decrees; liability of assignee*, § 805.—*One coming into possession of public money is a debtor*, § 806.—*Right extends to debtors generally*, § 807.—*The law is constitutional*, § 808.—*Partnerships*, §§ 809, 817.—*Corporations*, § 810.—*Rights of attaching creditor*, §§ 811, 814.—*Appointment of receiver not a transfer*, § 812.—*Attempted transfer of property*, § 813.—*As to prior liens*, §§ 815, 820.—*An exception must be proved by the party alleging it*, § 816.—*Administrator becomes a trustee*, § 818.—*The law supersedes state laws*, § 819.—*Statutes to be liberally construed*, § 821.—*Confession of judgment*, § 822.—*No lien conferred by the law; insolvency*, § 823.

§ 801. Although under the acts of 1790, 1797, and 1799, a mere state of insolvency or inability in a debtor of the United States to pay all his debts gives no right of preference to the

United States, yet where the debtor, being unable to pay all his debts, makes a voluntary assignment of all his property, the preference attaches to the property in the assignee's hands, and the right of the United States is prior to that of previous judgment creditors, though the judgments constitute a lien on the debtor's land. *Thelusson v. United States*, §§ 824-27.

§ 802. Though in cases specified in the statutes the debts due the United States are first to be satisfied, yet they can only be satisfied out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or his property has been seized under a *fi. fa.*, the property is divested out of the debtor and cannot be made liable to the United States. *Ibid.*

§ 803. The right of priority of the United States does not attach to property in the hands of an assignee of its debtor, where such assignment is of a portion only of the debtor's property. *United States v. Langton*, §§ 828-30.

§ 804. A conveyance by a debtor, known to be insolvent, of all his property to one or more creditors, in discharge of their own debts and liabilities, not exceeding the amount due to and payable to them, and not for the benefit of the creditors at large, or any other creditors than the immediate grantees, is not such a voluntary assignment as gives the United States priority of payment under the act of 1799, unless such conveyance was made with intent to evade the priority given by that act. *United States v. McLellan*, §§ 831-82.

§ 805. The right of priority of the United States to payment out of the effects of its insolvent debtor in the hands of his assignee is not defeated, either by state laws regulating the distribution in such cases, or the decree of the state court having jurisdiction of the assignment; and where the United States has not appeared in the state court, and the assignees, though they had knowledge of the claim of the United States, had not presented it for the consideration of the court, it was held that the distribution of the estate of the insolvent pursuant to the order did not exempt the assignees from liability for the claim of the United States to the amount of funds coming into their hands. *Field v. United States*, §§ 833-37.

§ 806. One who comes into the possession of public money to which he is not entitled becomes thereby a debtor of the United States, and it is entitled to priority of payment out of his estate in case of his insolvency. *Bayne v. United States*, § 838.

§ 807. The priority given to the United States by the fifth section of the act of 1797 (1 Stat. at L., 512) is not confined to the property of revenue officers and persons accountable for public money, but extends to debtors generally. *United States v. Fisher*, §§ 839-42.

§ 808. The law giving the United States preference over other creditors, in the case of persons other than revenue officers and receivers of public moneys, is constitutional. *Ibid.*

§ 809. Where an insolvent firm makes a general assignment of all of its property for the benefit of its creditors, the United States are not entitled to priority of payment out of the share of a partner in the firm proceeds on account of the individual liability of such partner to the United States. *United States v. Hack*, § 843.

§ 810. The fifth section of the act of March 3, 1797, applies to all debtors of the United States, and includes corporation as well as individual debtors. *Beaston v. Farmers' Bank of Delaware*, §§ 844-47.

§ 811. The right of a private creditor, who has attached the effects of a debtor, is not defeated by process subsequently issued in behalf of the United States. *Ibid.*

§ 812. The appointment of receivers for the property of a debtor in a suit for the collection of a debt is not such a transfer of the debtor's effects that the priority given to the United States by the act of 1797 attaches. *Ibid.*

§ 813. The priority of the United States does not attach in case of an attempted transfer of the property of a debtor which fails by reason of the refusal of the transferee to accept the trust. *Ibid.*

§ 814. The right of priority of the United States to the assets of a debtor under sections 3466, 3467, Revised Statutes, United States, applies and extends only to cases in which the estate of the debtor passes from him or is administered for the benefit of his creditors. It does not apply where, as under the law of Missouri, all the assets of the debtor have been attached and sold to satisfy the claim of the attaching creditor only. *United States v. Wilkinson*, § 848.

§ 815. The laws giving priority to the United States do not disturb prior vested liens, but *quære* as to the general lien of a judgment on which no execution has issued. §§ 849-57.

§ 816. The laws giving priority are of general application, and one alleging an exception has the burden of showing himself within it. *Ibid.*

§ 817. Where one of a firm is indebted to the United States, the right of priority of the United States exists in property of the firm which has become the individual property of the debtor. *Ibid.*

§ 818. The administrator of a debtor of the United States, whose estate is insufficient to pay all claims against it, becomes a trustee of the United States for the amount of the debt,

and it must first be paid from the funds in his hands, and a suit by other creditors against such administrator to reach assets in his hands, to which the United States was not a party, does not in any way affect its rights. *Ibid.*

§ 819. The statute giving the United States priority supersedes all state laws upon the distribution of those estates which come within its provisions. *Ibid.*

§ 820. In 1841, judgment was recovered against D. at the suit of the United States, which judgment was a lien on all the lands of D. in the state, and in 1842, certain creditors of D. procured judgments against D. which were a lien on his lands only in the county in which they were rendered. In 1846, the United States, upon another cause of action, obtained a decree that all the lands of D. in the state be sold to satisfy the claim on which suit was brought, and a quantity of land was sold and proceeds to an amount sufficient to satisfy the judgments of the other creditors were paid into court. The United States afterwards levied executions on all the lands of D. in the state under the judgment obtained by them in 1841. The creditors under the judgments of 1842 thereupon attempted to compel the United States to first satisfy their judgment of 1841 out of the lands in the state lying outside the county in which the judgments of 1842 were a lien, but the court held that the United States were entitled to priority over the judgments of 1842, and denied the application. *Ibid.*

§ 821. The statutes giving the United States priority are presumed to be for the public good, and are to be liberally construed. *Ibid.*

§ 822. Voluntary confessions of judgment for the purpose of defeating a claim of the United States, when made by an insolvent debtor, and constituting liens on his real estate to its full value, are such a voluntary assignment that the right of the United States to a priority of payment out of all his property, subject to all valid liens and incumbrances thereon, attaches at once. *United States v. Griswold*, §§ 858-63.

§ 823. Section 3406 of the Revised Statutes do not give the United States a lien, but only a priority of payment out of the property or assets of its insolvent debtor, after it has passed by a voluntary assignment or by operation of law to a third person for the benefit of creditors or with the intent to defeat such priority. Nor does this section apply to mere inability to pay outstanding debts. There must be a legal insolvency ascertained by legal proceedings, or a voluntary assignment of substantially all of the debtor's property. The pledge of property as security for an ordinary loan is insufficient. *Ibid.*

[NOTES.—See §§ 864-915.]

THELUSSON v. SMITH.

(2 Wheaton, 396-426. 1817.)

ERROR to U. S. Circuit Court, District of Pennsylvania.

Opinion by MR. JUSTICE WASHINGTON.

STATEMENT OF FACTS.—The plaintiffs in error instituted a suit in the circuit court for the district of Pennsylvania, against William Crammond, which, by the agreement of the parties, and the order of the court, was referred to arbitrators. An award was made in favor of the plaintiffs, and a judgment *nisi* was entered on the 20th of May, 1805. Exceptions were filed and overruled, and a judgment was finally entered on the 15th of May, 1806. On the 22d of May, 1805, Crammond executed a conveyance of all his estate to trustees, for the payment of his debts, at which time he was indebted to the United States on several duty bonds, which became due at different periods subsequent to the 22d of May, 1805. Suits were instituted on these bonds as they severally became due, and judgments were obtained and executions issued, under which a landed estate belonging to Crammond, called Sedgely, was levied upon and sold.

The plaintiffs considering this property as being bound by their prior judgment of the 20th of May, 1805, and that they were entitled to be first satisfied out of the money in the hands of the defendant (the marshal of the court), which he had raised under the above executions, issued in the name of the United States, they brought this action to recover so much of those funds as would be sufficient to satisfy their judgment.

Upon the trial of the cause in the circuit court the jury found that Crammond was insolvent on the 20th of May, 1805, but that it was not notoriously known; subject to the opinion of the court upon a state of facts agreed between the parties, whether the plaintiffs were entitled to recover. The parties further agreed in writing that on the 22d of May, 1805, Mr. Crammond was unable to satisfy all his debts, and that this fact should be considered as part of the special verdict. The other facts referred to by the jury are, in substance, those which have been mentioned. The circuit court gave judgment against the plaintiffs below, and the cause was brought by writ of error to this court.

Two questions were made in the circuit court. 1st. At what time a judgment *nisi* on an award of arbitrators, made under an order of court, binds the real estate of the defendant against whom the award is made; whether on the day it is rendered, or on the *quarto die post*, if no exceptions be filed, or on the day when the exceptions, if any are filed, are overruled. 2d. If from the time when the judgment *nisi* is entered, then whether, in this case, the United States are entitled to be paid in preference to the judgment creditor? The first question was not decided by the court below, and is not contested in this court. In considering the second question, it will be assumed, for the sake of the argument, that the judgment *nisi* binds the real estate of the debtor from the time it is rendered.

§ 824. *Meaning of the word "insolvency" as used in the act of 1790, chapter 35, section 45, and the act of 1797, section 5.*

This question did not arise in the cases of the United States v. Fisher, 2 Cranch, 358 (§§ 839-42, *infra*), or in that of the United States v. Hooe, 3 Cranch, 73. The point decided in those cases was that a mere state of insolvency or inability, in a debtor to the United States, to pay all his debts, gives no right of preference to the United States unless it is accompanied by a voluntary assignment of all the property for the benefit of his creditors. There can be little doubt but that the word insolvency, mentioned in the act of 1790, chapter 35, section 45, and repeated in the act of 1797, chapter 74, section 5, and of 1799, chapter 128, section 65, means a legal insolvency, which, whenever it occurs, the right of preference arises to the United States, as well as in the other specified cases to which the acts of 1797 and 1799 have extended the cases of insolvency. In this case the conveyance of Crammond on the 22d of May, 1805, was of all his property; at which time he was unable to pay all his debts; it is, therefore, a case precisely within the law and within the principle decided by the above cases.

§ 825. *The extent of the right of preference of the United States in case a debtor to them becomes insolvent.*

But the question still remains to be decided whether this right of preference which accrued on the 22d of May can cut out a prior judgment creditor? The law declares "that in all cases of insolvency, etc., the debts due to the United States shall be first satisfied; and if the assignees, etc., shall pay any debt due by the person or estate from whom or for which they are acting, previous to the debts due to the United States from such person or estate being first duly satisfied, they shall become answerable for the same in their own persons and estates." These expressions are as general as any which could have been used, and exclude all debts due to individuals, whatever may be their dignity. The assignees are made personally responsible to the United States if, in case of insolvency, they pay any debt previous to those due to the United States.

The law makes no exception in favor of prior judgment creditors; and no reason has been or we think can be shown to warrant this court in making one.

§ 826. — *effect of a mortgage, or a seizure under fi. fa., made before the preference accrued.*

Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied, but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *fi. fa.*, the property is divested out of the debtor and cannot be made liable to the United States.

§ 827. *Lien of a judgment creditor.*

A judgment gives to the judgment creditor a lien on the debtor's lands and a preference over all subsequent judgment creditors. But the act of congress defeats this preference in favor of the United States, in the cases specified in the sixty-fifth section of the act of 1799.

The judgment of the circuit court, therefore, is to be affirmed with costs.

Judgment affirmed.

UNITED STATES v. LANGTON.

(Circuit Court for Massachusetts: 5 Mason, 280-290. 1829.)

Opinion by STORY, J.

STATEMENT OF FACTS.— This case comes before the court under the trustee process of Massachusetts (act of 1794, ch. 65), the main object being to charge the trustees as garnishees of the principal debtor, by attaching his funds in their hands. The case turns wholly upon the answers of the trustees. They have come into court and have declared that they had not in their hands or possession, at the time the writ was served on them, any goods, effects, or credits of the principal, and they have submitted themselves to an examination on oath touching the premises. They are therefore entitled by the very terms of the statute to a discharge with costs, "if, upon such an examination, the said declaration shall appear to the court to be true."

§ 828. *The answer of trustees, under the trustee process, is to be taken as true, unless the court, by subsequent examination, can see that it is untrue.*

I cannot agree to the suggestion at the bar, in the broad and unqualified manner in which it is made, that persons, sued as trustees, are in all cases to be charged by the court, unless they clearly discharge themselves. Where they expressly swear that they have no goods, effects, or credits in their hands or possession of the debtor, that declaration must be taken for true, unless the court can clearly see, from the subsequent examination, that it is untrue. Where they neither expressly admit nor deny their liability, but put all the facts before the court, and leave the latter to decide the matter of law arising thereon, there must be sufficient upon the face of those facts to justify the court itself in pronouncing a judgment which shall charge them as trustees. If those facts, fully and sincerely disclosed, leave the matter in doubt, for myself I cannot perceive how a judgment charging them can be pronounced, upon any acknowledged principles of law. I agree that doubtful expressions

may be construed most strongly against the trustees, if they admit of two interpretations; but they are not to be tortured into an adverse meaning or admission. The answers are not to be more rigidly or differently construed, from what they would be in a bill in chancery. If the answers are not full, the plaintiff is at liberty to propound closer interrogatories; but he is not to charge parties upon a mere slip or mistake of certainty, or because they do not positively answer, what in conscience they do not positively know. The law would otherwise be a snare, which might entrap them to their ruin, and involve them in a double responsibility and payment. And such, I conceive, is the real doctrine in the state court, notwithstanding some general expressions which have been quoted and are applicable to special cases. *Leber v. Armstrong*, 4 Mass., 206; *Cleveland v. Clap*, 5 Mass., 201; *Whitman v. Hunt*, 4 Mass., 272; *Hatch v. Smith*, 5 Mass., 42, 49; *Gordon v. Webb*, 13 Mass., 215.

By the answers of the trustees it appears, that Langton (the principal debtor) being in failing circumstances, on the 5th of January, 1828, executed an assignment, by indenture, tripartite, of certain property to the trustees, upon certain trusts stated in the deed of assignment. It begins by reciting, that Langton is indebted in large sums of money to the parties of the second part (the trustees), and third part (general creditors), and that W. Monroe (one of the trustees) is liable, as indorser and surety of Langton, to pay large sums of money, and also has lent and accommodated him with money, a schedule of which sums, debts, and liabilities is annexed, marked A. It then further recites that Langton is possessed of certain goods, wares, merchandises, choses in action, credits, and demands, and other property, schedules whereof are annexed, marked C, D. It then recites the desire of Langton to secure to Monroe a full indemnity for all his liabilities as indorser and surety, and payment also of moneys loaned, and an equal distribution of the property which shall remain among the other parties of the second and third parts, so far as it will extend, and they are ready to accept and release Langton, as far as the same will go. Afterward there follows an assignment to the trustees of all the goods and other property in the schedules C and D, with a moiety of the brig *Dido*, a policy on her cargo, and the household furniture of Langton, at No. 1, Temple street. The trusts are declared to be, to collect the debts, etc., and sell the property, etc., and to apply the proceeds as follows: "In the first place, to apply the said trust moneys to the payment and discharge of \$8,400, due for custom-house bonds and liabilities, as mentioned in said schedule A; and also to the payment and discharge of the three sums of money mentioned in the said schedule A as being lent and accommodated to said Langton, amounting in the whole to the sum of \$9,784.69, moneys so lent, etc., as stated in said schedule A, and which said three sums of money, *together with the said amount of custom-house bonds, amounts in all as near as can be ascertained*, to the full sum of \$18,184.69, which amount is to be paid and satisfied in full. This is the material clause on which one of the questions made at the bar turns; the other clauses require no particular consideration. The schedule A begins as follows: "Schedule of claims and demands due to Washington Monroe from Samuel Langton, custom-house bonds and notes by him indorsed for said Langton, as moneys borrowed to be paid in full.

"Amount of custom-house bonds *upon which Washington Monroe is surety*, \$8,400.

"Notes payable to Washington Monroe and by him indorsed for said Langton as follows." Then follows a special enumeration of them; and then a

memorandum of moneys borrowed, and other notes, etc., in the whole amounting with the custom-house bonds to \$32,084.96. Schedule B contains the debts due to other creditors.

The custom-house bonds owing by Langton amounted in fact to the sum of \$8,257.43; and Monroe was surety upon all of them excepting one for \$1,752, which is now in suit. None of them were due at the time of the assignment; but all those upon which Langton is surety, amounting to \$6,505.43, have since been paid. The whole amount of the property assigned to the trustees by the assignment has produced less by \$10,000 than the debts and liabilities of Monroe provided for in the assignment.

The trustees, upon their disclosures, are certainly entitled to be discharged from the suit unless some one of the grounds contended for in argument on behalf of the United States can be maintained in point of fact and law. They explicitly deny that they have any goods, effects, or credits of Langton in their hands or possession; and as no evidence *aliunde* is admissible by law to control or contradict their answers, the *onus probandi* is on the United States to extract an opposite conclusion from the facts stated in them.

§ 829. *Only in cases of general assignment of a debtor's property does the priority of the United States attach.*

Two grounds are contended for by the United States. In the first place, that the assignment is an assignment of all the property of Langton; and if so, the priority provided for by the act of 1799, chapter 128, section 65, attaches in favor of the United States. I agree at once to the reasoning at the bar, that if the assignment be in fact of all the debtor's property, although it does not so appear upon the face of the instrument, the priority of the United States attaches. The same rule applies if a small part be left out for the purpose of fraudulent evasion of that priority. This doctrine is fully supported by the cases of *United States v. Clarke*, 1 Paine, 639; *United States v. Hooe*, 3 Cranch, 73, 91; *United States v. Howland*, 4 Wheat., 108, 115; and *Conard v. Atlantic Ins. Co.*, 1 Pet., 439. But the difficulty is that the present assignment purports on its face to be an assignment, not of all the debtor's property, but of all the goods, etc., in the schedules C and D; and these schedules do not purport to be all the property of the assignor, but of certain specific effects. In such a case (as was justly said by the court in 4 Wheat., 108, 116), the presumption must be that there is property not contained in the deed, unless the contrary appears. The *onus probandi* is thrown on the United States. Now there is not only no proof in the case that this assignment does contain all Langton's property; but both the trustees swear that they believe it does not contain all his property; and there is not a shadow of evidence that there was a suppression of any of his property with a fraudulent design to evade the rights of the United States. On the contrary, it does appear that the parties at the time had no distinct knowledge of the actual sums owing on bonds at the custom-house. We may, therefore, upon the mere footing of authority, dismiss this ground of argument as untenable.

§ 830. — *where property has been assigned for special trusts, such are to be executed.*

But in the second place it is contended that if this be not a general assignment, there is an express provision giving priority of payment out of the funds to the custom-house bonds, of which the United States are entitled to avail themselves in the present form of suit. One answer urged on behalf of the defendants to this ground is, that the trustee process furnishes no means

to enforce such a right, even if it exists. The argument is this. The trustee process can only reach goods, effects, or credits of the debtor himself. If the assignment is good and valid in point of law, it passes the goods, etc., to the trustees, as their property, to be by them applied to the trusts stated in the assignment. The whole reasoning, on behalf of the United States, assumed that the assignment is good and valid; and if so, the trust fund, to the amount of the custom-house bonds provided for by it, is a trust fund belonging to the United States, and not to the debtor; and the United States cannot attach their own property by this process in the hands of the trustees. And reliance is placed on the case of *Conard v. Atlantic Ins. Co.*, 1 Pet., 386, 438, 439, where it was held by the supreme court, that even a general assignment passes the property to the assignees, and gives a priority of payment only out of the fund, and does not, *pro tanto*, defeat the assignment. To everything stated in that opinion, I give my cordial assent, knowing that it was prepared upon very full deliberation of the court. I agree that the present assignment is good and valid, in point of law, to pass the property to the assignees. But the conclusion contended for by the defendants' counsel does not follow upon such an admission. If the United States had been called upon to assent, and had in fact assented, to the trusts created by the assignment so as to create a privity between themselves and the assignees, there might be great force in the argument. But until such assent, actual or constructive, the property was, by operation of law, a resulting trust for the assignor. If A transfers his goods or money to B, to be delivered over or paid to C, unless C assents, expressly or impliedly, to the bailment or trust, the trust is a resulting trust for A. If C refuses to receive the goods or money, A may recover them back for his own use. In such cases, the law implies a resulting use or trust for the benefit of the grantor, where the object of the trust has wholly failed. This is, as I think, the natural result of the general principles of law upon this subject. Our state decisions, in relation to the trustee process, uniformly assume the doctrine to be sound, and make no distinction, whether the goods, credits, or effects in the hands of the trustee are equitable or legal; whether they are a naked debt or bailment, or a resulting trust, where the assignment, *pro tanto*, has become inoperative, being good and valid in its general structure. In every case where a general assignment is made for the benefit of creditors, and an attachment under this process intervenes, before all the creditors have become parties, the assignment is not held utterly void, but is held inoperative only as to the proceeds not covered by the debts of the antecedent creditors; and if anything remains after such attachment, that may go, under the assignment, to any creditors who subsequently become parties. In short, the trust created by the assignment is defeated only *pro tanto*. And a creditor who refuses to come in under the trust may sue in the same manner as if he were not named or included in it. It appears to me, that wherever the property of a debtor is in the hands of an assignee under trusts, which are exhausted, or have failed, so that the assignee holds the property for his benefit by operation of law, the trustee process is a proper process to reach it. The statute of 1794, chapter 65, seems to me to have had such cases peculiarly in its eye in creating the remedy. The words of the preamble clearly cover them. They are "goods, effects and credits" of the debtor "so intrusted and deposited in the hands of others that the same cannot be attached by the ordinary process of law."

Another answer suggested at the bar is that the United States are not, upon

the face of this assignment, *cestuis que trust*; but that the trust is created in favor of Monroe to discharge the custom-house bonds, and thus to exonerate him from his suretyship. But, assuming this construction of the instrument to be correct (on which I give no opinion), it would not aid the case of the defendants. If the debtor has confided his property to them to fulfill certain trusts, the assignees are bound to fulfill those trusts, and cannot apply it to other purposes. If they should refuse so to do, and the *cestui que trust* cannot enforce it, or the trustee has failed, they must be charged as trustees of the debtor, because it remains, in equity, his property, by way of resulting trust or indebtment. If they should not refuse, then the property is a fund in their hands applicable to the trust, and they are merely his agents to pass it over to the creditors. Now, in this very process the United States, supposing *all* custom-house bonds are included in the trust, seek to have the acknowledged trust property of the debtor applied to the very purpose he intended; and I can perceive no solid objection upon reason or authority, or even technical grounds, to refuse it. It is the debtor's property "intrusted" to them for this purpose, and not attachable by the ordinary process of law. In *Jarvis v. Rogers*, 15 Mass., 389, 414, Mr. Chief Justice Parker, in delivering the opinion of the court, said: "I have neither heard nor seen any judicial decision tending to prove that if a creditor accidentally gets possession of his debtor's goods, or if a debtor commits them to him on a particular trust or confidence, the creditor has a right to retain them as security for his debt. On the contrary, any other creditor may attach them, if they can be seized by an officer; or the creditor may be charged as trustee, if they cannot be come at to be attached."

The strongest objection to a recovery by the United States yet remains for consideration. It is, that the assignment did not mean to provide for the payment of all custom-house bonds owing by Langton, but only for those on which Monroe was surety; and all these have been paid without scruple. It has been said that Langton might well be presumed to intend to cover *all* bonds, because it would save him from imprisonment on execution at the suit of the United States, from which he would not be entitled to be discharged, as in cases of private debts upon taking the poor debtor's oath, but only by the special authority of the secretary of the treasury under the act of 1798, chapter 66. I do not know that a court is at liberty to indulge any such presumption, unless the words of the instrument itself justify it upon a plain construction of their import.

Let us attend then to the words of the present assignment. The direction is "to apply the trust moneys to the payment and discharge of \$8,400 due for custom-house bonds and liabilities, as mentioned in said schedule A." By turning to that schedule we find the description to be, "amount of custom-house bonds, upon which Washington Monroe is surety, \$8,400." So that the schedule does not include *all* custom-house bonds, but those only upon which Monroe is surety. If, therefore, we take the general clause as it is controlled and explained by the schedule (as we are bound to do), it is manifest that the custom-house bonds alluded to are those only on which Monroe is surety. The preamble to the assignment fortifies this conclusion; for it recites as a main object the desire to secure Monroe for his liabilities as indorser and surety; and the whole structure of the assignment shows that he was a favored creditor, not merely as surety, but as *indorser*. He is not yet indemnified to the amount of \$10,000.

But it is argued that the sum provided for, *viz.* \$8,400, is more than the amount due on the bonds on which Monroe is surety, and that the actual amount of all the custom-house bonds approaches nearer the sum, *viz.* to \$8,257; and therefore the presumption is that *all* bonds were intended to be included. Now, in answer to this, there is force in the remark made at the bar, that the sum seems put down as a mere estimate, and not as the exact amount; for the terms of the assignment are, that "the three sums of money, together with the said amount of custom-house bonds, amount in all, *as near as can be ascertained*, to the full sum of," etc. Besides, in either view, there is a mistake as to the amount of the custom-house bonds. If the amount of all the bonds had been exactly \$8,400, there might have been a stronger ground for argument. If, then, the sum be mistaken, and we resort to the other words of the instrument to qualify or explain the intention, we there find the bonds described to be those, on which Monroe is surety. The mistake is, therefore, corrected by the context. Where there is any repugnancy or mistake in a description, if sufficient certainty as to the thing intended on the whole appears, the repugnancy or mistake does not vitiate. Taking the whole description together, it will run thus: "\$8,400 for custom-house bonds, upon which W. Monroe is surety;" and upon such an assignment, intended for his special protection, there cannot, I think, be a legal doubt that the mistake of the amount must yield to the certainty of the other part of the description. The whole provision must otherwise be rejected for utter uncertainty, and Monroe be left without any security, since the misdescription as to the amount of *all* the bonds owing to the United States is equally clear; or we must resort to parol evidence to explain the latent ambiguity. See *Colpoys v. Colpoys*, 3 Jac. & Walk., 451, 462.

My opinion is, that there is no necessity to resort to such evidence in this case. But if resort is to be had, the answers of the trustees, and particularly of Monroe, are entirely decisive. He explicitly swears, that no other bonds than those on which he was surety were in the contemplation of the parties, or intended to be provided for; and that at the time of the assignment, the exact amount of these was not known to them.

This is not all. The *onus probandi* is on the United States in this case, to establish, that the bond now in controversy is covered by the assignment; for otherwise, Monroe has a right to retain for the deficiency due to him. There is an acknowledged mistake in the *amount* of the bonds in the description. The United States must show, either that there is sufficient certainty on the face of the instrument to establish their claim (which has not been done), or that parol evidence is admissible to explain the intent; and then that very evidence overthrows their claim.

Upon the whole, my opinion is that the trustees are entitled to be discharged, and judgement must be entered accordingly.

UNITED STATES v. McLELLAN.

(Circuit Court for Maine: 8 Sumner, 345-358. 1838.)

Bill in equity brought by United States against defendants to enforce the right of priority of payment out of the property of Henry Gooding, an insolvent debtor of the United States. There is no dispute as to the facts of the case. The question at issue is stated in the opinion.

Opinion by STORY, J.

Taking the case to be, as the parties at the argument have assumed it to be, that the conveyances made to McLellan and Moody respectively were, what they purport to be, *bona fide* conveyances for a valuable consideration, without any knowledge or belief of the existence of any debts due to the United States, or any intention to defeat the priority of the United States; and that they embraced all the property of Gooding, except what is exempted by law from attachment and execution, the question arises, whether the priority given to the United States by the act of 1797, chapter 74, section 5, or (what in legal effect on this point is the same), by the act of 1799, chapter 128, section 65, attaches to the property so conveyed to them. If it does, then the present bill is maintained; if it does not, then the bill must be dismissed.

It is unnecessary, after the various decisions which have been made by the supreme court of the United States upon this subject, to enter at large upon the construction of these sections. By the act of 1799, chapter 125, section 65, it is provided, that, "in all cases of insolvency, or where any estate in the hand of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds (for duties) shall be first satisfied." If the clause had stopped here, it would have been open to consideration, whether the insolvency here mentioned was not a mere inability of the debtor to pay all his debts, without any open, notorious act, pointed out by law, to establish such insolvency. But the section goes on to declare, "And the cases of insolvency mentioned in this section shall be deemed to extend, as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors; or in which the estate or effects of an absconding, concealed, or absent debtor shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed." Now, upon the original interpretation of this act, it might well have been a question, whether the three cases thus put were anything more than mere illustrations of the general insolvency spoken of in the preceding clauses of the act. But that question has long since been put at rest by the supreme court of the United States in a variety of cases, and especially in *Prince v. Bartlett*, 8 Cranch, 431; *Thelusson v. Smith*, 2 Wheat., 396 (§§ 824-27 *supra*); *Conard v. Atlantic Ins. Co.*, 1 Pet., 387; *Conard v. Nicholl*, 4 Pet., 291; and *Beaston v. The Farmers' Bank of Delaware*, 12 Pet., 102 (§§ 844-47, *infra*), in which it has been held, that mere inability of the debtor to pay is not an insolvency within the statute; but that it must be such as is manifested in one of the three modes pointed out in this last explanatory clause.

The only mode, applicable to the circumstances of the present case, is that of "a voluntary assignment thereof for the benefit of his or her creditors." And the question is, whether such an assignment exists in this case. It appears to me, that, consistently with the construction which has been always put upon this part of the clause, it is not. In the first place, the voluntary assignment, here spoken of, must be, not of a part, but of the whole property of the debtor; unless, indeed, a part is accidentally and unintentionally omitted, by mistake, or is purposely omitted with a fraudulent design. A debtor may, notwithstanding this clause, *bona fide* convey to a creditor a part of his estate for payment of the debts due to him, or as security for his liabilities; and it will be good and valid against the priority of the United States. This was

expressly held by the supreme court of the United States, in *United States v. Hooe*, 3 Cranch, 73; *United States v. Howland*, 4 Wheat., 108; and *Conard v. Atlantic Ins. Co.*, 1 Pet., 386.

Now, it is to be considered, that, in the present case, each of these conveyances was made to a single creditor for his own debts or liabilities; and each took, distinctly and severally, for himself alone, the property conveyed to him. Nor is it stated in the bill, or shown in the case, that McLellan and Moody acted in concert together at the time, or that both conveyances were made with a mutual understanding between the parties that both should be given, or neither, or that the debtor should divest himself of all his property in their favor, or of none. For aught that appears in the case, although the transactions took place on the same day, they may have been perfectly independent and separate transactions, and neither of the creditors may have had any knowledge of the acts of the other. Each of the conveyances embraces a part only of the property of the debtor; and, of course, if they are to be treated as separate and distinct transactions, not produced in concert, or *uno flatu*, with both creditors, for a common purpose, they are clearly good within the authority of *United States v. Hooe*, 3 Cranch, 73. Mr. Chief Justice Marshall, in delivering the opinion of the court, on that occasion, said: "If a debtor of the United States, who makes a *bona fide* conveyance of part of his property for the security of a creditor, is within the act which gives a preference to the government, then would that preference be in the nature of a lien from the instant he became indebted, the inconvenience of which, where the debtor continued to transact business with the world, would certainly be great. The words of the act extend the meaning of the word 'insolvency' to cases where a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors. The word 'property' is unquestionably all the property which the debtor possesses; and the word 'thereof' refers to the word 'property,' as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words 'or a part thereof,' or others of a similar import, would have been used. If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But, where a *bona fide* conveyance of a part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act." Now, this language is directly in point to the present case, if we are to take these conveyances as independent transactions; for each embraces a part only of the property of the debtor, and neither of them contains any general assignment. If, therefore, they were not contemporaneous acts, but one was posterior in point of time and execution to the other, without any intentional connection, the first would at all events be valid, if made *bona fide*, even if the other were invalid, as against the United States, because it conveyed the whole remaining property of the debtor. If they were contemporaneous, concerted acts, then the same question would arise as if the whole property were conveyed to a single creditor in discharge of his debts and liabilities for the debtor. The bill and answers do not seem framed precisely with a view to this aspect of the case, and therefore there are scarcely facts enough before the court to present it fully.

But let us take the case as if so presented, and the question then comes

to this: whether the assignment contemplated by the act is an assignment to one creditor for the payment of his own debts, or as a security or discharge of his own liabilities, or whether it must be an assignment for creditors in general. It appears to me that the latter is the true and natural, if not the necessary, purport of the words of the act. The assignment is to be a voluntary assignment of all his property "for the benefit of his or her creditors." Now it seems to me that the word "creditors" here is used in contradistinction to a single creditor. If it does not mean all his or her creditors, it at least means a conveyance for more persons than the creditor or creditors who are the immediate assignees, for their own debts. The language seems to indicate an assignment made to some person or persons as trustees for the benefit of the creditors of the assignor, and not for the sole benefit of the assignees. It would be unusual language to speak of an assignment made for the benefit of the grantees only, as an assignment "for the benefit of creditors." If the conveyance were absolute to them, they would take, not as creditors, but as purchasers; not for the benefit of creditors, but for the benefit of themselves as grantees. It would still be more unusual language to speak of an assignment to the assignees, as a security for their liabilities for the debtor, to be an assignment "for the benefit of creditors." It would be rather an indemnity against the claims of the creditors, and in opposition to them. Indeed, if one were disposed to refine upon the present case, the conveyances were not assignments "for the benefit of creditors," strictly so called; but, to a large extent, they must be deemed to be purchases by indorsers and securities, upon a collateral contract by them to pay the debts, for which they were under liability to the creditors out of their own funds. In *Thelusson v. Smith*, 2 Wheat., 426 (§§ 824-27, *supra*), the supreme court said: "If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a *feri facias*, the property is divested out of the debtor, and cannot be made liable to the United States." Now, it is observable that this language was used in a case where there was a prior lien by judgment upon all the debtor's property. And in that case, as well as in *Conard v. Atlantic Ins. Co.*, 1 Pet., 386, 441, the supreme court held that the priority of the United States would not, even where there had been a general assignment for the benefit of creditors, divest an antecedent mortgage or lien for a debt, and that the priority was not itself in the nature of a lien on the debtor's property. He might still convey it *bona fide* to any creditor or purchaser for a valuable consideration, although he should happen at the time to be, in the general sense of the term, insolvent. In this view of the construction of the language and intent of the section of 1799, now in question, I confess myself to be of opinion that the conveyances in the present case are not voluntary assignments for the benefit of creditors, in the sense of that section.

The only doubt which has occurred to my mind has arisen from the language used by my brother, Mr. Justice Washington, in his charge to the jury in the case of *Conard v. Nicholl*, 4 Pet., 291, which was brought under the review of the supreme court, and so far as it was necessary to be considered by that court, that is, so far as it was or might be prejudicial to the plaintiff in error, was affirmed by the court. So far as it laid down the law favorably to the rights of the United States, it was not strictly within the cognizance of

the supreme court, and could be re-examined only upon a writ of error brought by the other party. In the course of his charge Mr. Justice Washington put these questions to the jury: (1) "Was Edward Thompson (the debtor) insolvent, and unable to pay all his debts at the time when these securities were given to the plaintiff? (2) Did they divest him of all his property, or, if not, was the part reserved trivial, with the intent to defeat the rights of preference of the United States? If these facts are proved to your satisfaction, then the transfers are to be considered as constructively divesting Edward Thompson of all his property, so as to let in the priority of the United States against the plaintiff." Now, it is observable that here the learned judge does not put the case upon the mere fact that the debtor was insolvent at the time of the transfer of the property and that they covered all the debtor's estate; but he adds the fact that the transfers were "with intent to defeat the right of preference of the United States." This latter ingredient is not pretended to exist in the present case; for the debts of the United States were, at the time of these conveyances, unknown and unsuspected by the grantees. So that it is by no means clear that the learned judge would have deemed an absolute conveyance of all the debtor's property to one or more creditors for the payment of their existing debts and liabilities, to have been, *per se*, a voluntary assignment within the act, without this ingredient, if the conveyance was not for the benefit of other creditors also. It is also to be observed that this part of the charge was highly favorable to the United States, and there is no evidence that it was complained of on the appeal. I have not the slightest doubt that this part of the charge of the learned judge, as given, was perfectly correct. And if it were shown or admitted, in the present case, that these conveyances were made with intent to defeat the priority of the United States, I should not hesitate to say that, as to the United States, they were subject to that priority. But, as has been already remarked, no such intent is set forth in the bill or established in the evidence. And in the consideration of the case it is not unimportant that there is a large class of other creditors unprovided for, as well as the United States.

§ 831. *Such a conveyance as stated above not considered a voluntary assignment to creditors within the purview of the act 1799, unless the intent to evade the priority given by the act can be shown.*

I take the naked question, then, stripped of all unimportant circumstances, to be, whether a conveyance by a debtor, known to be insolvent, of all his property to one or more creditors, in discharge of their own debts and liabilities, not exceeding the amount due to and payable by them, and not for the benefit of the creditors at large, or of any other creditors than the immediate grantees, is such a voluntary assignment as is within the purview of the section of the act of 1799? That it is a case within the same mischief as that against which the act meant to provide, I admit. That if the case had been wholly untouched by authority, there might have been strong ground to contend that the three cases put in the act were rather illustrations of the meaning of the word insolvency, as used in the act, than exclusive limitations of its meaning, I also admit. But, looking to the decisions which have been made, I do not feel warranted in saying that such conveyances as the present are voluntary assignments for the benefit of creditors within the meaning of the act, unless, indeed, it could be shown that they were made with the intent to evade the priority given by the act.

§ 832. *The construction of the act 1799 cannot depend upon the provisions of any particular state statute.*

I have not thought it necessary to rely on the act of the state of Maine, of April, 1836, respecting general assignments, because, after all, the construction of the act of 1799, chapter 128, cannot depend upon the provisions of any particular statute of a state, which does not fall within its very terms. But this state act does, in its provisions, point to classes of cases which seem to me to be the very cases which the act of 1799, principally, if not exclusively, contemplated in the clause which has been under our consideration. Upon the whole, my opinion is that the bill ought to be dismissed.

FIELD v. UNITED STATES.

(9 Peters, 182-202. 1835.)

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—This is a writ of error from a judgment of the district court of the United States for the district of Louisiana, rendered on the petition of the United States against Seaman Field and others, the plaintiffs in error, as syndics or assignees of Lewis E. Brown, an insolvent debtor. The petition states that Lewis E. Brown, being indebted to the United States on a certain bond, on which judgment had been obtained for a sum stated in the petition, became insolvent on or about the 20th of April, 1830, and made a voluntary assignment of all his property to his creditors, under the laws of Louisiana, and that the original defendants were appointed syndics or assignees of the creditors; and had received and taken possession of all the property of Brown, and sold and disposed of the same to an amount far exceeding the debt due to the United States; that the defendants, at the time of their receiving and taking possession of the property aforesaid, well knew of the existence of the debt due to the United States, and though the same had been demanded of them, refused to pay it. Several other suits of a similar nature were brought for other debts, upon bonds due to the United States by Lewis E. Brown, which were afterwards consolidated with the present suit. Answers were duly put in by the defendants, which admitted the assignment, but denied that the syndics then had funds applicable to the debt. The cause was finally submitted to the court upon a statement of facts (which is in the case) prepared by the parties; the trial by jury being waived by their consent.

From this statement of facts it appears that Lewis E. Brown, at the time of his failure and insolvency, on the 26th of May, 1830, was surety for one John Brown, on certain custom-house bonds, for duties, due at various times between the 26th of August, 1830, and the 9th of January, 1831, upon all of which bonds judgments were rendered in favor of the United States before the commencement of the present suit, which was in March, 1831. On these judgments writs of *fiери facias* issued against all the parties, which were returned by the marshal *nulla bona*; and none of them have as yet been paid. John Brown failed and became insolvent, and applied for the benefit of the insolvent act of Louisiana, on the 10th of June, 1830.

The defendants made sale of Lewis E. Brown's property, on a credit of one, two and three years, and received promissory notes therefor. A part of these notes were paid before the 3d of December, 1831; and the residue was secured by mortgage on the property, and amounted to \$24,898.60, one half of which

fell due on the 31st of July, 1832, and the other half on the 31st of July, 1833. The United States never in any manner appeared in the proceedings had in the parish court, under the laws of Louisiana, in relation to the insolvency of Lewis E. Brown. At the time of his failure, there were certain mortgages and privileged debts on his estate. A part of these, as well as some other debts, had been paid by the assignees, and were stated in the tableau of distribution, which was rendered to and confirmed by the parish court on the 15th of December, 1831, upon due proceedings had thereon. On the 30th of December, 1830, the marshal, acting under the writs of *fieri facias* on several of the judgments against Lewis E. Brown, seized the funds in the possession of the defendants as syndics, and gave notice to them of the seizure thereof to satisfy these judgments respectively. At the hearing of the cause, the court admitted certain evidence to prove that the marshal made a seizure, and gave notice to the defendants that he had seized any funds in their hands to satisfy the judgment on which the present petition was founded; and an exception, by a bill of exceptions, was taken to such admission. And upon the final hearing, in February, 1833, the court gave judgment for the United States, for the amount of all the bonds and the interest due thereon, and costs.

The claim of the United States to the payment of the debts due to them, out of the funds in the hands of the syndics, is founded upon the priority given them by the sixty-fifth section of the duty collection act of 1799, chapter 128, which, in cases of a general insolvency and assignment like the present, provides that the debts of the United States shall be first satisfied out of the funds in the hands of the assignees.

§ 833. *The order of distribution of the state court under the insolvent laws of Louisiana is binding on all creditors whose claims are before the court, and protects the syndics or assignees against such creditors.*

The first objection now taken by the plaintiffs in error is, that the order of the parish court confirming the tableau of distribution, was the judgment of a court of competent jurisdiction, in favor of each creditor whose debt was therein stated; and that the syndics were obliged to pay the proceeds of the sale to such creditors; and the United States, not being named as creditors therein, can have no right to the fund against the other creditors. If at the time of the confirmation of this tableau of distribution, no debts due to the United States had been known to the syndics, and they had, in ignorance thereof, made a distribution of the whole funds among the other creditors, that might have raised a very different question. But in point of fact, it has not been denied that the syndics, long before that period, had notice of the existence of the debts due to the United States; and the present suit was commenced against them in the preceding March.

§ 834. *The local laws of a state governing distribution of insolvents' estates did not take away the priority of right of the United States.*

The United States were, it is true, not parties to the proceedings in the parish court, nor were they bound to appear and become parties therein. The local laws of the state could not and did not bind them in their rights. They could not create a priority in favor of other creditors in cases of insolvency, which should supersede that of the United States. The priority of the latter attached by the laws of the United States, in virtue of the assignment and notice to the syndics of their debts. And it was the duty of the syndics to have made known those debts in their tableau of distribution, as having such priority.

§ 835. — *but mortgages on particular estates had priority over the United States on the estates mortgaged, but no further.*

There is no doubt that the mortgages upon particular estates sold must be first paid out of the proceeds of the sales of those estates. But if there be any deficiency of the proceeds of any particular estate, to pay the mortgages thereon, the mortgagees thereof cannot come in upon the funds and proceeds of the sales of the other estates, except as general creditors. The district judge was perfectly correct in the views taken by him in his opinion on this subject.

§ 836. *Credit was lawfully given by the syndics on the estate sold, and until collected they were not liable to the United States.*

It appears from the papers in the record that the whole amount of the proceeds of all the sales exceeds \$40,000, and that the mortgages are about \$27,000; and making allowance for other privileged claims, if any, there will remain a balance in the hands of the syndics (when all the notes for the sales are paid) more than sufficient to pay all the debts due to the United States. But the difficulty is that the notes for a large amount of their proceeds, namely, \$24,898.60, did not become due until July, 1832, and July, 1833 (a moiety in each year), the first being after the present suit was commenced, and the latter after the present judgment was rendered. Now the syndics are certainly not liable to the United States for the debts due to them, unless funds have actually come to their hands. The notes for the sales may all be good, but as one moiety thereof was not paid at the time of the judgment, it does not judicially appear that, even at that time, they had funds out of which the United States were entitled to judgments. If the remaining moiety of the notes has been since paid, the United States will then have a legal claim thereon for their debts. For this reason the judgment of the district court must be reversed, and the cause sent back for further proceedings.

§ 837. *Where the cause is tried by the court, an exception to the admission of evidence is not a subject for bill of exceptions. But if evidence be improperly admitted, the supreme court will reject it.*

In regard to the bill of exceptions, as the cause was, by consent, not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But, if the district court improperly admitted the evidence, the only effect would be that this court would reject that evidence, and proceed to decide the cause as if it were not in the record. It would not, however, of itself, constitute any ground for a reversal of the judgment. But we are of opinion that the evidence was properly admissible as proof positive to the syndics of the debts due to the United States; and if the fact was material to enable the court to render suitable judgment on the statement of the parties, it is not easy to perceive why it should have been objectionable. Without this evidence, there seems to be enough in the record to show that the syndics had full notice of the debts due to the United States. They do not even set up in their answers any want of notice as a defense. But in the present state of the case, this matter is the less important because they now have the most ample notice of the debts due to the United States; and these will, at all events, be payable out of the residue of the sales when it is received.

With the question of costs this court has nothing to do; and as the judgment is reversed for another cause, it becomes immaterial to be considered.

BAYNE v. UNITED STATES.

(8 Otto, 642, 643. 1876.)

APPEAL from U. S. Circuit Court, District of Maryland.

Opinion by MR. JUSTICE DAVIS.

STATEMENT OF FACTS.—This suit was brought by the United States against the trustees of Bayne & Co. The court below passed a decree declaring the United States to be a preferred creditor of that firm in the sum of \$100,000, and directing the trustees to pay it out of the trust fund in their hands, as far as it would suffice therefor, to the exclusion of the claims of any other creditor. The trustees appealed to this court.

The proofs, although conflicting in some particulars, establish the material facts which entitle the complainant to relief. The United States, March 31, 1866, gave a draft in favor of Brevet Lieut.-Colonel Edward E. Paulding, a paymaster in the army, for \$200,000, on the First National Bank of Washington, D. C., a depository of public money, duly designated as such by the secretary of the treasury. He deposited it to his credit, as such officer, in that bank, the 13th day of the following April. He had no individual account there. On the 21st of the latter month he drew two checks on that bank, each for \$100,000, indorsed them in blank, and sent them to the cashier of the Merchants' National Bank of Washington, who presented them to the former bank, with the information that Lawrence P. Bayne, a member of the firm of Bayne & Co., desired that \$100,000 should be deposited to its credit in New York. This was done, and the amount realized by Bayne & Co., who, it is not pretended, were creditors of the United States. One-half of the remaining \$100,000 was paid in currency to the Merchants' Bank. A draft in its favor on New York for the residue was afterwards transferred by it to Bayne & Co.

The decree confines the rights of the United States as a preferred creditor of Bayne & Co. to the \$100,000 deposited to the credit of the firm in New York, and no question as to the remainder is now before us.

On the 2d or 3d of the next month (May) Bayne & Co. suspended payment, and on the 5th made an assignment in favor of their creditors, making certain preferences, which have no bearing on the present controversy. The Merchants' Bank was largely the creditor of Bayne & Co., and met with a disastrous failure, occasioned in a great degree by the insolvency of that firm.

§ 838. *One who obtains public money to which he is not entitled becomes thereby a debtor of the United States, who is entitled to priority of payment of such debt.*

Government funds in a bank, which is a public depository, can only be lawfully withdrawn therefrom by a disbursing officer, to meet the legitimate requirements of the public service. The money in question was applicable to a specific purpose, and diverting it, as was done in this case, to other uses, was a criminal misappropriation of it. Even its transfer to another depository, although no private interest was to be thereby subserved, was forbidden by an explicit and peremptory general order of the paymaster-general. We are fully satisfied by the proofs that the transactions between Paulding, the Merchants' Bank, and the First National Bank, were the result of a fraudulent purpose to secure the use of the public money to Bayne & Co., who received it with full knowledge that it belonged to the United States, and had been applied in manifest violation of the act of congress. The law imposes on

that firm an obligation, and implies a promise on its part to refund the money to its owner. Such a promise can be enforced by action. Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. *Moses v. Macferlan*, 2 Burr., 1012. *Bayne & Co.* are indebted to the United States, within the meaning of the fifth section of the act of congress of March 3, 1797, 1 Stat., 515. The form of their indebtedness, or the mode in which it was incurred, is immaterial. *Lewis, Trustee, v. United States*, 92 U. S., 618 (DR. AND CR., §§ 1887-92). The government being entitled to a preference and priority of payment from the assets of its insolvent debtors, the relief in this case was, in our opinion, properly granted.

Decree affirmed.

UNITED STATES v. FISHER.

(3 Cranch, 358-405. 1804.)

ERROR to U. S. Circuit Court, District of Pennsylvania.

Opinion by MARSHALL, C. J.

STATEMENT OF FACTS.—The question in this case is, whether the United States, as holders of a protested bill of exchange, which has been negotiated in the ordinary course of trade, are entitled to be preferred to the general creditors, where the debtor becomes bankrupt?

§ 839. *The priority given by law to the United States over other creditors of a bankrupt debtor by the act of March 3, 1797, section 5, extends to debtors generally, and is not confined to persons accountable for public moneys.*

The claim to this preference is founded on the fifth section of the act, entitled "an act to provide more effectually for the settlement of accounts between the United States and receivers of public money." 1 Stats. at Large, 512. The section is in these words: "And be it further enacted, that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

That these words, taken in their natural and usual sense, would embrace the case before the court, seems not to be controverted. "Any revenue officer, or other person, hereafter becoming indebted to the United States by bond or otherwise," is a description of persons, which, if neither explained nor restricted by other words or circumstances, would comprehend every debtor of the public, however his debt might have been contracted.

But other parts of the act involve this question in much embarrassment.

§ 840. *Rules for the construction of statutes.*

It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.

On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself.

As the enacting clause in this case would plainly give the United States the preference they claim, it is incumbent on those who oppose that preference to show an intent varying from that which the words import. In doing this, the whole act has been critically examined; and it has been contended with great ingenuity that every part of it demonstrates the legislative mind to have been directed towards a class of debtors entirely different from those who become so by drawing or indorsing bills, in the ordinary course of business.

§ 841. — *effect of title of act.*

The first part which has been resorted to is the title. On the influence which the title ought to have in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.

The title of the act is unquestionably limited to "receivers of public money;" a term which undoubtedly excludes the defendant in the present case.

The counsel for the defendants have also completely succeeded in demonstrating, that the four first sections of this act relate only to particular classes of debtors, among whom the drawer and indorser of a protested bill of exchange would not be comprehended. Wherever general words have been used in these sections, they are restrained by the subject to which they relate, and by other words frequently in the same sentence, to particular objects, so as to make it apparent that they were employed by the legislature in a limited sense. Hence it has been argued, with great strength of reasoning, that the same restricted interpretation ought to be given to the fifth section likewise.

If the same reason for that interpretation exists; if the words of the act generally, or the particular provisions of this section, afford the same reason for limiting its operation which is afforded with respect to those which precede it, then its operation must be limited to the same objects. The fifth section relates entirely to the priority claimed by the United States in the payment of debts. On the phraseology of this act it has been observed that there is a circuitry of expression which would not have been used if the intention of the legislature had been to establish its priority in all cases whatever. Instead of saying "any revenue officer, or other person hereafter becoming indebted to the United States," the natural mode of expressing such an intent would have been, "any person indebted to the United States;" and hence it has been inferred that debtors of a particular description only were in the mind of the legislature.

It is true the mode of expression which has been suggested is at least as appropriate as that which has been used; but between the two there is no difference of meaning, and it cannot be pretended that the natural sense of words is to be disregarded because that which they import might have been better or more directly expressed.

As a branch of this argument, it has also been said that the description commences with the very words which are used in the beginning of the first section; and from that circumstance it has been inferred that the same class of cases was still in view. The commencing words of each section are, "Any revenue officer or other person." But the argument drawn from this source, if the subject be pursued further, seems to operate against the defendants. In the first section the words are, "Any revenue officer or other person accountable for public money." With this expression completely in view, and having used it in part, the description would probably have been adopted throughout, had it been the intention of the legislature to describe the same class of debtors. But it is immediately dropped and more comprehensive words are employed. For persons "accountable for public money," persons "hereafter becoming indebted to the United States, by bond or otherwise," are substituted. This change of language strongly implies an intent to change the object of legislation.

But the great effort on the part of the defendant is to connect the fifth with the four preceding sections; and to prove that, as the general words in those sections are restricted to debtors of a particular description, the general words of the fifth section ought also to be restricted to debtors of the same description. On this point lies the stress of the cause.

In the analysis of the foregoing parts of the act the counsel for the defendants have shown that the general terms which have been used are uniformly connected with other words in the same section, and frequently in the same sentence, which necessarily restrict them. They have also shown that the provisions of those parts of the act are of such a nature that the words, taking the natural import of the whole sentence together, plainly form provisions only adapted to a class of cases which those words describe if used in a limited sense. It may be added that the four first sections of the act are connected with each other and plainly contain provisions on the same subject. They all relate to the mode of proceeding on suits instituted in courts, and each section regulates a particular branch of that proceeding. Where the class of suits is described in the first section, it is natural to suppose that the subsequent regulations respecting suits apply to those which have been described.

The first section directs that suits shall be instituted against revenue officers, and other persons accountable for public money, and imposes a penalty on delinquents, where a suit shall be commenced and prosecuted to judgment. The second section directs that certain testimony shall be admitted at the trial of the cause. The third section prescribes the condition under which a continuance may be granted, and the fourth section respects the testimony which may be produced by the defendant. These are all parts of the same subject; and there is strong reason, independent of the language of the act, to suppose that the provisions respecting them were designed to be co-extensive with each other.

But the fifth section is totally unconnected with those which precede it. Regulations of a suit in court no longer employ the mind of the legislature. The preference of the United States to other creditors becomes the subject of legislation; and as this subject is unconnected with that which had been disposed of in the foregoing sections, so is the language employed upon it without reference to that which had been previously used. If this language was ambiguous, all the means recommended by the counsel for the defendants

would be resorted to in order to remove the ambiguity. But it appears to the majority of the court to be too explicit to require the application of those principles which are useful in doubtful cases.

The mischiefs to result from the construction on which the United States insist have been stated as strong motives for overruling that construction. That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects. But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.

Of the latter description of inconveniences are those occasioned by the act in question. It is for the legislature to appreciate them. They are not of such magnitude as to induce an opinion that the legislature could not intend to expose the citizens of the United States to them, when words are used which manifest that intent. On this subject it is to be remarked that no *lien* is created by this law. No *bona fide* transfer of property in the ordinary course of business is overreached. It is only a priority in payment, which under different modifications, is a regulation in common use; and this priority is limited to a particular state of things when the debtor is living, though it takes effect generally if he be dead.

Passing from a consideration of the act itself, and the consequences which flow from it, the counsel on each side have sought to strengthen their construction by other acts *in pari materia*. The act of the 3d of March, 1797, has been supposed to be a continuation of legislative proceeding on the subject which was commenced on the 3d of March, 1795 (1 Stats. at Large, 441), by the act "for the more effectual recovery of debts due from individuals to the United States," which relates exclusively to the receivers of public money. Admitting the opinion that the act of 1797 was particularly designed to supply the defects of that of 1795, to be correct, it does not seem to follow that a substantive and independent section, having no connection with the provisions made in 1795, should be restricted by it.

The act of 1795 contains nothing relative to the priority of the United States, and therefore, will not explain the fifth section of the act of 1797, which relates exclusively to that subject. But the act of 1797, neither in its title nor its enacting clauses, contains any words of reference to the act of 1795. The words which are supposed to imply this reference are, "to provide more effectually." But these words have relation to the existing state of the law, on all the subjects to which the act of 1797 relates, not to those alone which are comprehended in the act of 1795. The title of the act of 1795 is also, "for the more effectual recovery of debts," and consequently refers to certain pre-existing laws. The act of 1797, therefore, may be supposed to

have in view the act of 1795, when providing for the objects contemplated in that act; but must be supposed to have other acts in view, when providing for objects not contemplated in that act.

As, therefore, the act of 1795 contains nothing respecting the priority of the United States, but is limited to provisions respecting suits in court, the act of 1797 may be considered in connection with that act, while on the subject of suits in court; but when on the subject of preference, must be considered in connection with acts which relate to the preference of the United States.

The first act on this subject passed on the 31st of July, 1789, section 21 (1 Stat. at Large, 42), and gave the United States a preference only in the case of bonds for duties. On the 4th of August, 1790 (1 Stat. at Large, 145), an act was passed on the same subject with that of 1789, which repeals all former acts, and re-enacts, in substance, the twenty-first section, relative to the priority of the United States. On the 2d of May, 1792 (1 Stat. at Large, 263, § 18), the priority previously given to the United States is transferred to the sureties on duty bonds, who shall themselves pay the debt; and the cases of insolvency, in which this priority is to take place, are explained to comprehend the case of a voluntary assignment, and the attached effects of an absconding, concealed or absent debtor.

Such was the title of the United States to a preference in the payment of debts previous to the passage of the act of 1797. It was limited to bonds for the payment of duties on imported goods, and on the tonnage of vessels. An internal revenue had been established, and extensive transactions had taken place, in the course of which many persons had necessarily become indebted to the United States. But no attempt to give them a preference in the collection of such debts had been made.

This subject is taken up in the fifth section of the act of 1797. The term "revenue officer," which is used in that act, would certainly comprehend any persons employed in the collection of the internal revenue; yet it may be well doubted whether those persons are contemplated in the foregoing sections of the act. They relate to a suit in court, and are perhaps restricted to those receivers of public money who have accounts on the books of the treasury. The head of the department in each state most probably accounts with the treasury, and the sub-collectors account with him. If this be correct, a class of debtors would be introduced into the fifth section by the term "revenue officers," who are indeed within the title, but not within the preceding enacting clauses of the law.

But passing over this term, the succeeding words seem, to the majority of the court, certainly to produce this effect. They are, "or other person hereafter becoming indebted to the United States by bond or otherwise." If this section was designed to place the collection of the internal revenue on the same footing of security with the external revenue, as has been argued by one of the counsel for the defendants, a design so reasonable that it would naturally be attributed to the legislature, then the debtors for excise duties would be comprehended within it; yet those debtors cannot be brought within the title, or the previous enacting clauses of the bill. The fifth section, then, would introduce a new class of debtors, and if it does so in any case, the act furnishes no principle which shall restrain the words of that section to every case to which they apply.

Three acts of congress have passed, subsequent to that under particular consideration, which have been supposed to bear upon the case. The first passed

on the 11th of July, 1798, and is entitled "An act to regulate and fix the compensation of the officers employed in collecting the internal revenues of the United States, and to insure more effectually the settlement of their accounts." The thirteenth section of this act (1 Stats. at Large, 593) refers expressly to the provisions of the act of March, 1797, on the subject of suits to be instituted on the bonds given by the officers collecting the internal revenue, and shows conclusively that in the opinion of the legislature the four first sections of that act did not extend to the case of those officers, consequently, if the fifth section extends to them, it introduces a class of debtors distinct from those contemplated in the clauses which respect suits in court. The fifteenth section of this act takes up the subject which is supposed to be contemplated by the fifth section of the act of 1797, and declares the debt due from these revenue officers to the United States to be a *lien* on their real estates, and on the real estates of their sureties, from the institution of suit thereon. It can scarcely be supposed that the legislature would have given a *lien* on the real estate without providing for a preference out of the personal estate, especially where there was no real estate, unless that preference was understood to be secured by a previous law.

The same observation applies to a subsequent act of the same session for laying a direct tax (1 Stat. at Large, 597). A lien is reserved on the real estate of the collector, without mentioning any claim to preference out of his personal estate. The last law which contains any provision on the subject of preference passed on the 2d of March, 1799 (1 Stat. at Large, 676). The sixty-fifth section of that act has been considered as repealing the fifth section of the act of 1797, or of manifesting the limited sense in which it is to be understood. It must be admitted that this section involves the subject in additional perplexity; but it is the opinion of the court, that on fair construction, it can apply only to bonds taken for those duties on imports and tonnage, which are the subject of the act. From the first law passed on this subject, every act respecting the collection of those duties had contained a section giving a preference to the United States, in case of the insolvency of the collectors of them.

The act of 1797, if construed as the United States would construe it, would extend to those collectors if there was no other provision in any other act giving a priority to the United States in these cases. As there was such a previous act, it might be supposed that its repeal by a subsequent law would create a doubt whether the act of 1797 would comprehend the case, and, therefore, from abundant caution, it might be deemed necessary still to retain the section in the new act respecting those duties. The general repealing clause of the act of 1799 cannot be construed to repeal the act of 1797, unless it provides for the cases to which that act extends.

It has also been argued that the bankrupt law itself affords ground for the opinion that the United States do not claim a general preference. (2 Stats. at Large, 36). The words of the sixty-second section of that law apply to debts generally as secured by prior acts. But as that section was not upon the subject of preference, but was merely designed to retain the rights of the United States in their existing situation, whatever that situation might be, the question may well be supposed not to have been investigated at that time, and the expressions of the section were probably not considered with a view to any influence they might have on those rights.

After maturely considering this doubtful statute, and comparing it with

other acts *in pari materia*, it is the opinion of the majority of the court that the preference given to the United States by the fifth section is not confined to revenue officers and persons accountable for public money, but extends to debtors generally. Supposing this distinction not to exist, it is contended that this priority of the United States cannot take effect in any case where suit has not been instituted; and in support of this opinion several decisions of the English judges with respect to the prerogative of the crown have been quoted.

To this argument the express words of the act of congress seem to be opposed. The legislature has declared the time when this priority shall have its commencement; and the court think those words conclusive on the point. The cases certainly show that a *bona fide* alienation of property before the right of priority attaches will be good, but that does not affect the present case. From the decisions on this subject a very ingenious argument was drawn by the counsel who made this point. The bankrupt law, he says, does not bind the king, because he is not named in it; yet it has been adjudged that the effects of a bankrupt are placed beyond the reach of the king by the assignment made under that law, unless they shall have been previously bound. He argues, that according to the understanding of the legislature, as proved by their acts relative to insolvent debtors, and according to the decisions in some of the inferior courts, the bankrupt law would not bind the United States, although the sixty-second section had not been inserted. That section, therefore, is only an expression of what would be law without it, and consequently is an immaterial section; as the king, though not bound by the bankrupt law, is bound by the assignment made under it; so he contended that the United States, though not bound by the law, are bound by the assignment.

But the assignment is made under and by the direction of the law, and a proviso that nothing contained in the law shall affect the right of preference claimed by the United States is equivalent to a proviso that the assignment shall not affect the right of preference claimed by the United States.

§ 842. *A law giving priority to the claim of the United States over general creditors of bankrupt debtors is not unconstitutional.*

If the act has attempted to give the United States a preference in the case before the court, it remains to inquire whether the constitution obstructs its operation. To the general observations made on this subject, it will only be observed that as the court can never be unmindful of the solemn duty imposed on the judicial department when a claim is supported by an act which conflicts with the constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument.

In the case at bar the preference claimed by the United States is not prohibited, but it has been truly said that under a constitution conferring specific powers the power contended for must be granted or it cannot be exercised. It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof. In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must

be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.

This claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the constitution itself. The mischief suggested so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of congress extends.

As the opinion given in the court below was that the plaintiffs did not maintain their action on the whole testimony exhibited, it is necessary to examine that testimony. It appears that the plaintiffs have proceeded on the transcripts from the books of the treasury, under the idea that this suit is maintainable under the act of 1797. The court does not mean to sanction that opinion; but, as no objection was taken to the testimony, it is understood to have been admitted. It is also understood that there is no question to be made respecting notice; but that the existence of the debt is admitted, and the right of the United States to priority of payment is the only real point in the cause.

The majority of this court is of opinion that the United States are entitled to that priority, and, therefore, the judgment of the circuit court is to be reversed, and the cause to be remanded for further proceedings.

Judgment reversed.

UNITED STATES v. HACK.

(8 Peters, 271-276. 1834.)

Opinion by MR. JUSTICE THOMPSON.

STATEMENT OF FACTS.—This cause comes up on a writ of error from the circuit court of the United States for the district of Maryland. The action in the circuit court was for the recovery of a sum of money which came into the hands of the defendants, as assignees of John and Jacob Stouffer who were partners in trade and had become insolvent. The material facts in the case as agreed between the parties are: "That John Stouffer, one of the partners, is largely indebted to the United States on sundry judgments rendered against him on custom-house bonds. That at the date of said bonds, and at the time of the rendition of the judgments, he was a partner in trade with Jacob Stouffer, and so continued until the 19th day of May, 1832, when they became embarrassed and insolvent, and executed a deed of trust to and in favor of the defendants, for all their joint and partnership property, for the benefit of their joint and partnership creditors, they having no private or individual estate. The property then assigned is not sufficient to pay the partnership creditors, but the undivided half of John Stouffer, now in the possession of the defendants, amounts to \$974.71.

Upon this state of facts, the question submitted to the circuit court was, whether the United States were entitled to recover from the defendants the

sum of \$974.71, being John Stouffer's half of the proceeds of the partnership estate. Upon which the court gave judgment for the defendants.

It is claimed on the part of the plaintiffs in error, that under the provisions of the acts of congress, the United States, as judgment creditors of John Stouffer, are entitled to be first paid, to the extent of his share of the property, assigned to the defendants, in preference to the creditors of the partnership. The act of congress (3 Laws U. S., 197, § 65) declares that when any bond for the payment of duties shall not be satisfied on the day it becomes due, the collector shall forthwith cause a prosecution to be commenced, etc. And in all cases of insolvency, or where any estate in the hands of the executors, administrators, or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due from the United States on such bonds shall be first satisfied, etc.

The construction of this clause of the act of congress has frequently come under the consideration of this court, although not under the circumstances in which it is now presented. It was held, at an early day, in the case of the *United States v. Fisher and others*, 2 Cranch, 358, 1 Cond. Rep., 421 (§§ 839-42, *supra*), in the construction of a similar clause in the act of 3d March, 1797 (1 Stats. at Large, 515), chapter 74, that no lien is created by this law. No *bona fide* transfer of property, in the ordinary course of business, is overreached.

And in a late case of *Conard v. Atlantic Ins. Co.*, 1 Pet., 439, this question received a very full examination and explanation of some former decisions, which seem not to have been fully understood. And in the course of which it is observed: "What, then, is the nature of the priority thus limited and established in favor of the United States? Is it a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignee? Or is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignee? We are of opinion that it clearly falls within the latter description."

§ 843. *When one member of an insolvent firm is indebted to the United States and the firm has assigned all its property for the benefit of its creditors, the United States are not entitled to recover under the sixty-fifth section of the collection act of 1799.*

If, then, the debt of the United States is not a lien, but only entitled to priority of payment out of the general funds of the debtor in the hands of the assignee, what are the funds out of which this priority is set up in the present case? They are not the funds of John Stouffer, the debtor of the United States, but of John and Jacob Stouffer, who have become insolvent, and having no separate property, and the partnership property is insufficient to satisfy the partnership creditors. It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property is his share in the surplus, after the partnership debts are paid; and that surplus only is liable for the separate debts of such partner. And this is the rule in the exchequer in England with respect to debts due to the crown. In the case of *The King v. Sanderson*, 1 Wightwick's Ex. Rep., 50, it was held, that upon an extent against one partner, the crown, like a separate private creditor, took the separate interest of the partner, subject to the partnership debts.

It has been a question very much litigated in England and in this country,

both in the courts of law and equity, as to the manner in which the separate creditor of one partner was to avail himself of the share of such partner in the joint property of the firm, where the partnership is solvent. But whatever course is adopted, it is the interest only of the separate partner that is taken, and always subject to the rights of the partnership creditors. 16 Johns., 106, and cases in note; 2 Johns. Ch., 548; 4 Johns. Ch., 525; 7 Cranch, 332; 2 Cond. Rep., 516. But that question does not arise here, as it is admitted that the partnership property is insufficient to pay the partnership debts. We entertain no doubt, therefore, that the United States are not entitled to recover the \$974.71. The judgment of the circuit court is accordingly affirmed.

BEASTON v. FARMERS' BANK OF DELAWARE.

(12 Peters, 102-139. 1838.)

Opinion by MR. JUSTICE MCKINLEY.

STATEMENT OF FACTS.—This is a writ of error to the judgment of the court of appeals, for the eastern shore of Maryland, reversing the judgment of the Cecil county court. The defendant in error sued out and prosecuted a writ of attachment *feri facias* against the plaintiff in error, in said county court, upon a judgment, previously obtained, against the Elkton Bank of Maryland; upon which the sheriff returned that he had attached goods and chattels, rights and credits, of the president and directors of said Elkton Bank, in the hands of the plaintiff in error, the sum of \$500.

Upon the trial of the cause, the following agreed case was submitted by the parties to the court for its judgment: "It is agreed in this case, that in 1828, the United States instituted a suit against the Elkton Bank, in the circuit court of the United States, at the December term, 1829; a verdict and judgment were rendered in said suit, in favor of the United States, for \$21,200, on which judgment a *feri facias* was issued at April term, 1830, and returned *nulla bona*; but it is admitted that, at the time, the said president and directors of the Elkton Bank had a large landed estate, which has been since sold and applied to satisfy, in part, the said judgment; which landed estate, together with all other effects or property belonging to the bank, would not enable the bank to pay its debts, and that the same property and effects are not sufficient to pay the said debt due to the United States; and it is admitted that the bank was then unable to pay its debts. An appeal was prosecuted, but no appeal bond given; and the judgment was affirmed in the supreme court, at the January term, 1832. At the April term, 1830, of the circuit court, a bill in equity was filed against the said bank, at the suit of the United States; and Nathaniel Williams and John Glenn were appointed, by an order of court, receivers, with authority to take possession of the property of said bank, to dispose of the same, and to collect all debts due to it, as appears by the record marked exhibit A; which receivers gave bond, on the 14th day of June, 1830, and proceeded to execute their trust. The records marked exhibit A and exhibit B, herewith filed, are to be considered as part of this case stated. At December session, 1829, application was made to the legislature of Maryland, by the several persons who were the acting president and directors of the said bank, for the act which was passed at that session, chapter 170; which, with all other acts relating to said bank, are to be considered as part of this statement. A meeting of the stockholders, convened on the 17th day of May, 1830, which was the third Monday of said month, but without the

notice mentioned and required by the act incorporating the bank, and its supplements; and at the said meeting, a majority of the stockholders appointed two trustees, in conformity with the provisions of said act, who declined accepting; and no trustees have ever since been appointed, nor has there since been an annual or other meeting of the stockholders, or an election of directors; nor have there been any banking operations carried on by any persons professing to be the corporation of the Elkton Bank, since March, 1829.

“At September term, 1828, the Elkton Bank obtained a judgment against George Beaston for the sum which is attached in this suit; which, at the time of issuing and service of this attachment, had not been paid by Beaston. At April term, 1830, the Farmers' Bank of Delaware obtained, in Cecil county court, a judgment against the president and directors of the Elkton Bank for \$5,000, with interest from 9th December, 1825, till paid, and costs; and before the appointment and bonding of the receivers, as aforesaid, and on the 24th September, 1830, upon that judgment issued this attachment, and attached, in the hands of said Beaston, the sum of \$500; and after this attachment was issued and served, and after the affirmation of the judgment of the circuit court by the supreme court, attachment was issued by the United States, and the other proceedings had, as appears from the record marked B; and Beaston has actually paid and satisfied to the United States the amount for which judgment of condemnation was rendered against him in the circuit court. It is admitted, that up to the time of the decision in the supreme court, the said receivers had never collected or received, or by any process of law attempted to collect or receive the said debt, attached in this case. The question for the opinion of the court is whether the plaintiff can sustain the present attachment?” Whereupon the court rendered judgment in favor of the defendant; and, upon an appeal taken by the plaintiff, the court of appeals reversed the judgment of the county court.

In the argument here the counsel for the plaintiff in error made the following points: First, the Elkton Bank of Maryland is a person, within the meaning of the act of congress of the 3d of March, 1797, giving priority of payment to the United States; secondly, by a proper construction of that act, the plaintiff in error having paid to the United States the amount which he owed to the Elkton Bank, is not liable to the defendant in error; thirdly, the appointment of receivers by the circuit court, with power to take possession of the property of the bank and to sell and dispose of the same, and to collect all debts due to it, was such an assignment of its property as to give the right of priority to the United States; fourthly, the election of trustees by the stockholders of the bank, under the act of the Maryland legislature, was also such an assignment of the property of the bank as to give the right of priority to the United States; and for these reasons, they contended, the judgment of the court of appeals ought to be reversed.

The counsel for the defendant in error resisted all the grounds assumed by the counsel for the plaintiff in error, and insisted that, by a fair construction of the fifth section of the act, and the former adjudications of this court, the priority therein provided for did not attach to the fund belonging to the Elkton Bank in the hands of the plaintiff in error.

§ 844. *The priority of payment to which the United States is entitled under the act of congress of 1797 defined.*

The section referred to is in these words: “That when any revenue officer,

or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased person, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the effects of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

From the language employed in this section and the construction given to it from time to time by this court, these rules are clearly established: First, that no lien is created by the statute; secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts; thirdly, no evidence can be received of the insolvency of the debtor until he has been divested of his property in one of the modes stated in the section; and, fourthly, whenever he is thus divested of his property, the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property. *The United States v. Fisher*, 2 Cranch, 358 (§§ 839-42, *supra*); *The United States v. Hooe*, 3 Cranch, 73; *Prince v. Bartlett*, 8 Cranch, 431; *Conard v. Atlantic Ins. Co.*, 1 Pet., 439; *Conard v. Nicholl*, 4 Pet., 308; *Brent v. The Bank of Washington*, 10 Pet., 596.

§ 845. *A bank is a "person" within the meaning of the act of congress of 1797 giving priority of payment, etc.*

If the Elkton Bank of Maryland is not a person within the meaning of the act, no law of congress was drawn in question in the court below, and, consequently, the question of priority did not arise. That court having decided upon the legal effect of the several acts done by the circuit court of the United States, and also upon the legal effect of the election of trustees by the stockholders of the bank, under the act of Maryland, which several acts were relied upon by the plaintiff in error as being an assignment of all the property of the bank, or as constituting an act equivalent to such an assignment, the question whether the bank is a person, within the meaning of the act of congress, was necessarily decided. It lies at the foundation of the whole proceeding; and if we now decide that the bank is not a person, within the meaning of the act, under the twenty-fifth section (1 Stats. at Large, 85) of the Judiciary Act of 1789, it will be our duty to dismiss the writ of error for want of jurisdiction. *Inglee v. Coolidge*, 2 Wheat., 363; *Miller v. Nicholls*, 4 Wheat., 311; *Crowell v. Randell*, and *Shoemaker v. Randell*, 10 Pet., 368 (*APPEALS*, §§ 857-60); *M'Kinney v. Carroll*, 12 Pet., 66, decided at the present term of this court. We must, therefore, inquire whether the bank is a person within the meaning of the act of congress.

All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the act of congress. And it is manifest that congress intended to give priority of payment to the United States over all other creditors in the cases stated therein. It therefore lies upon those who claim exemption from the operation of the statute to show that they are not within its provisions. No authority has been adduced to show that a corporation may not, in the construction of statutes, be regarded as a natural person, while, on the contrary,

authorities have been cited which show that corporations are to be deemed and considered as persons when the circumstances in which they are placed are identical with those of natural persons, expressly included in such statutes. As this statute has reference to the public good, it ought to be liberally construed. *United States v. The State Bank of North Carolina*, 6 Pet., 29. As this question has been fully decided by this court, other authorities need not be cited.

In the case of the *United States v. Amedy*, 11 Wheat., 392, which was a prosecution for destroying a vessel at sea with intent to prejudice the underwriters, the Boston Insurance Company, the section of the statute (2 Stats. at Large, 290) under which he was prosecuted subjected to the penalty of death any person, being owner, or part owner, who should burn, destroy, etc., any ship or vessel, with intent to prejudice any person or persons that had underwritten, or should underwrite, any policy of insurance, etc. The court in delivering the opinion, says: "Another question not raised in the court below has been raised here, and upon which, as it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is that a corporation is not a person, within the meaning of the act of congress. If there had been any settled course of decisions on this subject in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of the act. But there is no such course of decision. The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons." After citing 2 Inst., 736, and some other authorities, the opinion proceeds thus: "Finding, therefore, no authority at common law which overthrows the doctrine of Lord Coke, we do not think that we are entitled to engraft any such constructive exception upon the text of the statute." This case, we think, is decisive of the question. And the fact that the Elkton Bank cannot be brought within all the predicaments stated in the statute proves nothing if it can be brought within any one or more of them.

The record in this case abundantly proves that a bank may become largely indebted to the United States, and not have property sufficient to pay all its debts. If to these facts were superadded the fact of a voluntary assignment by the bank of all its property, in any mode authorized by law, the right of the United States to priority would be clearly established.

§ 846. *An attachment in favor of a private creditor, levied before the issuance of one in favor of the United States, takes precedence over the latter.*

This brings us to the consideration of the second point raised by the plaintiff in error. The agreed case shows that the attachment *fieri facias*, upon the judgment of the defendant in error against the Elkton Bank, issued on the 24th day of September, 1830, and attached in the hands of the plaintiff in error the sum in controversy. The attachment in favor of the United States did not issue until the 8th day of July, 1831. And the plaintiff in error, in answering the interrogatories propounded to him in that proceeding, stated that in October, in the year 1830, an attachment, at the suit of the Farmers' Bank of Delaware, against him, as garnishee of the Elkton Bank of Maryland, was served on him, returnable to Cecil county court, where said attachment was still depending. The money thus attached in the hands of the plaintiff in error, by legal process, before the issuing of the attachment in behalf of the United States, was bound for the debt for which it was legally attached by a writ, which is in the nature of an execution; and the right of a private cred-

itor thus acquired could not be defeated by the process subsequently issued on the part of the United States. *Prince v. Bartlett*, 8 Cranch, 431.

We are next to inquire into the legal effect of the appointment of receivers by the circuit court. Without deciding whether a circuit court of the United States has authority, in a case like this, to appoint receivers, with power to take possession of all the property of a debtor of the United States, it is sufficient to say in this case, that it does not appear that the power conferred on the receivers was ever executed; and if it had been, it would not have been a transfer and possession of the property of the Elkton Bank, within the meaning of the act of congress, and therefore, the priority could not have attached to the funds in their hands.

§ 847. *Upon the transfer of property by a debtor of the United States, the assignee becomes a trustee for the United States under the act of 1797.*

The only remaining question is, whether the election of trustees by the stockholders of the Elkton Bank, under the statute of Maryland, was such an assignment of all the property of the bank as would entitle the United States to priority of payment out of its funds. In the investigation of this branch of the subject, it is not necessary to inquire into the regularity of the election of the trustees. Suppose it to have been perfectly regular in all respects, did it so operate as to divest the Elkton Bank of its property? No one can be divested of his property by any mode of conveyance, statutory or otherwise, unless at the same time, and by the same conveyance, the grantee becomes invested with the title. As the trustees refused to accept the trust, none was created, and the election thereby became inoperative and void, and the property remained in the bank. *Brent v. Bank of Washington*, 10 Pet., 611; *Hunter v. United States*, 5 Pet., 173 (BONDS, §§ 527-31).

The moment the transfer of property takes place under the statute, the person taking it, whether by voluntary assignment or by operation of law, becomes bound to the United States for the faithful performance of the trust. *Conard v. Atlantic Ins. Co.*, 1 Pet., 439. As the title to the property of the bank did not pass to the trustees by virtue of the election, there was no fund to which the priority of the United States could attach; there was no one authorized or bound to execute a trust under the statute; therefore, no legal bar was opposed to the right of recovery and satisfaction of the debt due by the Elkton Bank to the defendant in error.

Upon the whole, it is the opinion of the court there is no error in the judgment of the court of appeals.

MR. JUSTICE STORY dissented (BALDWIN and McLEAN, JJ, concurring), on the ground that a corporation is not a person within the sense of the fifth section of the act of 1797.

UNITED STATES v. WILKINSON.

(Circuit Court for Missouri: 5 Dillon, 275-280. 1878.)

STATEMENT OF FACTS.—The bill in this case alleged that Wilkinson, as internal revenue collector, became indebted to the plaintiff, in a sum named, for which plaintiff obtained judgment in March, 1876; that in September, 1875, Wilkinson fled the country, and the Bank of St. Joseph obtained a judgment under an attachment, and became the purchaser of the property at the sale. The bill seeks to charge the bank as trustee.

Opinion by KREKEL, J.

The legal question raised may be considered under the first cause assigned in the demurrer, "that the bill does not state a cause of action against the defendant bank." The right of recovery on part of the United States is based upon section 3466 of the Revised Statutes of the United States, which is as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." See, also, R. S., section 3467.

It would appear that the priority provided for applies and extends to cases only in which the estate of the debtor passes from him or is administered for the benefit of his creditors. Burrill on Assignments, p. 534, and cases cited. An insolvent estate is so administered. The administrator or executor deals with the assets of the estate for the benefit of creditors in the first instance. An assignment made voluntarily brings the property to be administered into the same category. Thus far there is no difficulty in ascertaining the meaning and intent of the law securing the preference. The clause affecting the estate and effects of an absconding debtor, when attached by process of law, presents the real difficulty.

We have two classes of attachment in the United States; in the one the effect is to vest the property of the debtor in trustees for the benefit of all the debtor's creditors; in the other class (as in Missouri) the attachment is for the exclusive benefit of the attaching creditor. In New York, New Jersey, Delaware and Pennsylvania, the property of absconding and concealed debtors, when attached, passes into the hands of trustees, to be administered for the benefit of the whole of the creditors. The provision of the United States statutes uses the words "absconding, concealed, and absent debtor," and it is a reasonable construction to say the attachments spoken of refer to the class of attachments in the states named. This has been so held. 1 Kent's Commentaries, 247, side page and notes; *United States v. Clark*, 1 Paine, 639; *Smith v. Tinker*, 2 Day, 241; *McLean v. Rankin*, 3 Johns. Ch., 369; *United States v. Cruikshank*, 3 Edw. Ch., 233; *Johnson v. Hunt*, 23 Wend., 87, 89; *Plunkett v. Moore*, 3 Harr. (Mich.), 380; *Cummings v. Blair*, 3 Harr. (N. J.), 152; *Bouchaud v. Dias*, 1 Comst., 204; Burrill on Assignments, 534; *Field v. United States*, 9 Pet., 201; *United States v. Fisher*, 2 Cranch, 390, note; *United States v. Mott*, 1 Paine, 201; *United States v. Hooe*, 3 Cranch, 87; *Conard v. Insurance Co.*, 1 Pet., 439, 440; *Watkins v. Otis*, 2 Pick., 101, 102; *Drake on Attachment*, secs. 644, 668, 673.

§ 848. *The priority of the United States as a creditor does not attach in Missouri to effect property attached by a creditor.*

The effect of an attachment in Missouri is to secure to the attaching creditor a conditional lien which may be perfected by a judgment, and affects the property attached only and does not affect the interest of any other than the attaching creditor in any way. The fact that the St. Joseph Bank attached all the property of Wilkinson—the defaulter—cannot alter the case or change the effect of the law. The attaching bank, under the laws of Missouri,

was the only party interested, both as a creditor and as regards the property attached.

The next section of the Revised Statutes after the one quoted supports this view. That section provides that "every executor, administrator, or assignee, or other person who pays any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due the United States," shall become personally answerable in his own person and estate for the debts due to the United States. The class of persons here referred to is evidently a class acting as trustees in some capacity and not for themselves. Reading this provision thus, it harmonizes with the construction given to the attachment referred to in section 3466.

In considering the question at issue, it may not be improper to ask: Does the priority secured to the United States so impress itself upon the property as to create a lien, subject to which the Bank of St. Joseph acquired the property of the defaulting debtor, Wilkinson? If it did, then every person dealing with one who is or may become indebted to the United States does so at his peril. All property of a debtor of the United States would be affected by possible liens, the existence and extent of which no one could well ascertain. The question of such implied lien in favor of the United States has been considered by commentators and courts. Chancellor Kent (1 Commentaries, side page 245, citing *United States v. Hooe*) says that it was there held "that the priority to which the United States were entitled did not partake of the character of a lien on property of the public debtor. The United States, in the character of a creditor, have no lien on the real estate of their debtor. If the priority existed from the time the debt was contracted, and the debtor should continue to transact business with the world, the inconvenience would be immense. The priority only applied to cases where the debtor had become actually and notoriously insolvent, and, being unable to pay his debts, has made a voluntary assignment of all his property, or having absconded or absented himself, his property had been attached by process of law." In the case of *Prince v. Bartlett*, 8 Cranch, 431, it was decided "that the effects of an insolvent debtor duly attached in June were considered not liable to the claim of the United States on a custom-house bond given prior to the attachment and put in suit in August following. The private debtor had acquired a lien by his attachment which could not be divested by process on part of the United States subsequently issued." *Beaston v. The Farmers' Bank*, 12 Pet., 102 (§§ 844-47, *supra*).

Under the views expressed no lien in favor of the United States on account of preference existed at the time the sheriff of Buchanan county seized the property afterwards sold under execution on judgment in favor of the bank obtained in the attachment suit. The property being free of liens, the bank buying it thereby incurred no liability to the United States and holds the property free of any claim of the United States.

The judgment of the court is that the demurrer be sustained and the bill dismissed.

UNITED STATES *v.* DUNCAN.

(Circuit Court for Illinois: 4 McLean, 607-634. 1850.)

Opinion by DRUMMOND, J.

STATEMENT OF FACTS.—In the year 1835, Joseph Duncan, whose representatives are the defendants in this case, became one of the sureties of William

Linn, receiver of public moneys at Vandalia, in this state. The principal having failed to comply with the duties imposed on him by law, the sureties became liable in the bond given to the United States. At the June term, 1841, of this court, the United States recovered three several judgments at law against the sureties. Duncan, among others, for the aggregate sum of \$29,191.05. At the time these judgments were obtained, none of the sureties except Duncan had any available property, and Linn, the principal, was insolvent. On the 22d of December, 1843, the United States realized on these judgments the sum of \$23,532.65.

In January, 1844, Joseph Duncan died, disposing by will of his real and personal estate, but making no provision other than the usual one for the payment of his debts, for the amount due the United States. At the time of his death, he was seized of a great many tracts of land lying in different counties of this state, and in Morgan county, his place of residence. The judgments of 1841, in this court, not covering the defalcation of Linn, the plaintiffs instituted suit at law, to the December term of this court, 1844, against William Thomas, as administrator, etc., of Joseph Duncan, the executors having resigned or ceased to act; and at that term recovered judgment against the administrator *de bonis testatoris*, for the sum of \$48,151.61.

In February, 1846, the United States filed a bill in this court, setting forth most of the facts detailed above, and asking for a discovery of the title papers and estate of Duncan; insisting upon the priority of the plaintiffs, and praying for an account of the money due the United States, of the personal estate of Duncan, and of the value, rents and profits of the real estate; and that if the personal estate was not sufficient, the real estate might be sold to pay the debt due the plaintiffs. To this bill, the widow, heirs, executors, devisees, etc., of Duncan were made parties. During the progress of the cause the value of the widow's dower was agreed upon and amicably settled, and she relinquished. Answers were put in by the defendants, and at the June term, 1846, a decree was rendered in favor of the United States for the sum of \$49,156.15 (that being all that was due except what had not been collected under the judgments of 1841), and ordering the real estate of Duncan to be sold, and the proceeds to be paid to the United States, "first paying prior liens, if any."

Under this decree, various sales of real estate out of Morgan county have taken place, under the direction of a commissioner, for which very considerable sums have been realized, part of which have been paid over to the United States, but there remains the sum of \$4,052 subject to the order of the court. Personal property to the amount of \$300 was sold under the judgment of 1844.

There were two judgments recovered against Duncan in his life-time in the circuit court of Morgan county, of this state, one by McConnell and others for \$333.76, in November, 1841, and the other by Matthews for \$497.35, in March, 1842. On the 10th of November, 1845, Doremas, Suydam & Nixon filed a bill in the same court against William Thomas, administrator, etc., of Duncan's estate, alleging that certain personal property which the executors of Duncan had sold, and the proceeds of which, amounting to \$960.60, it seems they had applied to the payment of taxes on real estate and expenses of administration, belonged to a firm of which one James M. Duncan and Joseph Duncan, in his life time, were partners, and that the plaintiffs were creditors of that firm, and claiming that they (Doremas, Suydam & Nixon) should be repaid the money so used by the executors, and that they should be substituted in their place, insisting it was a former claim. James M. Duncan, also one

of the sureties of Linn, was a party to this bill, but he was insolvent. The administrator in his answer denied the partnership, and referred to the claim of the United States and their priority, and to the proceedings in this court, which he set forth at length; but the circuit court of Morgan county, by a decree rendered on the 17th November, 1847, found that the partnership did exist, as stated in the bill; that at the death of Duncan, the goods and chattels referred to, and the proceeds of which had gone into the hands of the executors, were liable for the partnership debts, wherever traced, and ordered that the plaintiffs should be paid out of the estate of Duncan. To Doremas & Nixon, \$766.48; to Wm. A. Ranson & Co., \$194.12. The latter had been made parties and Suydam had died pending the suit. The court further adjudged that inasmuch as it did not appear the administrator had any assets in his hands, he should pay the above sums out of assets thereafter to come into his hands, or which might remain in his hands after the settlement of his accounts as administrator. It is proper to add that an objection was made in the answer of Thomas, because the United States were not made parties; but the court decided that it was not necessary to make them parties.

§ 849. *The judgments of a circuit court of the United States have a lien co-extensive with its jurisdiction (in Illinois).*

It was conceded that the judgments of 1841, rendered in this court, were a lien on all the real estate of Duncan within the state; that the decree of June term, 1846, operated to the same extent, upon the real estate in the hands of the heirs, devisees, executors, etc., of Duncan; and that the judgments of the Morgan circuit court operated only upon real estate within the county of Morgan. The judgments and decrees rendered in the circuit court of Morgan county are yet in force, not being paid or satisfied, except some partial payments hereafter mentioned.

The judgments at law of this court recovered in 1841, being only paid in part, the United States in 1847 issued alias executions on those judgments, and the marshal levied them on lands lying in Morgan county of which Duncan had been seized, and they were sold by the plaintiffs. Joseph Duncan, at the time of his death, did not possess sufficient property, including real and personal, to discharge the debt he owed the United States, the lands out of Morgan county not being of value enough to satisfy the decree of June term, 1846. And it does not appear that there was more than sufficient property in Morgan county to meet the balance due on the judgments of 1841 of this court.

In this condition stood the case, when, on the 15th of June, 1847, McConnell *et al.* and Matthews filed their petition in this court. The petition of McConnell *et al.* alleges that under the decree of 1846, sales of lands without the county of Morgan had taken place, upon which had been made \$3,555.20, which it insists ought to be, as to the lien of their judgment, a credit on the judgments at law of the United States of June, 1841 — that there are lands out of the county of Morgan more than sufficient to satisfy those judgments, and that the United States are proceeding to sell real estate in Morgan county. The petition calls for the interposition of the court to arrest the sale; to marshal the securities so as to give them the benefit of their lien, by throwing the judgments of the United States of 1841 upon lands out of Morgan county, and that the sum made, \$3,555.20, be applied upon those judgments. The petition of Matthews is, in all respects, similar to that of McConnell *et al.*

A *fi. fa.* had issued on the judgment of McConnell, and \$60.00 had been obtained on it. A *fi. fa.* had also issued on the judgment of Matthews, and

real estate had been levied on and \$393.00 made by the sale of it. The executions in each case were issued within a year after the judgments were obtained respectively.

On the 23d of December, 1847, Doremas & Nixon, and A. Ranson & Co., likewise filed a petition setting forth most of the facts heretofore mentioned, and alleging that this court had taken full administration of the estate of Duncan; that their decree of the Morgan court of November, 1847, had been rendered useless; that there was no priority of payment to the United States, till the estate was ready to be disbursed; that taxes and costs of administration were to be first paid; that under the circumstances they stand as the state and individuals, and were clothed with their rights; that there was more real estate to be sold, and their partnership fund had increased the amount to be disbursed in this cause; and asking that their decree be paid out of money received from the sale of real and personal estate, or, if that be not proper, that the commissioner of this court be ordered to sell land enough to satisfy the sum named in their decree and pay it over to them.

Various supplemental petitions were filed by all the parties from time to time, bringing before the court the proceedings that have since taken place in this cause, and particularly stating that other lands, out of Morgan county, had been sold under the decree of June, 1846, and the money received, and that the sum of \$3,789.56 was made by sale of land in Morgan county under the judgment of 1841.

The petition of O'Donoghue, which was filed on the 10th of January, 1849, states that he had purchased a lot of land at a sale made by the commissioner in this cause, which lot was sold as a part of the estate of Duncan; that he paid the commissioner for it, and that Duncan had no title to it, having before his death by deed duly recorded, conveyed it to the Illinois College, and he seeks to have the sale by the commissioner annulled, and to have the money paid by him reimbursed out of the fund in court.

When these petitions were presented, this court, without determining the questions sought to be raised by them, ordered that a sufficient fund should be reserved to satisfy their claims, which was to be paid to the petitioners provided the court should be of opinion, upon the final disposition of the cause, that the parties were entitled to receive the amounts they sought. And there is now a fund of more than \$4,000 awaiting the decision of the questions presented by these petitioners.

These are the material facts: The applications were once heard before the former judge of this court, but no decision was given or order entered. They have therefore been fully argued before me, and it now becomes my duty to announce my opinions upon the different questions presented. The counsel of the United States, not denying the allegations contained in the petitions, insists that the petitioners are not entitled to the relief they seek, nor to any relief. As the petition of O'Donoghue stands upon a footing entirely different from the others, it may be convenient to consider that first.

§ 850. *A purchaser at a judicial sale cannot call upon the plaintiff to refund the purchase money. The rule of caveat emptor.*

The sale under which he purchased the lot was made by the order of this court, and it is well settled that in all judicial sales there is no warranty; but that the rule of *caveat emptor* applies. *Owings v. Thompson*, 3 Scam., 502. If there be fraud or concealment or any unfair dealing, that may be a ground for an application to a court of equity; otherwise the purchaser must look to

the soundness of his title. This is the established rule in England and throughout the United States, and it should be peculiarly applicable here, where it is so easy to trace the title to real estate, the sources, in nearly all cases, being the public records of the country. It is true where a plaintiff in an execution purchases a tract of land, belonging apparently, or which he supposes to belong, to the defendant, and there is, in fact, no title, a court will interpose and place the parties in their former condition. But that is because it is a matter between themselves; the purchase having neither benefited nor injured any third person; and it has been decided that where there was no fraud and a stranger to the execution purchased a piece of land as the property of the defendant, where he had no title, a court of equity would compel the judgment debtor to refund the amount to the purchaser, on the ground that his purchase had paid the debt. But no case has been shown in which, under such circumstances, the purchaser could call upon the plaintiff in the execution to refund the amount. Indeed the case just mentioned is conclusive that he could not, for it is because the sale must so far stand as to enable the plaintiff to retain the money paid, that the defendant is liable. It could make no difference that the money, instead of being in the hands of the party, was held by the officer or paid into court. In either case, it would seem, the right of the party to the fruits of his judgment could not be contested.

But conceding that this last position may be questionable, still after the money has actually been paid to the party, it is beyond the reach of the purchaser. Here the money paid by the petitioner has been received by the plaintiff, and he seeks to make another fund, now in court, arising from the sale of other property belonging to the estate of Duncan, liable to the claim.

On the part of the petitioner the court was referred to *Lansing v. Quackenbush*, 5 Cowen, 38, a case where the defendant had represented he was the owner of lots, which the party purchased, and it turned out he was not. On application to the court, they said there was a remedy but that it was in equity. Here was a false statement, and if the plaintiff were not a party to it, the remedy would be against the defendant. *Adams v. Smith*, 5 Cowen 280, was also referred to. In this case the sheriff had sold personal property which did not belong to the defendant, and the real owner sued the sheriff and plaintiff jointly and recovered. The court allowed the amount made on the sale and indorsed on the execution, to be stricken out and an execution to issue for the amount of the original judgment. In this case it was personal property, and the owner resorted to the remedy which the law gave him, the property remaining with the purchaser. Both cases are very shortly reported and clearly distinguishable from the present. But the supreme court of Illinois have held, under somewhat similar circumstances, there was no remedy against the plaintiff in the execution. A party purchased some property under an execution. A stranger sued for and recovered the property from the purchaser. The latter then brought suit against the plaintiff in the execution to recover back the purchase money. The court decided that the plaintiff was not liable. *England v. Clark*, 4 Scam., 486. These were all cases of personal property, but in a sale of real estate under execution, no action is brought, because if the property of A is sold on an execution against B the title to the property is unchanged, and A ordinarily suffers no wrong.

In a very recent case, however, *Dunn v. Frazier*, 8 Blackf., 432, this question was directly decided. That was a much stronger case than this. A judgment had been obtained and an execution was issued and returned *nulla bona*, and

afterward the judgment creditor filed a petition alleging that the judgment debtor was the owner of certain real estate in fee simple. On the application of the petitioner the court ordered the real estate to be sold on execution. It was sold accordingly, and Frazier became the purchaser. One of the administrators of the judgment debtor was present at the sale, and solicited Frazier to buy, assuring him that the title was good. Various proceedings took place, during which Dunn, the judgment creditor, transferred the judgment to one Adams, and Frazier refused to pay the purchase money. Another execution was issued which was enjoined. Finally Frazier paid part of the money to Adams and the remainder into court (to the clerk). The judgment debtor had no title to the property. These facts being made to appear to the court below, by bill in chancery, it ordered the money to be paid back to Frazier, but the supreme court of Indiana reversed the decree, on the distinct ground that a purchaser who buys land and pays the money, the judgment creditor receiving it, cannot recover it back from the creditor, either at law or in equity, merely because the judgment debtor had no title to the land. The proper course in such a case was to proceed against the judgment debtor or his estate by bill in equity. And even in relation to the money in court, it depended altogether upon the fact whether there was anything due on the judgment, or it was an overplus, in which last count it might be paid over to the purchaser. And see *Warner v. Helm*, 1 Gil., 220.

It will be seen, therefore, from these principles and authorities, the petitioner, while he has no claim upon the fund now in court, has a remedy against the estate of Duncan. That it may be unavailing is his misfortune. If the petitioner obtain the money he has paid, it must be by the voluntary act of the plaintiff, and not by the order of this court.

§ 851. *If a partner's executors use partnership funds to pay taxes on his own land, partnership creditors acquire thereby no lien on the land.*

Let us now proceed to consider the petition of Doremus & Nixon and A. Ranson & Co. They insist that, inasmuch as there was a partnership between James M. and Joseph Duncan, and the executors of Joseph Duncan had used the partnership goods to pay the taxes on his real estate, and the expenses of administration, they, as creditors of the partnership, have a right to be repaid out of the fund in court.

There can be no doubt that the partnership effects are primarily liable for the partnership debts, and that those effects ought not to be appropriated to the payment of the separate liabilities of one of the partners. And if the executors knowingly diverted them in the manner charged in the bill filed in the circuit court of the state, they acted illegally. But conceding this, it does not follow that the partnership creditors thereby obtained a lien upon the separate property of Duncan. No authority has been referred to which shows that if one partner withdraws funds from the partnership, and pays the taxes on his private estate, the creditors of the firm thereby acquire a lien on the land, unless, indeed, the decree on which the application now under consideration is founded may be so regarded. All that can be said is, that the estate of the partner becomes liable to the creditor of the firm. The estate of the partner is still his own private property, and, in case of his death, passes to his heirs or devisees, subject, if he has used the partnership funds for the purpose mentioned, to that debt as to others. Story on Part., §§ 97, 326, 358, 359, 360 and 361. Neither would the use of the partnership funds by the executors, in the expenses of administration, create any lien upon the estate. It would

still be a debt due from the estate. And, if the creditor of the firm were placed in the condition of those individuals to whom those expenses had been paid, it is doubtful whether that circumstance, for reasons presently to be given, would affect the question.

§ 852. *The true test of the liability of assets to partnership debts, in preference to individual debts, is whether such assets are partnership property or not.*

It has been decided that the priority of the United States does not reach the property of a partner in partnership effects, so as to pay the separate debt of one of the partners (he being the debtor of the United States) when the partnership property is not sufficient to pay the debts of the firm. *United States v. Hack*, 8 Pet., 271 (§ 843, *supra*). But that proceeds upon the presumption that they are partnership effects. It is plain, if they had ceased to be such, and had become the separate property of the one indebted to the United States, the doctrine would be different. The true test would seem to be whether the property belonged to the firm or the individual.

Now it is to be remarked that these petitioners did not ask the court of Morgan county to do more than to declare the partnership, and to decree the payment of the partnership debt out of assets which were at that time, or thereafter to be, in the hands of the administrator. They claimed, at most, not a lien on the estate, but a priority of payment out of the estate. And the court, though it expresses the opinion that the funds of the partnership effects were liable to the debts of the petitioners wherever they could be traced, decides they were to be paid out of the estate of the testator. Accordingly, in whatever light we may regard this decree of the circuit court of Morgan county, it is clear it intended that payment of the debts was to be made out of Duncan's estate, when there should be sufficient assets for that purpose in the hands of the administrator. The court does not even decree that the petitioners shall be first paid, but there is an alternative that they may be paid, when the administrator, upon the settlement of his accounts as such, shall have money then remaining in his hands. The decree did not create any lien, specific or general, upon any fund, nor upon the real estate of the testator, as it probably could not; and it does not vary essentially from the usual judgment against an administrator for the debt of a deceased party.

§ 853. *The proceedings in a state court, in a case in which the United States were not parties, does not impair their rights nor limit their priority of payment. The administrator, upon receiving proceeds of land sold, becomes a trustee for the United States.*

Though an objection was taken to the proceedings in Morgan county, because the United States were not made parties, it is said that the decree is binding on them in this court in this application, on the part of the petitioners. Let us now examine this position, and endeavor to ascertain whether this is so.

At the time of Joseph Duncan's death, his indebtedness to the United States, except the balance due on the judgments at law of this court, of 1841, did not constitute a lien upon his real or personal estate. The plaintiffs had only a right to a priority of payment. And it may be admitted, for the purpose of this argument, that their priority did not extend, in point of law, so as to operate upon the real estate of which Duncan died seized, in the hands of heirs or devisees. But at the time the petitioners filed their bill in the circuit court of Morgan county, there was a judgment of this court against William Thomas, as the administrator with the will annexed, etc., of Duncan, and at the time

the final decree was rendered in the circuit court of Morgan county, there was and had been for more than a year, a decree standing in this court, which took effect upon all the real estate of Duncan within the state, and directed it all to be sold for the payment of the debts of the United States, first paying prior liens. When this decree was rendered in June, 1846, the claims of the petitioners were certainly not a prior lien binding the estate. If, then, we give effect to the decree in the state court, we are not the less bound to give full effect to the judgments and decree in this court; and we will now proceed to show that it must be considered subject to those of this court; that under the law and by virtue of the proceedings here, the decree of the circuit court of Morgan county could not become operative until the claims in this court were satisfied.

The petitioners have not sought to enforce their decree in the state court; indeed, so long as there is nothing in the hands of the administrator, it would not, by its terms, be enforced. They come into this court and request its action on their claims.

By the fifth section of the act of 3d March, 1797, it is provided that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied. 1 Statutes at Large, 515. This applies to two classes of debtors. Those who are insolvent, and those whose estates, in the hands of executors or administrators, are not sufficient to discharge all the debts due from the estate. It was intended to reach the property of the debtor, whether living or dead. It has been decided that this section is applicable to all debtors of the United States. Joseph Duncan's estate was the estate of a deceased debtor of the United States, and when it comes within the other requisition of the act, that is, whenever it came into the hands of executors or administrators, then the operation of the law was complete. The doctrine of the supreme court of the United States, as founded on this law and a similar one (act of March 2, 1799, sec. 65) as it respects this point is, that the party, whether assignee, executor or administrator, into whose hands the estate of the two classes of debtors mentioned passes, becomes a trustee for the United States, and from the fund in his hands, they must first be paid. *Beaston v. The Farmers' Bank of Delaware*, 12 Pet., 102 (§§ 844-47, *supra*); *Brent v. Bank of Washington*, 10 Pet., 596. If it be admitted that the priority of the United States did not extend to the real estate of Duncan, in the hands of heirs or devisees, as already stated, because it does not attach as against them, still when the real estate or the proceeds thereof passed to, or vested by law in, the hands of the executors or administrators, the priority did attach. *United States v. Crookshank*, 1 Edw. Ch., 233. Consequently, whenever the proceeds of any real estate or any personal estate came into the hands of Thomas, as the administrator, he, having notice of the debt due the government, became a trustee for the United States, and was obliged to pay them first, independent of the judgment of December term, 1844, and the decree of June term, 1846, of this court. These merely determined the amount of the debt, but in no degree changed his duty in the premises.

It is to be observed that this law of congress supersedes all state laws upon the subject of the distribution of those estates that come within its provisions. The language of the supreme court of the United States, in *Thelusson v. Smith*,

2 Wheat., 396 (§§ 824-27, *supra*), is that there is no exception made by the law in favor of a particular class of creditors. And the same court, in *Conard v. Atlantic Ins. Co.*, 1 Pet., 444, say, that the priority of the United States does not yield to any class of creditors, however high may be the dignity of their debts. It follows, then, if these principles are correct, that the claims of the petitioners cannot bind any funds in the hands of the administrator, nor any lands sold under the judgments or the decree in chancery of this court, nor the proceeds of the same, notwithstanding the decree of the circuit court of Morgan county; for whatever may be the effect of this last decree, it cannot operate, under the circumstances, so as to impair the rights of the United States. *Field v. The United States*, 9 Peters, 182 (§§ 833-37, *supra*).

§ 854. *The priority of payment privilege of the United States is not affected by the rule that where one party has a lien on two funds and another on but one of them the first must resort in the first instance to that fund on which the second has no lien.*

The remaining question is as to the effect of the judgments at law of the circuit court of Morgan county. As the rights of the petitioners whose claims we are now to consider depend upon the same principle, we will examine them together. This, then, was the position of the parties. The United States had judgments binding all the lands of Duncan throughout the state, prior, in point of time, to the judgment of McConnell and others, and that of Matthews, which last two judgments were binding only on lands in Morgan county; and the United States had a decree subsequent and subordinate to both, but which, in extent, had the advantage of operating, like the judgments of June, 1841, throughout the state. The petitioners insist they have a right to throw the judgments of 1841 upon lands without the county of Morgan. They assert that at the time their judgments became liens upon the real estate in Morgan county, the United States, having also judgments which were liens upon that land, and which were, besides, liens upon lands out of Morgan county, are compelled to go upon these last mentioned lands upon the principle, well recognized and understood, that where a party has a lien for a debt on two funds, and another party has a lien on one of the funds only, a court of equity will oblige the party who has the double fund, to resort, in the first instance, for payment, to that fund upon which the other party has no lien. And it is contended that the circumstance of the United States procuring a decree binding the lands out of Morgan county, before the application is made here, can make no difference. Another principle is also involved, which may be considered settled law in New York at least, that where there is a general incumbrance upon distinct parcels of land, and the owner aliens them at different times to different persons, the parcel last sold is to be first charged to its full value to pay the general incumbrance, and so on backwards. The argument is this: If Duncan had mortgaged all his lands in the state to the United States for the payment of \$30,000, and then had mortgaged his lands in Morgan county to these petitioners for the amount of their judgments, and afterward all his lands out of Morgan county to the United States for \$49,000, these lands out of Morgan county, being the last aliened, are, according to the doctrine above mentioned, to be first charged with the payment of the sum first named. And it can make no difference, it is said, if, instead of mortgaging the lands out of Morgan county, he had mortgaged all of his lands in the state over again; because, it will be seen, in order to adapt it to this case, we must include all the land, the decree of 1846 of this court binding the lands in

Morgan county as well as elsewhere. It is urged that these being judgments, the principle is the same.

This is stating the proposition fully, and carrying the analogy to as great an extent in favor of the petitioners as was contended for by their counsel in the argument.

§ 855. *The rule settled in New York of the liability of lands in the inverse order of their alienation.*

The doctrine that where a man owns different parcels of land, and transfers some of them, himself also retaining some, all the parcels being subject, before the transfer, to a general incumbrance made by him, the part which he still retains shall be applied to the payment or discharge of that general incumbrance, rather than that which he has transferred, is founded on the plainest principles of equity. It would be manifestly unjust that those persons to whom he had made transfers should be compelled to pay off the incumbrance, when he held land which would satisfy it. Accordingly, it has been held, under such circumstances, that the property transferred is only liable, in the event of the part remaining in the owner not being sufficient to discharge the incumbrance. On the other hand, the doctrine already mentioned as settled in New York, that land consisting of different parcels, subject to a general incumbrance, is in equity to be charged in the inverse order of the alienation of the several parcels, has been sometimes questioned, and Judge Story thinks it is not maintainable upon principle, and inclines to the opinion that there should be contribution, in such cases, according to the relative value of the estates. Story's Equity Juris., §§ 634a, 1233a.

The New York doctrine was pressed very far in the case of *Schryver v. Tiller*, 9 Paige, 173, and as that was cited in the argument by the counsel of the petitioners, and considered conclusively settling the principles which should govern this case, it may not be improper to give it a particular examination.

In that case, the owner of two parcels of land — one at Cocksackie, the other at Redhook — having incumbered both by judgments, and each by mortgages, on the 28th of May, 1840, mortgaged the Cocksackie property, and on the 7th of July following, mortgaged it again to another person. On the 9th of June of the same year, he mortgaged the Redhook property, and again on the 12th of the same month, this last being given to the same persons that held the mortgage of the 7th of July on the Cocksackie property. On the 3d of June, 1840, a judgment was docketed, which was a lien on both. The parties who held the mortgage of the 7th of July on the Cocksackie property, and those who held the mortgage of the 9th of June on the Redhook property, at different times and in different courts, filed bills for foreclosure, and at different dates obtained the usual decrees for sale of the property, the master having reported as to the priority of the several liens. On the 2d of March, 1841, the Redhook property was sold for an amount sufficient to satisfy all the liens on it prior in point of time to the mortgage of the 28th of May, 1840, on the Cocksackie property. On the 23d of March, 1841, this last property was sold for an amount not sufficient to pay the costs of foreclosure and the mortgage of 28th of May, if the previous judgments, as well as the prior specific liens on that property were paid out of such sale.

Under these circumstances the holder of the mortgage of the 28th of May made application to the court for a modification of the original decree, so as to throw the judgments on the surplus proceeds of the Redhook property, after satisfying all liens thereon prior to his mortgage. The court allowed the ap-

plication on the ground that as the Redhook property was more than sufficient to pay all liens on it prior to the date of the applicant's mortgage, in case the judgment creditors, who held liens at that time, sought to enforce them on the Redhook property, if the applicant paid them, he would have a right in equity to insist on an assignment of them, so that he might have a repayment out of the surplus funds, in preference to those who had liens on that property accruing after the date of his mortgage. For instance, the judgment creditors had liens on both properties, when his mortgage was taken on one (Coxsackie). If, in enforcing these liens it would prejudice his mortgage, he would have a right in equity to compel them to go upon the Redhook property, because certainly he could be in no better position by taking an assignment of the judgments than those who held them. Let us suppose the case put had actually happened — that the applicant had purchased the judgments; then he would be the holder of judgments binding on both properties and of a mortgage on one. The doctrine of the court is that in this condition, he could go upon the Redhook property to satisfy his judgments in preference to one who had a lien on that property accruing after his mortgage. The court illustrated it by saying, if there had been a mortgage on both properties, and it had been foreclosed, the decree would require the property to be sold separately, and the proceeds so to be marshaled as to pay general liens on the whole, out of that part of the fund arising from the sale of the Redhook property, thus far giving the applicant the benefit of his priority on the Coxsackie property over a subsequent incumbrancer of the Redhook property.

In the case just cited there was a general incumbrance binding both parcels, also specific incumbrances binding each, and a transfer made of one and then the other; and it seems to proceed upon the principle that, inasmuch as at the time when the transfer was made of one of the parcels, the party would have the right to compel the general incumbrancer to go upon the parcel not affected by the transfer, no subsequent act of the owner in relation to that other parcel could change his rights. Whether it would make any difference if the general incumbrance and the transfer of the second parcel were held by the same person, does not appear; but it is certain he would, in one sense, come within the qualification of limitation of the rule laid down by Judge Story. He says that though the rule — that is if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien — is so general it is never applied, except where it can be done without injustice to the person who has the double fund, as well as the debtor. It is never done when it trenches upon the rights or operates to the prejudice of the party entitled to the double fund. Equity Jurisprudence, etc., §§ 558, 559, 560, 633. The object is to satisfy both creditors. It is apparent, however, whenever the double fund is insufficient to pay all the claims against it, and the same person has the right to proceed against both, and against one alone, it does affect the right of the party entitled to the double fund. For example, in this case the United States have a general lien upon different parcels of land; creditors — the petitioners — have also a general lien upon some of the parcels; and the United States have a lien which may well be considered specific upon all the parcels. Now, it is plain if the creditors turn the general lien of the United States over to the lands not bound by the lien of the creditors, under the facts of this case it diminishes by so much the fund which is to satisfy the decree of 1846. In other words, whatever is paid to the petitioners is an absolute loss to the plaintiff. Notwithstanding such would be the effect, in this case,

upon the party entitled to the double fund, it may be questionable whether the circumstance of taking a subsequent lien could or ought to place them in a better position; certainly not if the true reason be given for the rule in the case in *Paige*. To apply the argument of that case to this;—if these petitioners had paid off the balance due on the judgments of the plaintiffs of 1841, they would have the right, in equity, to insist upon an assignment thereof.

The case of *Schryver v. Felter*, if we admit it was rightly ruled, must be regarded as deciding that a general lien will be thrown upon a particular parcel of land, so as to give a party having a mortgage the benefit of his priority over subsequent incumbrances, either of the whole or a part; that is where the question is dependent upon priority of time alone. But it does not follow that this would be the rule where there is a priority of right—that is in a case where the parties as such, do not stand upon an equality of right.

Let us, therefore, examine how far the character of the parties in this case affects the question. The plaintiffs constitute the sovereign power of the country, and, according to the jurisprudence of most states, under certain circumstances, are entitled as a creditor to peculiar privileges. It was so under the Roman law; is so under the law of England, and under our own.

We must bear in mind that the statutes giving the government a priority are presumed to have for their object the public good, and are, therefore, to be liberally construed. *United States v. State Bank of North Carolina*, 6 Pet., 29; *Beaston v. Farmers' Bank of Delaware*, 12 Pet., 134 (§§ 844-47, *supra*).

The application was presented, in this case, after a levy had been issued by the United States upon lands in Morgan county, under executions issued on the judgments of 1841. The lands were sold and the money appropriated upon those judgments, subsequent to the filing of the original petitions, as appears by the supplemental petitions. This court did not interfere with the proceedings under the executions, but suffered them to continue, and directed that there should be reserved a sufficient fund to meet the claim of the petitioners, from what might be made by the sale of lands in this case. The rights of the petitioners ought, perhaps, for that reason, to be considered the same as if the money arising from the sale of the Morgan lands had been paid into court, subject to its order herein. And, apparently, it should be governed, by the same principles, as if the petitioners, instead of pursuing the course they have, had applied to a court of equity to restrain the proceedings on the executions—waiving for the purpose of the supposed case all objections on account of sovereignty—and the United States had come and given, in answer, the decree of 1846, the indebtedness of Duncan's estate; in fine stating all the facts and claiming a priority of payments under the law.

It would seem upon principles as well as by the authority of adjudged cases—if we throw out of view the decree of 1846 and the question of sovereignty—there could be no doubt of the right of the judgment creditors to compel the plaintiffs to look to lands out of Morgan county, not bound by their lien for the satisfaction of the balance due the United States upon the judgments of 1841, for in that case there would be property sufficient to pay both. It is true, technically speaking, the petitioners, if they paid the judgments of 1841, could not compel the plaintiffs to assign those judgments to them, because they could not directly reach the United States. *Hill v. United States*, 9 How., 386 (EQUITY, § 1365). But if this difficulty were avoided, the question is whether the decree of 1846, which operated specifically upon lands not affected by the judgments of the petitioners, changes the principle.

§ 856. *The priority of the United States does not disturb specific liens, nor a mortgage, nor the lien of an execution levied on land. As to a general lien—quære?*

It must be conceded the question is not free from embarrassment in consequence of the difficulty of extracting from the various cases which have been decided, the true rule of interpretation of the acts of congress, laid down by the supreme court. The petitioners had taken out executions on their judgments within a year after they were rendered; on one some real estate—not in question here—had been sold, on the other a small payment had been made; as to the balances due on them respectively the judgments became general liens.

It has been uniformly held in all the cases that the priority of the United States does not disturb any specific lien, nor the perfected lien of a judgment, that is, it does not supersede a mortgage on land, nor a judgment made perfect by the issue of an execution and a levy on land. *Thelusson v. Smith*, 2 Wheat., 396 (§§ 824–27, *supra*); *Conard v. Atlantic Ins. Co.*, 1 Pet., 386. But in the case of a general lien it is not so clear.

The case of *Thelusson v. Smith*, if it is not considered, as in some respects, overruled by the case of *Conard v. Atlantic Ins. Co.*, certainly establishes the doctrine that the priority of the United States does not yield to a judgment which is a general lien upon real estate. The facts were that *Thelusson* and others recovered a judgment against *Crammond*, which it was admitted by the court was a lien upon his lands on the 30th of May, 1805. Afterwards he made an assignment of all his estate, being insolvent, and in debt to the United States so as to bring him within the operation of the acts of congress. The United States subsequently brought suit against him, had judgment, sued out execution, levied on and sold an estate called *Sedgely*, admitted to be bound by the judgment of May 20, 1805. The marshal having received the proceeds, *Thelusson* and others brought suit against him. They had not issued execution nor levied on the estate by virtue of their judgment. One of the questions made in the case was, whether the United States were entitled to be paid in preference to the judgment creditor? This the supreme court decided in the affirmative, concluding by saying, “a judgment gives the judgment creditor a lien on the debtor’s lands, and a preference over all subsequent judgment creditors. But the act of congress defeats this preference.” This was under the act of 1799, but we have already seen that in this respect it is like the act of 1797.

This case was particularly examined and reviewed in *Conard v. Atlantic Ins. Co.* It is there said that *Thelusson v. Smith* was a case where a judgment creditor sought to recover the proceeds of a sale of land made under an adverse execution, on the ground that he had a general lien by judgment on the land, and in such circumstances the action was not maintained. The real ground of the decision, the court says, was that the judgment creditor had never made his lien specific; that he had no title to the proceeds in his property; and if they were to be deemed general funds of the debtor, the priority of the United States attached; that a mere lien on land did not convey the legal title to the proceeds of a sale made under an adverse execution; the case did not establish the principle that a specific lien could be displaced by the priority of the United States, because that priority was not of itself equivalent to a lien.

Judge Johnson, in his reported opinion, says that he never acknowledged the authority of the case of *Thelusson v. Smith* on the point supposed to be

decided by it, the precedence of the right of the United States as to a previous judgment in the case of a general assignment, and that he concurred in it only because of the want of privity between the parties. He thought the sale of the Sedgely estate under the execution was a nullity, because the assignment of Crammond divested all his interest, so as to place it beyond the reach of the execution issued on the judgment of the United States. Suppose, however, the assignees in whom the estate had vested, admitting it had vested, had sold it notwithstanding the lien, then, according to my understanding of the case of *Thelusson v. Smith*, also as corrected and explained in *Conard v. Atlantic Ins. Co.*, the proceeds of the sale, in the hands of the assignees, would have been subject to the priority of the United States. As in this case, if the lands in Morgan county had been sold by the executors or administrator, under the authority of the will or the law, the proceeds would have been liable, not to the judgment creditors (the petitioners), but to the United States, it being understood in all such cases that the executor or administrator, in whose hands were the proceeds, had notice of the debt due the government.

In *Conard v. Atlantic Ins. Co.*, the court are careful to say the priority of the United States does not affect any specific lien; but in the case of *Brent v. The Bank of Washington*, 10 Pet., 596, the court state that it has never been decided that the priority of the United States affects any lien, general or specific, existing when the event happened which gave them the priority.

Suppose, then, the case of *Thelusson v. Smith* may be considered as shaken, and indeed overruled, about which some doubt may be entertained so far as it gives a preference to the United States over the general lien of a judgment creditor, it would follow that the judgments of these petitioners would not be affected by the mere force of the statute of 1797; and possibly we might go further, and say they would not be affected by any mere judgment or decree in favor of the United States, or the indebtedness of Duncan's estate, rendered after the date of the judgments of the petitioners. But this court is asked to go some further; to say that the United States shall forego their lien of 1841, superior to that of the petitioners as to the lands in Morgan county, and sell a part of the lands bound by their decree of 1846, out of that county, so that the petitioners may be paid in preference to the plaintiffs. This, it seems to me, cannot be done. The United States are entitled to all their legal rights; and, in the case supposed, of an application to a court of equity, to say to the judgment creditors: We will enforce our lien of older date than yours, made specific by a levy before you applied to the court; we will retain our lien under the decree of 1846 upon the lands out of Morgan county; we are not to be regarded as ordinary individual creditors of the estate; your rights must yield to ours. The same answer to the application of the petitioners must be given in this court. If they have a lien, so have the United States; and to decide that, under the circumstances of this case, the latter could not enforce their judgments of 1841, would be to say, in effect, they had no priority of payment at all, but they must stand upon an equal footing with the other creditors; to prevent which was the very object of that portion of the statutes of 1797 and 1799, already referred to.

§ 857. *The priority laws of the United States being general, one claiming an exception must show it.*

We have been told their lien cannot be displaced by that which is not a lien, the priority of the plaintiffs. It is not. There is not only a priority, but that priority has been perfected into specific liens. If it be said that, discard-

ing the decree of 1846, the United States might be regarded as individuals and thrown on the lands out of Morgan county for the satisfaction of their judgments of 1841, and they ought, consequently, to be treated in the same manner, notwithstanding that decree; if the first could be done the other would not necessarily follow, and the reason is, in the former case the United States would be paid, in the latter not; and the law is imperative they shall be first paid when the estate of any deceased debtor, in the hands of executors or administrators is insufficient to pay all the debts due from the deceased. And certainly the lands of the deceased debtor, when these petitioners made their application to this court, were as strongly bound by the claim of the United States as the proceeds of them could have been in the hands of executors or administrators.

The laws of the United States giving a priority to the government are of general application in the cases therein stated, and if a debtor is to be excepted out of the general rule, it devolves upon the party alleging the exception to show it. I think these petitioners have not satisfactorily established their right to be withdrawn from the ordinary predicament of creditors, when they come in competition with the claims of the government. In all such cases, it is manifest congress intended to give priority of payment to the United States over all other creditors. *Beaston v. Farmers' Bank of Delaware*, 12 Pet., 134 (§§ 844-47, *supra*).

Admitting that the question is not free from difficulty, yet I have not been able to come at any other conclusion than that which is here announced.

It is sometimes a hard rule, undoubtedly, upon individual creditors and upon families, that a man's whole estate should be swept away to pay a debt due to the government, but courts of justice can only expound and apply the law, and if upon a fair and impartial examination of the subject they can ascertain its intent and meaning, their duty is simply to administer it, as it becomes applicable, in the various relations of life, to the rights and interests of the parties before them.

UNITED STATES v. GRISWOLD.

(Circuit Court for Oregon: 7 Sawyer, 296-311. 1881.)

Opinion by DEADY, J.

STATEMENT OF FACTS.—On August 29, 1879, the plaintiff commenced a suit against William C. and Jane O. Griswold and others, the defendants herein, which, upon a demurrer for multifariousness, was dismissed as to said Jane O. and the plaintiff allowed to file an amended bill against the remainder of the defendants, which was done on January 9, 1880.

From the amended bill it appears that on and prior to May 27, 1877, the defendant, William C. Griswold, was the owner in fee of certain real property, situate in Salem, Oregon, including block 18, known as "the agricultural works" and "Griswold's water works," and lots 1, 2, 3 and 4, in block 36, with the water power and appurtenances; lot 8, in block 10, and the west half of lots 1, 2, 3 and 4, in block 73; and that on said day the plaintiff, by B. F. Dowell, informant, commenced an action in the United States district court for this district, under sections 3490 and 5438 of the Revised Statutes, against said defendant, to recover about \$17,000 wrongfully obtained by him on January 29, 1874, from the treasury of the United States, by means of false vouchers and affidavits, together with the damages and forfeitures allowed

therefor, as provided in said sections, amounting in all, as claimed in the amended complaint, to the sum of \$143,000; in which the plaintiff, on December 14, 1878, had a verdict for \$35,228, and on January 11, 1879, obtained a judgment thereon for that amount and \$2,400 costs.

On April 22, 1879, said judgment was, on error to this court, reversed and the cause remanded for a new trial, in which the plaintiff, on July 30, 1879, had judgment again for \$35,228, and \$2,821.60 costs, which was on the same day duly docketed in the lien docket of that court, and became and is a lien upon the real property of said defendant, in Oregon. Afterwards, an execution issued to enforce said judgment, which was levied by the marshal of the district upon the real property aforesaid and upon certain other property of the defendant Griswold, situate in Salem, from the sale of which last mentioned, the sum of \$174 was realized, and the writ returned on November 17, 1879 — “no other property found in this district” — and the remainder of said judgment is still unsatisfied. On June 11, 1877, said Griswold borrowed of the defendants William S. Ladd and Asahel Bush the sum of \$3,500, to secure the payment of which with interest, he gave them a mortgage on said block 18 for the sum of \$10,000, bearing date June 4, 1877, and on June 4, 1878, said Griswold mortgaged said block 18 and said lots 1, 2, 3, and 4, in block 36, with the water power and appurtenances, to the defendants, W. Lair Hill, George H. Durham and H. Y. Thompson, to secure the payment to them of his note for \$10,000, given as a fee for defending the action aforesaid against him. On December 18, 1878, Griswold mortgaged said lot 8 in block 10 to Ladd & Bush to secure the payment to them of a debt of \$306.25, with interest thereon.

On January 6, 1879, Griswold voluntarily appeared and confessed judgments in the county court of Marion county in favor of Ladd & Bush for \$348.82, and the defendants, A. Kelly, Thomas A. Mauzy, W. G. Woodworth, William H. Watkins, Benjamin Hayden, William H. Holmes, and James W. Nesmith, for the aggregate sum of \$3,223.13.

On January 7, 1879, Hill, Durham and Thompson commenced a suit in the circuit court for the county of Marion to foreclose their mortgage, and made the defendants Griswold and L. & B., and the other persons to whom judgments were confessed as aforesaid, defendants, in which, on February 11, 1879, there was a decree given that L. & B. recover of the defendant Griswold the sum of \$3,816.16, and H., D., and T. the sum of \$9,365.42, the balance due on Griswold's note, and that the premises described in the mortgages be sold to satisfy the same and costs; in pursuance of which they were sold by the sheriff to the defendant Hill, on March 22, 1879, for the sum of \$13,500.

On February 22, 1879, said lot 8 was sold to the defendant Burnett for the sum of \$368, upon an execution issued out of said county court upon the judgment therein aforesaid, in favor of L. & B., and afterwards said L. & B. foreclosed their mortgage upon said lot 8, making the defendants Griswold and Burnett parties defendants to the suit therefor, and upon process issued upon the decree given therein for said L. & B. for \$374.37, said lot 8 and the west half of said lots 1, 2, 3, and 4 in block 73 were sold to said Bush for \$388.94.

During the years 1878 and 1879 Griswold purchased various “Oregon Indian war claims and other government debts and claims, and to conceal them from the plaintiff” took the assignments thereof to his nephew, the defendant Edward Chamberlain, and the defendant J. H. Alberts, for which the latter, on November 29, 1879, gave his note to said Griswold for \$1,577.

The bill also alleges that the mortgage to L. & B. for \$10,000 was given and received in so much larger a sum than the real indebtedness of Griswold to L. & B., to enable him to hinder and delay the plaintiff in the collection of its debt; that the mortgage to H., D. and T. for \$10,000 was given and received in a much larger sum than was ever actually agreed to be paid said H., D. and T. for their legal services, or than they were worth, with the like intent, and that \$3,000 was ample compensation for such services; that the judgments confessed as aforesaid by said Griswold were given and received on "fictitious and trumped-up accounts" with the like intent to hinder and delay the plaintiff; that all said mortgages, judgments, and assignments were given, confessed, taken and received with the intent to defraud the plaintiff out of the debt for which it obtained judgment as aforesaid, and to defeat its priority, as provided for in section 3466 of the Revised Statutes; and that Griswold was insolvent at the several dates thereof, and intended thereby to assign all his property before the plaintiff could obtain a judgment in said action in the district court, of which the defendants each and all had notice at and before the taking of said mortgages, judgments and assignments.

The prayer of the bill is, that the premises aforesaid be sold on the decree of this court, free from the effect of said mortgages and judgments, and that an account be taken of the rents and profits thereof received by the defendants, and that the proceeds of such sale and account be first applied to the satisfaction of the plaintiff's judgment.

All the defendants, except L. & B., in whose favor judgments were confessed, as aforesaid, and also the defendant Chamberlain, answered the bill, disclaiming any interest or right in or to the property in question, and consenting that it might be applied upon the plaintiff's judgment; and as to them, the bill was dismissed, they paying the costs of their being made defendants. The defendant, Griswold, did not answer, and the bill was taken against him for confessed. The defendants, L. & B., Alberts and Burnett, answered on February 28, 1880, jointly, and the defendants H., D. and T., on April 26, 1880; and the cause was heard upon the amended bill, the answers thereto, and the replications and evidence.

The defendants, by their answers, admit the fact of the making of the several mortgages and the confessing of the several judgments by Griswold, and the commencement, progress, and result of the action of the United States *v.* Griswold, as alleged in the amended bill, but severally allege that the mortgages given to them were given and received in good faith, for the purpose of securing an actual indebtedness to L. & B., of \$3,500, and to H., D. and T. of \$10,000, upon which \$500 was afterwards paid; that the judgment in favor of said L. & B. was obtained in good faith, for money then due them; that the assignment of "Oregon Indian war claims" to the defendant Alberts was made and received in good faith, and that such claims were purchased and paid for by said Alberts for his own benefit, and without any intention to defraud the United States; and that said Griswold was not insolvent at the date of said mortgages, and the same did not amount to an assignment of his property.

From the evidence it satisfactorily appears that the judgments confessed in the county court on January 6, 1879, in favor of Kelly and others, were procured and confessed by Griswold with the intent and for the purpose of delaying and hindering the plaintiff in the collection of its debt or claim against Griswold, and with the intent to defeat the priority of the United States as

established in section 3466 of the Revised Statutes (1 Stat., 515, 676) which reads:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts of the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

It also appears that Griswold, on December 31, 1868, filed his petition in bankruptcy in the eastern district of New York, upon which he was adjudged a bankrupt, and on November 15, 1869, was discharged from his debts upon a settlement or compromise with his principal creditors in which he paid them about thirty-three and one-third per centum of his indebtedness; and that at the making of the mortgages to L. & B. and H., D. and T., his property subject to execution, not including a portion of block 47, called the "Griswold block," and block 38 in the town of Salem, and conveyed to James M. Adams by Griswold and wife on December 21, 1867, was worth not to exceed \$25,000.

Assuming, then, that the mortgages to the defendants, L. & B. and H., D., and T., are valid, these judgments, when docketed, operated to transfer to the creditors therein, substantially all the property ostensibly owned by Griswold, remaining after their satisfaction; and if they can be considered as an "assignment" within the meaning of the statute, the priority of the plaintiff took effect from the date of such judgments, and as to all the property upon which they were a lien, subject to the prior valid liens of third persons.

§ 858. *Under section 3466, Revised Statutes, the United States has no lien on its debtors' property, but only a right to priority of payment out of the same in certain cases.*

It is well settled that section 3466 of the Revised Statutes does not give the United States a lien, but only a priority of payment out of the property or assets of its insolvent debtor, after it has passed by a voluntary assignment or by operation of law to a third person for the benefit of creditors or with the intent to defeat such priority.

By the statute, this priority only takes effect in four classes of cases: 1. The death of a debtor without sufficient assets to pay his debts; 2. Bankruptcy or insolvency manifested by some act pursuant to law; 3. A voluntary assignment by an insolvent debtor of all his property to pay his debts; 4. The attachment of the property of an absent, concealed, or absconding debtor. *United States v. Fisher*, 2 Cranch, 390 (§§ 839-42, *supra*); *Conard v. Atlantic Ins. Co.*, 1 Pet., 438; *Beaston v. The F. B. of D.*, 12 id., 133 (§§ 844-47, *supra*); *United States v. McLellan*, 3 Sumn., 350 (§§ 831-32, *supra*); *United States v. Canal Bank*, 3 Story, 81; 1 Kent, 247; *Conk. Treat.*, 722.

Mere inability to pay, or a sale or mortgage of a part of the debtor's property is not sufficient to set the statute in motion; but the insolvency, if not established by legal proceedings, resulting in the appointment of an official assignee, must be accompanied by a voluntary assignment of substantially all the debtor's property. So long as it remains in his own hands, any partial sale, transfer or pledge of it does not bring the case within this statute.

Nor is a sale or mortgage for a present consideration and not on account of

a pre-existing debt or obligation an assignment, technically speaking, or within the spirit or meaning of the statute, which contemplates that the debtor shall thereby divest himself of his property for the benefit of one or more of his creditors. An assignment implies the relation of debtor and creditor between the assignor and those to be benefited thereby, and that the consideration therefor is an existing debt or liability. Burr. on Assignments, sections 3, 4.

But an assignment may be made within the statute by one or more instruments to one or more persons at different dates, provided the circumstances warrant the conclusion that they are all the result of a pre-existing purpose to assign the insolvent's property for the benefit of his creditors. *Downing v. Kintzing*, 2 Serg. & R., 326. So far as this case is concerned, the question of Griswold's insolvency is not affected by the fact that he was adjudged a bankrupt in 1868, as the United States was not then his creditor; and even admitting, as the plaintiff claims, that his discharge was fraudulently obtained, still it is a valid and binding discharge from the debts then owing by him, until set aside or annulled in a suit brought for that purpose in the court where it was granted, by an injured creditor or the official assignee. Section 5120, R. S.; *Nicholas v. Murray*, 5 Saw., 323. But apart from this, when Griswold confessed the judgments to Kelly and others for \$3,571.95, he was doubtless insolvent and intended thereby to prevent the United States from collecting the claim for which it had just obtained a verdict. His whole property, so far as appears, even if unincumbered, was not sufficient to pay this one debt. Nor is it material in this connection, whether such insolvency was known or believed by third persons or not. The fact that the United States had a valid claim against Griswold for \$35,228, since January 29, 1874, has been conclusively established by the judgment of the district court.

§ 859. *A debtor to the United States may assign his property by means of judgments confessed in favor of various persons to the full value of such property, and in such case the priority of the United States will attach at once.*

But as all claim under these judgments has been formally abandoned by the creditors therein, except that of L. & B., it is only necessary to consider the effect of this conclusion as to the latter. These judgments being in effect a voluntary assignment by an insolvent debtor, the right of the United States to a priority of payment out of all his property, subject to all valid liens and incumbrances thereon attached at once. Under the law of the state a judgment, when docketed, is a lien upon the debtor's property, similar to that of a mortgage, and is in effect a convenient method of transferring such property to the judgment creditors. *Catlin v. Hoffman*, 2 Saw., 491.

§ 860. *Circumstances under which a mortgage may be held valid and not fraudulent as to the United States, although apparently for a sum much in excess of the real debt and made by a debtor to the United States.*

The sale, therefore, of lot 8 in block 10, and the west half of lots 1, 2, 3 and 4 in block 73, by L. & B., upon their execution to enforce said judgment and the one to enforce the personal decree in the suit to foreclose the mortgage of December 18, 1878, on said lot 8, was made subject to the prior right of the United States, and so far as it interferes with the assertion of such right, must be set aside, and the property resold upon the execution of the plaintiff, unless L. & B. account to the plaintiff for the value thereof, which the evidence tends to show is about \$1,600, together with the rents and profits thereof, less the amount of their mortgage for \$306.25 with interest.

As to the mortgage of L. & B. on block 18, dated June 4, 1877, these ad-

ditional facts appear: Griswold was then insolvent, the debt which he owed the United States being greater in amount than the value of all the property claimed by him or in his name, but the defendants, although aware of the fact that the plaintiff had commenced the action against him to recover this debt, were not otherwise informed on the subject. It appears that on or about June 4, 1877, Griswold presented a note and mortgage upon block 18 for \$10,000, payable with interest at one per centum per month, in seven months, at the bank of L. & B. in Salem, and asked for a loan of that amount on that security. Mr. Bush, to whom the matter was referred by the cashier, declined the offer on account of the amount, but after some negotiation and a delay of some days not extending beyond June 11th, he directed the latter to let Griswold have \$3,500; and because the latter did not wish, as he said, to incur the trouble and expense of making a new note and mortgage, it was arranged between them to use the one already prepared by indorsing on the note a credit of even date therewith of \$6,500, but leaving the mortgage as it was, for the full amount, in which condition it was recorded and remained. It is probable that Griswold intended to use the excess of this mortgage over the sum really secured by it to ward off the plaintiff's claim, which he knew to be just and then in suit; but there is no evidence to warrant the conclusion that L. & B. had any object in taking the note and mortgage as they did, but to secure their loan in a manner to accommodate Griswold, or that they knew or had reason to believe that he had any ulterior purpose in the matter.

§ 861. *The fraudulent intent of a grantor will not affect the title of a purchaser for a valuable consideration.*

This mortgage is not affected by section 3466, *supra*, giving the United States a priority, because Griswold was not then legally a bankrupt or insolvent, and although unable to pay his debts, and, therefore, in fact insolvent, the conveyance did not amount to or pretend to be a voluntary assignment of all his property for the benefit of his creditors, but only a security for an ordinary loan that would not even constitute an act of bankruptcy under the bankrupt law. If it is invalid at all, it is because it is contrary to the statute of frauds (Or. Laws, p. 523, sec. 51), which is substantially a copy of 13th Elizabeth, chapter 5, and provides, among other things, that every conveyance of any estate or interest in lands, "made with intent to hinder, delay or defraud creditors of their lawful suits, damages, forfeitures, debts or demands, . . . as against the persons so hindered, delayed or defrauded, shall be void."

The "question of fraudulent intent" is made by the statute "a question of fact and not of law," and "the fraudulent intent" of a grantor is not to affect the title of "a purchaser for a valuable consideration," without notice of such intent. Or. Laws, *supra*, secs. 54, 55. The false statement of the consideration for the mortgage is a badge of fraud, but not conclusive evidence of it. Bump on F. C., 33, 42. And in this case the explanation of how it came to be and remain in the mortgage is satisfactory, so far as the mortgagees are concerned; at least we do not feel warranted in coming to the conclusion from this circumstance alone that the mortgage was understood by them to be fraudulent, as to the excess of \$3,500.

But when H., D. and T. sought to foreclose their mortgage on the same property, and made L. & B. defendants in their suit, the latter answered, setting up the lien of their judgment in the county court for \$348.82, and also alleged that they had a mortgage on the property for \$10,000, which was then "in full force." The bill alleges that this answer was made with intent "to

defraud" the plaintiff out of its debt by making it appear that L. & B. had a mortgage to secure an actual indebtedness of \$10,000, instead of one for only \$3,500. It may be admitted that the allegation in the answer is literally true, that the mortgage was "in full force," but nevertheless, it was calculated to make a false impression. It may have been "in full force" as a security for \$3,500, or because it was uncanceled or not satisfied, but not otherwise; for, in fact, almost two-thirds of it was fictitious from the beginning, and so far never had any force. But this circumstance of itself cannot impair the validity of the mortgage, if it was otherwise valid. It is only material in this connection, as the subsequent act or conduct of one of the parties to the transaction, that may serve to throw light upon the purpose and intent with which it was originally made and received. But when it is considered that there is no other act or declaration of the mortgagees, that can be construed into an assertion or claim that this mortgage was in "force" otherwise than as security for the amount really loaned upon it — \$3,500 — and that in the suit in which this answer was made, L. & B. only claimed and took a decree, February 11, 1879, for the sum actually due them — \$3,816.16 — we do not think this answer is sufficient to characterize the original transaction as fraudulent on their part. But admitting that the circumstances of the false statement of the consideration in the mortgage, and the claim in the answer that it was then "in full force," are suspicious and not satisfactorily explained by the mortgagees, still, we think it a case within the rule laid down in *Boyd v. Suydam*, 1 Johns. Ch., 478, in which it was held by Chancellor Kent that "when a deed is sought to be set aside as voluntary and fraudulent against creditors, and there is not sufficient evidence of fraud to induce the court to avoid it absolutely, but there are suspicious circumstances as to the adequacy of the consideration and *fairness* of the transaction, the court will not set aside the conveyance altogether, but permit it to stand as a security for the sum actually paid." See *Bump. on F. C.*, 288.

The mortgage is allowed to stand as a valid lien on the property for the amount loaned thereon, with interest, less the amount paid thereon by Griswold — \$325.80 — and the priority of the United States must be enforced subject thereto. As to the mortgage of H., D. and T. to secure their fee of \$10,000, the evidence is satisfactory that the contract was made and the mortgage taken by them in good faith for the purpose claimed.

It may be that Griswold was influenced in giving the mortgage in this amount by the consideration that he preferred to spend the property in litigation rather than allow it to be appropriated to the payment of what he owed the plaintiff. But there is no evidence in the case to sustain the allegation that this contract is tainted with a secret trust in favor of Griswold or anyone else. The conversation between Griswold and Thompson, to which John Young testifies, wherein the latter said that in some event they would take the case up and the former must pay them another \$1,000, in addition to the \$2,000 before agreed upon, is relied on as showing directly that the fee really agreed to be paid was much less than \$10,000. But though it may be claimed from the general drift of the witness' testimony that this conversation occurred after the making of this contract and mortgage, there is a circumstance stated in it, which plainly shows that it took place during the first trial, and of course before they were made. For Young states that after this conversation he saw Griswold on the street, who then told him "that the jury had disagreed;" and as this only occurred on the first trial, and before the contract

and mortgage were made, it follows that the conversation between Thompson and Griswold in no way conflicts with them. It is also insisted that the fee is extravagant and grossly in excess of the ordinary compensation allowed and paid for similar services in this state; and so much so, that the contract and mortgage ought to be considered and held fraudulent on that account, for all in excess of \$3,000.

§ 862. *Circumstances under which an attorney's fee of \$10,000 was reasonable and a mortgage to secure it valid.*

But the weight of the testimony does not support this conclusion. Besides the services of the defendants having been rendered in the United States courts, the character and extent of them are well known to us.

The case was a very extraordinary one in many respects — involving a claim for \$143,000, of which about \$35,000 for damages, and as much more for forfeitures, was well founded in fact and law; besides very grave charges against the defendant's integrity. There were three jury trials — the first one resulting in a disagreement of the jury, after being on twenty-four days; the second one occupied nineteen days, and the third one fifteen. There was a motion for a new trial, after which the case was taken to the circuit and heard there on error. The preparation and trial of the action covered a wide field of inquiry and controversy, extending over a period of nearly a quarter of a century and reaching from the Atlantic to the Pacific. The time, labor and expense devoted to the defense of the action by all the members of the firm was unusual, and nothing was spared or omitted by them to make it successful.

The fee is admitted to be a large one — probably the largest unconditional and secured one then ever paid or promised in the state. But we do not think that there is any reason on that account to conclude that the contract is fictitious or the mortgage fraudulent. On the contrary, we think the fee, under the circumstances, was reasonable and well earned.

As to the allegation of the bill that the property covered by these mortgages was purchased with the money that the defendant Griswold had fraudulently obtained from the treasury of the plaintiff, the evidence tends strongly to establish the truth of it, but there is no evidence that the mortgagees in either of them had notice of this fact, at the date thereof.

§ 863. *How the priority of the United States should be asserted and enforced.*

The plaintiff is entitled to relief, and to that end, a decree will be made, to the effect, that the sale and conveyance of L. & B., of the west half of lots 1, 2, 3, and 4 in block 73, is declared void and annulled, so that the plaintiff may sell the same upon the execution to enforce its judgment, as though said sale and conveyance had never been made; that the sale and conveyance to him of lot 8 in block 10, upon the execution issued to enforce the judgment confessed by Griswold in their favor, is also declared void and annulled; that the mortgage given to said L. & B., upon said lot 8 and block 18, are declared valid as securities — the former for the sum of \$306.25 and the latter for the sum of \$3,500; that the mortgage to H., D. & T., upon said block 18 and lots 1, 2, 3, and 4 in block 36, is also declared valid as a security for \$10,000, and that subject to the liens of these respective mortgages the plaintiff is entitled to a priority of payment out of the proceeds of the sale of said lot 8, block 18, and lots 1, 2, 3, and 4, to secure which the case is referred to the master of this court to take and state an account between said mortgagees and the plaintiff, crediting them with interest on their respective debts as per contract and sums paid for taxes and repairs, if any, and charging them with the payments

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thereon, and the rents and profits received from the property, if any, and to sell said lots and blocks as upon execution, and apply the proceeds: 1. To the payment of the expenses of the reference; 2. To the payment of the debts secured by the several mortgages thereon, according to their priority; 3. To the payment of the plaintiff's taxable costs and expenses in this suit, and the remainder upon the judgment in the case of *United States v. Griswold*, aforesaid.

No proof having been made of the allegations in the bill concerning the defendant J. H. Albert, the bill is dismissed as to him.

§ 864. *Assignments, generally.*—The act of 1799, chapter 125, section 65, provides that in cases of insolvency the debts due the United States of a certain kind shall be first paid, and further declares that the cases of insolvency mentioned in this section shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall have made a voluntary assignment thereof for the benefit of his creditors, and to two other cases not material to mention, as to cases in which an act of legal bankruptcy shall have been committed. It having been settled that mere inability to pay is not insolvency within the statute, but that it must be such as is manifested in one of the three modes pointed out in this last explanatory clause, it is held, in this case, that a conveyance by a debtor, known to be insolvent, of all his property, to one or more creditors, in discharge of their own debts and liabilities, not exceeding the amount due and payable to them, and not for the benefit of the creditors at large, or of any other creditors than the immediate grantees, is not such a voluntary assignment as is within the purview of the above section, unless made with intent to evade the priority given to the United States by the act. *United States v. Knight*, 3 Sumn., 358.

§ 865. Under section 5 of the act of March 3, 1797, providing that "Where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, the debt due the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, as to cases in which an act of legal bankruptcy shall be committed," it is not necessary that the assignment should be for all the creditors of the insolvent. *United States v. Mott*,* 1 Paine, 188.

§ 866. The priority of the United States, under the act of March 3, 1797, does not attach, by its terms, except where "a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof for the benefit of his creditors," thus leaving him in a condition of technical insolvency. An assignment of a portion only of his assets is insufficient. *United States v. Hooe*, 3 Cr., 73.

§ 867. The priority of the United States, under the act of March 2, 1799, in cases of assignment for benefit of creditors, is simply a right of prior payment out of funds in the hands of the assignee. It does not supersede or overrule the assignment as to property which the United States may subsequently take in execution and prevent such property from passing to the assignee. *Conard v. Atlantic Ins. Co.*, 1 Pet., 386; *Conard v. Nichol*, 4 Pet., 291.

§ 868. Under section 65 of the act of 1799, chapter 128, giving priority of payment to the United States in cases of insolvency "in which the debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors," in order to give the priority, the assignment must include all the property of the debtor, provided the omission is not by fraud or mistake. *United States v. Munroe*,* 5 Mason, 572.

§ 869. The right of priority of the United States in cases of assignments for the benefit of creditors attaches only in cases where the debtor assigns all of his property; and where the deed of assignment transfers all property enumerated in a certain schedule, but does not purport to transfer all the debtor's property, the burden of proof of showing that all the debtor's property is included is on the United States. *United States v. Howland*,* 4 Wheat., 108.

§ 870. In case of an assignment for benefit of creditors the United States are entitled to priority only when the assignment is of the whole property of the debtor; and in a bill to enforce such priority it should be alleged that such assignment is of the whole of the debtor's property. *United States v. Munroe*,* 5 Mason, 572.

§ 871. Where a debtor of the United States makes a voluntary assignment of all his property, the priority of the United States is not defeated by the fact that the debtor afterwards recovers certain personal property belonging to his wife whose right thereto was not established at the time the assignment was made, and the priority of the United States attaches to such property when recovered. *United States v. The Marshal*,* 2 Marsh., 488.

§ 872. *Liability of assignee.*—The fact that an assignee for the benefit of creditors has received property, which he has sold at public auction, is *prima facie* evidence that he has re-

ceived the money, and sufficient, if not rebutted, to sustain an action by the United States for money had and received, based on the priority given them by statute. *United States v. Clark*, 1 Paine, 629.

§ 873. Where an assignee for the benefit of creditors has received property which cannot be reached in an action by the United States to recover their priority, the expenses incurred by the assignee in the execution of his trust should fall on such fund, and not be paid before paying the debt of the United States. *Ibid*.

§ 874. An assignee for the benefit of creditors is not liable to the United States for the priority given by the act of congress of 1797, until notice of the debt. But all the notice required is such as would put a reasonable man on inquiry. Where, at the time of the assignment, the assignee was informed that the debtor was liable to the United States as surety on a bond which had been broken, it was held to be sufficient notice. *Ibid*.

§ 875. Contract made in foreign country.—In the distribution of the assets of a bankrupt, situated in this country, the United States are not deprived of their priority by the circumstance that the contract was made in a foreign country, with a person resident abroad. Nor is this priority waived by proving the debt under the commission in bankruptcy. *Harrison v. Sterry*, 5 Cr., 289.

§ 876. Set-off.—In insolvency proceedings the priority rights of the United States as a creditor can be pleaded as a set-off against a claim of the insolvent estate. Nor is this right waived by the certificate of a quartermaster in the purchase of property for the government that their accounts were correct. *Allen v. United States*, 17 Wall., 207.

§ 877. Liens.—The priority of the United States, under the bankrupt act, does not overrule any liens upon the debtor's property, which existed before the event occurred which gives the statutory priority, that is, before the insolvency. *Cottrell v. Pierson*, 2 McC., 390.

§ 878. Taxes and funeral expenses.—The priority of the United States in the payment of the debts of an insolvent decedent is a priority and not a lien upon the assets of the estate. Taxes and funeral expenses are not "debts of the decedent," but charges imposed upon the estate, under state law, and must be paid before the claim of the United States. *United States v. Eggleston*, 4 Saw., 199.

§ 879. Vendees and mortgagees.—The priority of the United States is not a lien on the estate of the debtor, but is a priority simply over other unsecured creditors, and is subordinate to the rights of vendees and mortgagees. *Brent v. Bank of Washington*, 10 Pet., 596.

§ 880. Estate of surety.—A judgment was recovered by the United States against B. as principal and C. as surety, on bonds to secure duties on distilled spirits. B., becoming insolvent, made an assignment of all his property to C. and M., and another for the benefit of his creditors. C. dying, his estate was placed in the hands of his executors. The assignees having disposed of more of the fund than was necessary to pay the debt of the United States, without first paying such debt, the United States filed a bill against the assignees to compel payment of their preferred claim. It was held that M., to whom B. was also indebted, could not compel the United States to resort to the estate of C. before using the assigned estate for the payment of their preferred claim. The estate of C. was not before the court, nor did it appear that C. left any estate sufficient to pay the claim. *United States v. Mott*,* 1 Paine, 188.

§ 881. Where a joint and several bond was given for duties and afterwards a joint judgment was rendered against all the obligors, and a surety died, all being insolvent in equity, the United States are entitled to payment out of the assets of the deceased surety by reason of their general right to priority of payment. *United States v. Cushman*, 2 Sumn., 426.

§ 882. The power of a debtor to apply his payments is not controlled by the priority right of the United States. Thus when a delinquent officer before absconding put the amount of his bond into the hands of his sureties with instructions to use it to exonerate themselves, and the government, in ignorance that the money was the money of the principal debtor, surrendered the bond upon payment of the amount, this was held to operate a release of the sureties. *United States v. Cochran*, 2 Marsh., 274.

§ 883. Judgment liens.—Under the 5th section of the act of March 3, 1797, the United States has no priority over a previous lien by judgment and execution in a state court. *United States v. Sheriff*,* Bee, 196.

§ 884. Under section 65 of the act of congress of 1799, the right of priority of the United States supersedes the right of individual judgment creditors, though their judgments constitute liens on the debtor's lands. *Thelluson v. Smith*,* Pet. C. C., 195.

§ 885. The priority right of the United States will not affect the lien of an execution and levy under a judgment of a state court. *United States v. Mechanics' Bank*, Gilp., 51.

§ 886. Maritime liens.—The priority right of the United States is not superior to and cannot disturb the maritime lien of workmen and materialmen on a vessel for their services and materials. *Phillips v. The Thomas Scattergood*, Gilp., 1.

§ 887. Custom-house bonds.—The act of congress of March 2, 1799, gives the United States a preference as against other creditors on custom-house bonds, only after a notorious act of insolvency, as where the debtor has assigned for the benefit of his creditors, where he has absconded and his property attached, etc. *United States v. King*,* Wall. C. C., 12.

§ 888. The act of March 3, 1797, gives the United States priority in cases in which the indebtedness is on a bond for duties, which was made before, but not payable till after, the assignment of the debtor. *United States v. State Bank of North Carolina*,* 6 Pet., 29.

§ 889. Partnership.—The priority right of the United States to payment out of the assets of bankrupt estates applies to the separate and individual estates of bankrupt partners, thus superseding the rule of equity, that partnership property is to be first applied in payment of partnership debts, and individual property in payment of individual debts. *Lewis v. United States*,* 13 Alb. L. J., 385.

§ 890. So far as partnership assets are concerned the United States has no priority over firm creditors, by reason of the indebtedness of one of the partners to it. *United States v. Evans*,* Crabbe, 60.

§ 891. An assignment by a partnership, which is indebted to the United States, of all of its property to pay its debts, where the fund is inadequate, is an act of insolvency which gives the United States priority. *United States v. Shelton*,* 1 Marsh., 517.

§ 892. Debt anterior to act.—The act of March 3, 1797, giving priority to the United States, does not apply to a debt contracted before the passage of the act, though the account was not adjusted at the treasury till afterwards. *United States v. Bryan*,* 9 Cr., 374.

§ 893. Residue in hands of assignee.—The priority of the United States to funds in the hands of the assignee of its debtor attaches to the residue, after the expenses are paid. *United States v. Hunter*,* 5 Mason, 229.

§ 894. Various debts.—Whenever there is a general assignment of all the estate of a debtor, and the United States have various debts secured by various sureties, which debts, by the statute, are to be first paid out of the fund in the hands of the assignees, the aggregate constitutes but one debt, and the priority attaches to it as a whole. The whole fund ought to be applied *pro rata* in extinguishment of all the priority debts of the United States. But if the parties consent to a different arrangement, nothing prevents such an agreement from being carried into effect by the court. *United States v. Amory*,* 5 Mason, 455.

§ 895. Government agents.—The United States has a priority in all cases; and especially as against the property of agents of the government who have received large sums of money before any other lien existed; and it is not material that the persons are non-residents, for their property in the United States is liable. *Harrison v. Sterry*,* Bee, 244.

§ 896. Conveyance of Property.—Although in a case of insolvency the debts due to the United States are first to be satisfied, without regarding the superior dignity of those due by the insolvent to others, still they must be satisfied out of the debtor's estate. And, therefore, if before the right of preference has accrued to the United States the debtor has made a *bona fide* conveyance of property to a third person, or has mortgaged it to secure a debt, or if his property has been seized under an execution, the property is divested out of the debtor and cannot be made liable for debts due to the United States. *United States v. Delaware Insurance Co.*,* 4 Wash., 413.

§ 897. Allowance to widow.—A debt due the United States is not entitled to priority over the allowance made to the widow of the deceased debtor by the probate judge, pursuant to the laws of the state. *Postmaster-General v. Robbins*,* 1 Ware, 165.

§ 898. Pleading.—A bill to charge the assets of a corporation in the hands of its shareholders, with an equitable lien in favor of the United States, and to establish the government's right of priority, must allege the insolvency of the company at the time it was wound up, and that the receiver had notice of the government's claim. *United States v. Globe Works*, 7 Fed. Rep., 530.

§ 899. Claim for penalties.—The claim of the United States for penalties and forfeitures, incurred by the violation of the revenue law, where no particular method of enforcing it is prescribed, is a debt for which a suit will lie, and is provable in bankruptcy against the defendant, and the government is entitled to a priority of dividend, under the twenty-eighth section of the bankruptcy act after payment of the costs, fees and expenses there mentioned. *In re Rosey*, 6 Ben., 507.

§ 900. Form of debt.—Under section 5 of the act of March 3, 1797, the United States are entitled to priority of payment out of the assets of an insolvent or bankrupt debtor, without regard to the form of the debt, or the place where it was contracted, and whether the debtors be joint or several, or principals or sureties. *Lewis v. United States*, 2 Otto, 618; *Lewis v. United States*, 8 Ch. Leg. N., 217.

§ 901. National banks.—The right of priority of the government, as a creditor, in the distribution of insolvent estates, extends to the case of a national bank in the hands of a receiver

appointed by the comptroller of the currency. The provision of the National Banking Act of 1864, putting all creditors of suspended national banks on an equal footing, does not apply to the United States. *United States v. Cook County National Bank*, 9 Biss., 55.

§ 902. Subrogation.—A collector of the United States, who has deposited moneys of the United States in a bank contrary to law, is not entitled to be subrogated to the right of the United States to priority of payment in case of the failure of the bank. *Wilkinson v. Babbitt*,* 4 Dill., 207.

§ 903. Where an imported article was sold "duty free," and the purchaser, in order to obtain the article, was compelled to pay the duty, it was held that in recovering from the vendor who had subsequently become bankrupt, he was subrogated to the priority of the United States. *In re Kirkland*, 2 Hughes, 208.

§ 904. Custom-house bonds were deposited by the United States in a bank for collection. The bank accepted notes in payment of them, discounted the notes and applied the proceeds to the credit of the United States. It subsequently developed that the indorsement of the notes was a forgery. Held, that the notes were not paid to the United States, but taken by the bank on its own responsibility; that the bonds were discharged by the payment and that the bank could not be subrogated to the right of priority of the United States. *United States v. Roussimaniere*, 2 Mason, 878.

§ 905. A surety, who pays the United States the amount of a duty bond for a bankrupt, does not thereby acquire the right of the United States to proceed against the person of the bankrupt, but only against his effects. *Kerr v. Hamilton*, 1 Cr. C. C., 546.

§ 906. The same right to priority of payment out of the effects of an insolvent debtor which belongs to the United States, attaches to the claim of an individual who, as surety, pays the debt to the United States. *Hunter v. United States*, 5 Pet., 173.

§ 907. The right of a surety, who is compelled to pay a bond for duties to the United States, to a priority over other creditors of his principal is not affected by the sixth-fifth section of bankrupt law of March 2, 1799. *Mott v. Maris*, 2 Wash., 196.

§ 908. A surety on a custom-house bond who has been obliged to pay it is entitled to the same right of priority against the estate of his principal that would have been possessed by the United States, if the bond had been unpaid. *United States v. Hunter*,* 5 Mason, 62.

§ 909. The surety on a bond for duties, who pays the liability, is not subrogated to the rights of the United States in case of insolvency of the principal. *Pollock v. Pratt*,* 2 Wash, 490.

§ 910. The insolvency of a debtor which will give priority to the United States under the acts of 1797 and 1799, is a legal and known insolvency, manifested by some notorious act of the debtor pursuant to law. *Prince v. Bartlett*,* 8 Cr., 481.

§ 911. The voluntary assignment by a debtor of all his property for the benefit of his creditors is such an act of insolvency that the right of priority of the United States attaches. *United States v. The Marshal*,* 2 Marsh., 488.

§ 912. The right of priority of the United States attaches in case of a voluntary conveyance of all of the debtor's property, or in case of a legal insolvency, but not in case of a mere inability to pay all his debts. *Thelsson v. Smith*,* Pet. C. C., 195.

§ 913. Miscellaneous.—The right of priority of the United States is not affected by the fact that it has paid to the assignee of a debtor a sum due from a Spanish claim, without first deducting therefrom the amount due it. *United States v. Hunter*,* 5 Mason, 62.

§ 914. Under the statute of 1797 the priority of the United States attaches to all debts, equitable as well as legal. *Howe v. Sheppard*,* 2 Sumn., 133.

§ 915. The United States is not obliged before enforcing its right of priority to resort to the collateral securities in its hands. The right of priority exists as to the satisfaction of claims against a partnership out of the assets of the individual partners. The United States may file its bill to establish its priority before proving up its claim in bankruptcy. *United States v. Lewis*,* 13 N. B. R., 83; 14 N. B. R., 64.

XI. CONQUERED AND CEDED TERRITORY.

SUMMARY—*Conquest of New Mexico; effect of change of sovereignty*, §§ 916, 917.

§ 916. On the conquest of New Mexico by the United States the former political relations of its inhabitants were dissolved, but their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the constitution and laws of the United States, or with regulations established by the conquerors. *Leitensdorfer v. Webb*, §§ 918-22.

§ 917. Among the consequences necessarily incident to a change of sovereignty is the appointment or control of the agents by whom, and the determination of the form in which, the government is to be administered. *Ibid.*

[NOTES.— See §§ 923-932.]

LEITENSDORFER v. WEBB.

(20 Howard, 176-186. 1857.)

Opinion of MR. JUSTICE DANIEL.

STATEMENT OF FACTS.— This case is brought before this court upon a writ of error to the supreme court of the territory of New Mexico.

Upon the acquisition, in the year 1846, by the arms of the United States, of the territory of New Mexico, the civil government of this territory having been overthrown, the officer, General Kearney, holding possession for the United States, in virtue of the power of conquest and occupancy, and in obedience to the duty of maintaining the security of the inhabitants in their persons and property, ordained, under the sanction and authority of the United States, a provisional or temporary government for the acquired country.

§ 918. *A change of sovereignty affects the allegiance, but not the private rights or contracts of persons.*

By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remained in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain. Amongst the consequences which would be necessarily incident to the change of sovereignty would be the appointment or control of the agents by whom and the modes in which the government of the occupant should be administered—this result being indispensable, in order to secure those objects for which such a government is usually established.

This is the principle of the law of nations, as expounded by the highest authorities. In the case of *The Fama*, in the 5th of Robinson's Rep., p. 106, Sir William Scott declares it to be "the settled principle of the law of nations that the inhabitants of a conquered territory change their allegiance, and their relation to their former sovereign is dissolved; but their relations to each other, and their rights of property, not taken from them by the orders of the conqueror, remain undisturbed." So, too, it is laid down by Vattel, book 3d, cap. 13, sec. 200, that "the conqueror lays his hands on the possessions of the state, whilst private persons are permitted to retain theirs; they suffer but indirectly by the war, and to them the result is that they only change masters." In the case of *the United States v. Percheman*, 7 Pet., 86, 87, this court have said: "It may be not unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign, and assume dominion over the country. The modern usage of nations, which has become law, would be violated, and that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their sovereign is dissolved; but their relations to each other, and their rights of property,

remain undisturbed." *Vide* also the case of *Mitchell v. The United States*, 9 Pet., 711, and Kent's Com., vol. 1, p. 177.

§ 919. *Provisional government of New Mexico.*

Accordingly we find that there was ordained by the provisional government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned. By the same authority, the jurisdiction of the circuit courts to be held in the several counties was declared to embrace, 1st, all criminal cases that shall not be otherwise provided by law; and, 2d, exclusive original jurisdiction in all civil cases which shall not be cognizable before the prefects and alcaldes. *Vide* Laws of New Mexico, Kearney's Code, p. 48. Of the validity of these ordinances of the provisional government there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended, that whatever may have been the rights of the occupying conqueror *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest every institution which had been overthrown or suspended would be revived and re-established. The fallacy of this pretension is exposed by the fact that the territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute permanent dominion and sovereignty; and this, too, under the settled purpose of the United States never to relinquish the possession acquired by arms. We conclude, therefore, that the ordinances and institutions of the provisional government would be revoked or modified by the United States alone, either by direct legislation on the part of congress, or by that of the territorial government in the exercise of powers delegated by congress. That no power whatever, incompatible with the constitution or laws of the United States, or with the authority of the provisional government, was retained by the Mexican government, or was revived under that government, from the period at which the possession passed to the authorities of the United States.

Among the laws ordained by the provisional government of New Mexico is one conferring upon creditors the right of proceeding by attachment in certain cases against their debtors, and prescribing the instances in which, and the modes by which, this remedy may be prosecuted. This law is contained in what is called the Kearney Code, at p. 39, and is found under the title Attachments. Upon its provisions, the case under consideration was instituted; and those provisions, so far as they are pertinent to the questions before us, will now be examined.

By section 1, it is declared that creditors, whose demands amount to \$50 or more, may sue their debtors in the circuit court by attachment in the following cases, to wit: "1st. When the debtor is not a resident of this territory; 2d. When the debtor has concealed himself, or absconded, or absented himself from his usual place of abode in this territory, so that the ordinary process of law cannot be passed upon him; 3d. When the debtor is about to remove his

property or effects out of this territory, or *has fraudulently concealed or disposed of his property or effects*, so as to *hinder, delay or defraud* his creditors."

It is under the third clause only of this first section of the attachment law that this case has been or could have been instituted; since, by a recurrence to the affidavit made by the plaintiff in the attachment, it will be found to state, that Leitensdorfer & Co. *have* fraudulently disposed of their property and effects. By the second section of this law it is declared that a creditor, wishing to sue his debtor by attachment, shall file in the clerk's office of the circuit court a petition or other lawful statement, with an affidavit of his cause of action, and a bond, with a condition to the latter to prosecute his action with effect, and without delay, and to refund all sums of money that may be adjudged to the defendant, and to pay all damages that may accrue to any defendant or garnishee by reason of the attachment or any process or judgment thereon.

The third section of this same statute provides that the affidavit made by the plaintiff shall state that the defendant is justly indebted to the plaintiff, after allowing all just discounts, in a sum to be stated in the affidavit, and on what account; and shall also state that the affiant has good reason to believe, and does believe, the existence of one or more of the causes which, according to the provision of the first section, will entitle the plaintiff to sue by attachment. (See collection of the laws of New Mexico comprising the Kearney Code, p. 39.) With the requisites of the foregoing provisions of the statute, it appears by the record that the plaintiff below, the defendant in error here, formerly and regularly complied.

The sixteenth section of the statute enacts, that "in all cases when property or effects shall be attached, the defendant may, at the court to which the writ is returnable, put in his answer without oath, denying the truth of any material fact contained in the affidavit; to which the plaintiff may reply. A trial of the truth of the affidavit shall be had at the same term; and on such trial the plaintiff shall be held to prove the existence of the facts set forth in the affidavit as the ground of the attachment; and if the issue shall be found for him, the cause shall proceed; but if it be found for the defendant, the cause shall be dismissed at the costs of the plaintiff."

At the October term, 1849, of the circuit court of the territory, established by the Kearney Code, the defendants in the attachment appeared and filed a demurrer to the petition, and at this point terminated the proceedings had in this cause in the court last mentioned. By subsequently tendering and joining in an issue in the district court of the territory, in bar of the plaintiff's right of recovery, the defendants must be considered as having waived the demurrer interposed by them in the circuit court of the provisional government, and there appears not to have been a joinder in the demurrer, nor any order whatever taken with respect to it.

On the 9th day of September, 1850, was approved the act of congress establishing the territorial government for the territory of New Mexico. *Vide* Stat. at Large, vol. 9, p. 446. By this act, commonly distinguished as the organic law, the legislative and judicial powers of the territorial government are provided and defined, to have effect from the passage of that act. The former, (the legislative power), *vide* section 7, it is declared shall extend to all rightful subjects of legislation not inconsistent with the constitution of the United States and the act of congress above mentioned. The latter (the judicial

power), *vide* section 10, shall be vested in a supreme court, in district courts, and in justices of the peace. That the supreme court shall consist of a chief justice and two associate justices, any two of whom shall form a quorum; that the said territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such time and place as shall be prescribed by law. And it is further declared that the jurisdiction of the several courts, as therein provided for, both appellate and original, and that of the justices of the peace, shall be as limited by law.

On the 19th day of September, 1851, the district court of the United States for the first judicial district, created by the act of congress, being then in session, the plaintiff in the attachment moved the court for leave to file therein the papers and proceedings in that case, and that the same might be made a part of the records of the district court; and it was thereupon ordered by the court that the case be entered upon its docket. Objection was made by the defendants to the transfer of this case from the circuit court of the provisional government (*vide* Kearney Code), to the district court created by congress, upon the ground that the legislative assembly had no power to authorize such a transfer. This objection was overruled by the district court, and exception was taken to its decision.

Afterwards, viz., on the 25th of March, 1852, the defendants in the attachment so far submitted themselves to the jurisdiction of the district court, as to plead to the averments in the petition and affidavit, and to pray judgment of the action, because they say that at the time of the institution of the suit, viz., on the 30th day of July, 1849, the defendants had not fraudulently disposed of their property, so as to hinder, delay and defraud their creditors. And again, at the same term of the said district court, the defendants, upon affidavits made by them of the insufficiency of the sureties in the bond filed by the plaintiff in the attachment, applied for and obtained from that court an order for further security, which security was, upon the said application and order, given by the plaintiff.

§ 920. *Supreme court will not review decision of inferior court on motion for new trial, or in arrest, where the facts are not fully disclosed by the record.*

On the 1st day of October, 1852, this cause was, upon the petition and affidavit, the plea of the defendants, and the evidence produced by the parties, submitted to a jury, who found that the affidavit of the plaintiff was true; whereupon it was considered and ordered by the court that the cause should proceed, and that the defendants should plead to the merits of the plaintiff's demand; and the defendants having pleaded that they did not promise and undertake as the plaintiff had charged them, and upon this last issue the cause having been committed to a jury, they found for the plaintiff, and assessed his damages at \$10,330.25. After the finding of the juries upon both the issues in this case, motions were made, first for a new trial, and secondly for an arrest of judgment, both of which motions were overruled. As these were motions submitted to the discretion of the court, and determined by it upon facts and circumstances not fully disclosed upon this record, it would be improper in this court, and in conflict with its settled rule of action, to overrule or even to canvass the decision of the court which overruled these motions.

§ 921. *Legislature of New Mexico territory had authority to provide for transfer of causes pending in courts of provisional government to territorial courts.*

In the objection which was taken to the power of the legislative assembly

to transfer the cognizance of causes previously pending under the laws of the provisional government to the courts created by the act of congress establishing the territory of New Mexico, we can perceive no force. It was, undoubtedly, within the competency of congress either to define directly, by their own act, the jurisdiction of the courts created by them, or to delegate the authority requisite for that purpose to the territorial government; and by either proceeding, to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional government, to the tribunals of the government they were about to substitute for the territory, in lieu of the temporary or provisional government. This power, we consider, was, in fact, delegated by congress to the territorial government by the seventh section of the act of 1850, which declares that "the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and with this act;" and by the tenth section of the act, which, after ordaining a supreme court, district and probate courts, and justices of the peace, and after dividing the territory into three judicial districts, and directing a district court to be held in each district by one of the judges of the supreme court, goes on to declare that "the jurisdiction of the several courts therein provided for, both appellate and original, and that of the probate courts, and of justices of the peace, shall be as limited by law."

The inquiry regularly suggested by these provisions of the act of congress is not whether they invested the legislative assembly with authority to prescribe the subjects for the cognizance of the courts created by that act — of this there can be no doubt — but whether the authority delegated to that assembly has been *in fact*, and *to what extent*, exerted with reference to controversies previously in litigation in the courts of the provisional government, and to subjects of controversy subsequently arising.

Under the provisions of the act of congress above quoted, the legislative assembly have, in several instances, prescribed the powers and duties of the territorial courts, and, among others, by the fourth section of the act of that assembly, passed on the 12th of July, 1851, by which section it is declared that the *district* courts shall have original jurisdiction in all cases, civil and criminal, in which the jurisdiction is not specially delegated to some other court; and by the second section of the act of the assembly, approved on the 14th of July, 1851, expressly providing "that all bonds, writs and processes, which have remained in force, shall be carried to a final decision in the courts established by the legislative assembly, *to the same effect* as they would have been in the courts previously existing."

As the legislative assembly possessed no power to organize or create courts differing from those created by the act of congress, which act had divided the territory into districts, and had designated the courts which should be vested either with appellate or original jurisdiction, it would seem to follow that, by an act of the legislative assembly designed to preserve and to prevent the discontinuance of rights in litigation subsisting in the courts of the provisional government, the distribution of the cognizance of those rights was intended to be made to courts corresponding in their jurisdiction with the tribunals of the provisional government.

Such appears to have been the interpretation, by the judges of the supreme court of the territory, of the acts of the legislative assembly, and by which interpretation they have recognized the transfer of causes pending in the circuit

courts of the provisional government for final decision to the *district* courts under the territorial government; and although there is some obscurity in the language of the territorial statutes on this subject, yet the reasonableness of their interpretation by the supreme court and the district courts of the territory commends it to our approval, and its adoption conforms to the rule of this court by which it has followed the construction of local statutes established by the highest judicial authority of the community for whose government they are enacted.

At the trial of the issue joined upon the verity and effect of the affidavit, the plaintiff in the attachment, to maintain that issue on his part, produced in evidence and proved the execution of an assignment by which Leitensdorfer had conveyed all his goods, wares, and merchandise, and all his property and effects of the late firm of Leitensdorfer & Co. Also, an instrument executed at the same time by Joab Houghton, the other member of the firm, whereby he authorized the assignees of Leitensdorfer & Co. to use and sign his name in any way that it might be necessary for them to use it in settling the business of the late firm of Leitensdorfer & Co. By the deed from Leitensdorfer, certain creditors to the amount of between twenty and thirty thousand dollars were preferred, besides all sums of money due by Leitensdorfer & Co. for simple deposits or money loaned without interest; after which the general creditors were to be paid *pro rata*, from whatever might be collected until the assets should be exhausted. There was no inventory of assets nor any schedule of debts due by said Leitensdorfer attached to or accompanying the deed of assignment. The deed provided that a fair and correct list of the liabilities of Leitensdorfer & Co., and also a fair list, so far as could be made, of all the assets, was to be made within ten days after signing the deed; within this period an inventory of assets was made out, but no list of liabilities. Some persons whose names were not in the assignment, who had deposited with or loaned money without interest to the firm, were paid by the assignees and the deed was not pursued in other respects. Upon the closing of the testimony on the trial in the district court, the defendants, the now plaintiffs in error, moved the court for the following instructions to the jury, all of which were refused:

1. That as the assignment was the act of Leitensdorfer alone, with which Houghton had nothing to do, the act of one defendant would not authorize an attachment against two, and the verdict must be for the defendants.
2. That the deed of assignment was not fraudulent in law; and unless the jury find, from the evidence, that in fact at the time of the commencement of this suit the plaintiff had good reason to believe that the defendants had fraudulently disposed of their property and effects so as to hinder, delay, and defraud their creditors, they must find for the defendants.
3. That as the plaintiff had shown no title to the note sued on in himself, he had no authority to sue, and the jury must find for the defendants.

The court then instructed the jury that the deed was fraudulent in law, because of the want of a schedule thereunto annexed of the property and effects conveyed to the assignees, and because of the want of a schedule of the preferred creditors, and because of a preference of some creditors; and also, if the jury found that the defendants, or either of them, had fraudulently disposed of their property and effects so as to hinder, delay, or defraud their creditors at the time of the commencement of this suit, they must find for the plaintiff. That the execution of the deed by Leitensdorfer, unaccompanied by the proper schedules, was a fraudulent disposition in law as

aforesaid; and that the commission of a fraud *in law* by the defendants, or either of them, without fraud *in fact*, or without an intent to defraud, was a sufficient cause for the attachment as the commission of a fraud in fact or with intent to defraud. And also that upon the trial of this issue it was not necessary for the plaintiff to show himself a creditor of the defendants farther than is shown in the affidavit, to entitle him to a verdict in his favor upon the issue of the truth of the affidavit; but that the sole issue was whether the defendants, or either of them, at the time of the commencement of the suit, had fraudulently disposed of their property and effects, so as to hinder, delay, or defraud their creditors.

Upon the refusal by the court of the first, second and third prayers presented by the defendants, and to the granting of the instructions prayed for by the plaintiff below, the defendants excepted. Upon the trial of the issue joined on the plea in bar to the action, no question of law was raised, no exception taken to any of the proceedings under that issue. On an appeal from the judgment of the district court to the supreme court of the territory of New Mexico, the judgment of the district court was, on the 28th of February, 1853, affirmed.

It is obvious, that in the proceedings in the district court, neither the justice nor the amount of the plaintiff's demand was put in controversy. These were not embraced within the issue raised upon the petition and affidavit. That issue related only to the right of the plaintiff to sue in a particular form of action, a right dependent upon his ability to show the alleged character of the defendants' acts, with respect to their creditors generally, and not with respect to the plaintiff particularly or exclusively. The verity and the amount of the plaintiff's demand were matters for distinct and ulterior investigation. The proceeding, then, upon the petition and affidavit, was in reality a proceeding in abatement, and not in bar of the plaintiff's debt or right of recovery. This appears to be a regular conclusion from the language of the law of the territory, and it is in accordance with the construction by the courts of a neighboring state of a law identical in its provisions with the law of the Kearney Code, and from which law it is not improbable that the latter was adopted. *Vide* Missouri Reports, vol. 5, p. 544; id. 13, p. 118; id. 14, p. 600; id. 15, p. 499.

§ 922. *Supreme court will not review the judgment on a plea in abatement, it not being final.*

It is true, that by the practice of the state courts the preliminary proceedings upon the petition and affidavit, and any questions of law ruled by the courts in those proceedings, are carried for review to the tribunals of last resort. But this is a practice authorized by the states under their peculiar jurisprudence. The states possess an undoubted power to permit or to require of their courts the re-examination and control of proceedings in their own tribunals, entirely interlocutory in their nature. The appellate or revisory power of this court, as defined by the constitution and laws of the United States, is more restricted in its extent than that with which some of the states have invested their courts. By the twenty-second section of the act of congress to establish the judicial courts of the United States, it is declared that *final* judgments and decrees in civil actions and suits in equity in a circuit court, brought there by original process, or removed there from the courts of the several states, or from a district court, where the matter in dispute exceeds the sum or value of \$2,000, exclusive of costs, may be examined, and reversed or

affirmed, in the supreme court. But there shall be no reversal for error in ruling any plea in abatement other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer.

From this provision in the act of congress it follows that the preliminary proceeding in the district court of the territory, being in its nature interlocutory, and designed to abate the particular remedy by attachment only, and having no application to the plaintiff's right to a recovery of his demand, or to the jurisdiction of the territorial court, either as to the parties or the subject-matter of the controversy, that proceeding comes not within the appellate or revisory power of this court.

Upon the trial in chief, or upon the merits, there appears to have been no question made, nor any point reserved upon the law or the evidence; the record of this trial presents simply the finding of the jury, and the judgment of the district court upon that finding. The decision of the supreme court of the territory in sustaining the judgment of the district court must therefore be affirmed.

§ 923. In general.—In cases of conquests of an enemy's country, according to modern usages of civilized nations, the conqueror is regarded as pledging to those of the inhabitants who remain and become his subjects or citizens, security of their liberty and property. And such conqueror has the right to exercise his sovereign authority over such inhabitants of the conquered country, and may forbid their departure from it. And where it was provided by treaty that the inhabitants of such conquered country, who desired to adhere to their allegiance to their native sovereign, should be permitted to sell their property to a certain class of persons within a certain time, and depart from the country, such property if not so sold became abandoned to the conqueror. *United States v. Repentigny*, 5 Wall., 211.

§ 924. By the law of nations, the inhabitants, citizens or subjects of a conquered or ceded country, territory or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed. *Mitchell v. United States*, 9 Pet., 711.

§ 925. By the law of nations, a cession of territory by treaty is never understood to be a cession of the property of the inhabitants. The king only cedes that which belongs to him; lands which he had previously granted were not his to cede. *Strother v. Lucas*, 12 Pet., 410.

§ 926. A cession of territory by one government to another is never understood to be a cession of the property belonging to individuals. The succeeding sovereign simply assumes the place of the predecessor, and private property rights are undisturbed. *United States v. Percheman*, 7 Pet., 51.

§ 927. Conquered territory forms part of the conqueror's domain for belligerent and commercial purposes, when the acquisition is considered permanent. *Thirty Hogsheads of Sugar v. Boyle*, 9 Cr., 191.

§ 928. Under the constitution the United States has the power of making war and treaties, and consequently may acquire territory either by conquest or by treaty. Under the usage of nations, conquered territory, if the country be not entirely subdued, is to be considered as held under a military occupation merely, until its fate shall be determined by treaty of peace. The effect of the transfer by treaty is to transfer the allegiance of those who remain in it. *American Ins. Co. v. Canter*, 1 Pet., 511.

§ 929. The division or cession of an empire works no forfeiture of the private property of a citizen, previously acquired. *Jones v. McMasters*, 20 How., 8.

§ 930. A change of sovereignty produces no change in the rights of individuals as to the soil. Thus where, under sections 6 and 8 of the act of Virginia, of December 22, 1794, property pledged to the Mutual Assurance Society continued liable to assessments for losses, even in the hands of a *bona fide* purchaser without notice, such lien was not disturbed by the cession of the District of Columbia to the United States. *Mutual Assurance Society v. Watts*, 1 Wheat., 279.

§ 931. A port or province held by conquest and military force is to be considered by neutrals as the territory of the power so occupying it. *Fleming v. Page*, 9 How., 603.

§ 932. Discovery in America gave a title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession, but it gave no title as against the aborigines. The title thus acquired by

§§ 1-8. GOVERNMENT CONTRACTS—GRANTS AND FRANCHISES.

discovery was the title granted by the crown to the colonies, and it included the exclusive right of purchase from the Indians. The powers of war conferred on the colonies by these charters included only the right of defensive war, and not of war for purposes of conquest. These charter powers, with these limitations, have descended to the respective states, the sovereign powers of Great Britain to the United States. They have always considered the Indian tribes as nations capable of maintaining the relations of peace and war, and of governing themselves under their protection and of making binding treaties. A state law subjecting white persons residing in the limits of the Cherokee Nation to arrest and removal thence and trial in the state courts is unconstitutional. *Worcester v. State of Georgia*, 6 Pet., 515.

GOVERNMENT CONTRACTS.

See GOVERNMENT; PATENTS, p. 169.

GRAND JURY.

See CRIMES, XXIV.

GRANTS AND FRANCHISES.

[See CONSTITUTION AND LAWS; CORPORATIONS; FERRIES; LAND.]

§ 1. *Grants.*—A legislative grant is not to be taken as conferring an exclusive privilege unless it is given in explicit language. Where the intention of the legislature is doubtful the act must be construed against the grantees. So where the legislature of a state granted to A. the right to dig phosphate rocks and phosphate deposits from the beds of the navigable streams of the state for the term of twenty-one years, and provided that the grantee should pay \$1 for each ton dug, and a license of \$500, and give a bond in the sum of \$500, and the legislature subsequently granted substantially similar rights to B., it was held that, in the absence of express words of exclusion, the grant to A. conferred no exclusive right. *Bradley v. South Carolina Phosphate, etc., Co.*, 1 Hughes, 72.

§ 2. The word grant is not a technical word like the word *enfeoff*; and although if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted, and to apply the proceeds arising out of it to the use and benefit of the grantor. *Rice v. Minnesota & Northwestern R. Co.*, 1 Black, 360.

§ 3. It is the settled rule that public grants must be construed strictly, and nothing passes by implication. *Ibid.*

§ 4. A grant is absolutely void where the state has no title to the thing granted or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law. *Polk's Lessee v. Wendal*, 9 Cr., 87.

§ 5. If the meaning of the words in a grant, that is designed to be a general benefit and accommodation to the public, be doubtful, they shall be taken most strongly against the grantee and for the government, and should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed, and if they do not support the right claimed it must fail. *Mills v. St. Clair County*, 8 How., 569 (FERRIES, §§ 12-14).

§ 6. If a grant admits of two interpretations, one of which is more extended and the other more restricted, so that a choice is fairly open, and either may be adopted without any violation of the apparent objects of the grant, if, in such a case, one interpretation would render the grant inoperative, and the other would give it force and effect, the latter, if within a reasonable construction of the terms employed, should be adopted. *Ibid.*

§ 7. Whatever is included in an exception in a grant is excluded from the grant, and it often becomes important to ascertain what is excepted in order to determine what is granted. *Leavenworth, Lawrence & Galveston R. Co. v. United States*, 2 Otto, 733.

§ 8. "There be and is hereby granted" are words of absolute donation, and import a grant: *in presenti*. *Ibid.*

§ 9. In construing a public grant, the intention of the grantor, gathered from the whole and every part of it, must prevail. If there are doubts about the intention or extent of the grant, the government is to receive the benefit of them. *Ibid.*

§ 10. A patent under the seal of the United States or a state is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. *United States v. Arredondo*, 6 Pet., 691.

§ 11. A grant is void unless the grantor has the power to make it; but it is not void because the grantee does not prove or produce it. The law supplies this proof by legal presumption, arising from the full, legal and complete execution of the official grant under the solemnities required by law of the country where it is made. *Ibid.*

§ 12. A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implication. *Ibid.*

§ 13. Private grants are construed strongly against the grantor and liberally for the grantee; yet the latter shall never take by general words or by construction what the grantor had before granted to another. *Ibid.*

§ 14. The clearly expressed and manifest intention of the grantor, and not of the grantee, must govern in private, *a fortiori* in public, grants. *Ibid.*

§ 15. A corporation is strictly limited to the exercise of those powers which are specifically conferred upon it. The exercise of a corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation. *Beaty v. Knowles*, 4 Pet., 152 (CORP., §§ 862-66).

§ 16. It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony. *Buyck v. United States*, 15 Pet., 215.

§ 17. The existence of a grant is, in itself, a sufficient ground from which every man may infer that every prerequisite has been performed. *Polk v. Wendal*, 9 Cr., 87.

§ 18. A grantor can convey no more than he possesses. *Polk v. Wendell*, 5 Wheat., 293.

§ 19. It is a principle applicable to every grant that it cannot affect pre-existing titles. *City of New Orleans v. Armas*, 9 Pet., 223.

§ 20. In general, no grant can take effect unless there be a sufficient grantee then in existence. In the case of corporations, this rule is pressed further still; for if there be an aggregate corporation, having a head, a grant or devise, made to the corporation during the vacancy of the headship, is merely void. *Town of Pawlet v. Clark*, 9 Cr., 292 (CHURCHES, §§ 34-51).

§ 21. A grant by way of public appropriation or dedication to pious uses is an exception to the generality of the rule that, to make a grant valid, there must be some person *in esse*, capable of taking it. *Ibid.*

§ 22. A grant is void for uncertainty where the grantee is not sufficiently designated to distinguish him from all others; and when such designation cannot be gathered from the grant, it cannot be supplied by parol testimony. *Friedman v. Goodwin*, 1 McAl., 142.

§ 23. Where a grant made by a government in general terms refers to a certainty, it is the same as if such certainty had been expressed in the grant, though it be not matter of record, but lie in averment by matter *in pais* or in fact. *Ibid.*

§ 24. Nothing passes by implication in a public grant, but it is to be construed strictly. *Griffling v. Gibbs*, 1 McAl., 212.

§ 25. In ascertaining the real meaning of the parties a more liberal rule of construction is allowable in interpreting a grant from one state or political community to another, than is permitted in interpreting a mere private grant. *State of Indiana v. Milk*, 13 Reporter, 709.

§ 26. Franchises.—Franchises are special privileges conferred by the government, and cannot be held unless derived from the law of the state. *People's R. R. v. Memphis R. R.*, 10 Wall., 51.

§ 27. A franchise is property. *West River Bridge Company v. Dix*, 6 How., 534 (CONST., §§ 2188-90).

§ 28. A franchise is not liable to be seized and sold under a *feri facias*. *Gue v. Tide Water Canal Co.*, 24 How., 263.

§ 29. A franchise can only be subjected to the demands of creditors through a court of equity. *Ibid.*

§ 30. The term *franchise* must always be considered in connection with the corporation or property to which it is alleged to appertain. Immunity of a corporation from taxation is not a franchise. *Morgan v. Louisiana*, 3 Otto, 217.

§ 31. A franchise to erect a bridge, construct a road, keep a ferry and to collect taxes, may be resumed or extinguished by a state in its exercise of the right of eminent domain. *West River Bridge Co. v. Dix*, 6 How., 534 (CONST. §§ 2188-90).

§ 1.

GRATUITOUS BAILEE—HARMONY SOCIETY.

§ 32. A proviso in a legislative act that certain improvements in the navigation of a river shall not affect the mill privilege of a named person is only the remission of the penalty of a nuisance, not the grant of a franchise. *Rundle v. Delaware, etc., Company*, 14 How., 80.

§ 33. Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state. *Bank of Augusta v. Earle*, 18 Pet., 519 (CORP., §§ 1123-35).

GRATUITOUS BAILEE.

See BAILMENT, I, 2.

GREAT BRITAIN.

See FOREIGN GOVERNMENTS; TREATIES.

GUARANTIES.

See BILLS AND NOTES, V; CONTRACTS, II, 3.

GUARDIAN AND WARD.

See DOMESTIC RELATIONS, III; PATENTS, p. 290.

GUARDIAN AD LITEM.

See PRACTICE.

HABEAS CORPUS.

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HANDWRITING.

See EVIDENCE, XII.

HARMONY SOCIETY.

§ 1. One of the articles of the communistic association, known as the Harmony Society, provided that members might withdraw voluntarily, and that, on doing so, the association might in its discretion make a donation to a member. In the absence of allegations touching its fairness and validity, a receipt signed by a former member reciting that he had withdrawn from the society and received a certain donation, according to contract, is held to be a contract of withdrawal and a dissolution of the relationship between the association and the member. *Baker v. Nachtrieb*,* 19 How., 126.

§ 2. And in a suit by the withdrawing member for a share of the property of the community, on the theory that he had been unjustly expelled, such receipt, in the absence of allegations in the bill impeaching its fairness, is conclusive. *Ibid.*

NOTE.—The above opinion reverses *Nachtrieb v. The Harmony Settlement*, 3 Wall. Jr., 66, which is published in full under CHURCHES AND BENEVOLENT ASSOCIATIONS, Vol. 5. It will be seen that the supreme court takes a different view of the facts under the state of the pleadings from that entertained by the lower court, the former holding that the receipt, under the pleadings, conclusively showed a voluntary withdrawal, while the latter held that the peculiar facts and circumstances surrounding the case showed a wrongful expulsion, and that the expelled member was entitled to his just share of the property.

HEADS OF DEPARTMENTS.

See GOVERNMENT.

HEARSAY EVIDENCE.

See EVIDENCE, IX.

HEIRS.

See ESTATES OF DECEDENTS; PATENTS, p. 290. As Parties to Suits, see PRACTICE.

HIGH SEAS.

See CRIMES, VI; MARITIME LAW.

HIRE.

See BAILMENT, I, 1.

HOGS.

See ANIMALS.

HOLIDAYS.

[See COURTS, §§ 49, 77; SUNDAY.]

§ 1. Courts may be held on thanksgiving day; and a state law forbidding the holding of courts on a holiday would not affect the United States courts. *In re McGlynn*, 2 Low., 128.

§ 2. A merely ministerial act may be performed by the clerk of a court on a legal holiday and still be valid. *In re Worthington*, 7 Biss., 456 (COURTS, §§ 68, 69).

§ 3. Fast-day, regarded as a working day, in the absence of any statute or usage. *Pierson v. Richardson*, 1 Cliff., 386 (CARRIERS, §§ 797-98).

§ 4. As to the observance of fast-days, it is held that the proclamation of the governor is only a recommendation and has not the force of law. *Ibid.*

§ 5. Fast-day a holiday in Massachusetts, but by custom, not like Sunday by positive law. *The Bark Tangier*, 3 Ware, 120.

§ 6. Common carrier may give notice to consignee and discharge cargo on "fast" or "thanksgiving" day, appointed by governor as holiday. *Richardson v. Goddard*, 23 How., 40 (CARRIERS, §§ 786-96).

§ 7. Where the master has commenced the delivery of the cargo, he may continue and complete it on a fast-day. *Pierson v. Richardson*, 1 Cliff., 885 (CARRIERS, §§ 797-98); *Salmon Falls Mfg. Co. v. Bark Tangier*, 1 Cliff., 398.

HOMESTEAD.

See LAND. Exemption in Bankruptcy, see DEBTOR AND CREDITOR, p. 469.

HOMICIDE.

See CRIMES, VII. Actions for Damages, see TORTS.

HOTELS.

See INNKEEPERS.

HOT SPRINGS.

[See LAND.]

§ 1. The decision of the commissioners appointed under the provisions of the act of congress of March 3, 1877, entitled "An act in relation to the Hot Springs reservation in Arkansas," upon matters specified in the act is a final adjudication, and conclusive upon the parties. *Rector's Case*,* 9 Fed. R., 16.

§ 2. The land known as the "Hot Springs Reservation," reserved for the disposal of the United States by act of congress. *Dupas v. Wassell*, 1 Dill., 213.

HUSBAND AND WIFE.

See DOMESTIC RELATIONS. Also, CONVEYANCES; CRIMES; DEBTOR AND CREDITOR; EVIDENCE; FRAUD; GIFTS.

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Abbreviations: *Fees & Sal.*, Fees and Salaries. *Fer.*, Ferries. *Fish.*, Fisheries. *For. Gov.*, Foreign Governments. *Fraud & F. C.*, Fraud and Fraudulent Conveyances. *Gam. & Lot.*, Gaming and Lotteries. *Gov.*, Government.

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